MODERNISING THE MONTEVIDEO CONVENTION: A REDEFINED CONCEPT FOR THE 21ST CENTURY

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This is the part everyone skips over, and you may too. It feels like a natural ending to a major journey in my life. I could not have done it without these people;

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List of Abbreviations

AANES – Autonomous Administration of North and East Syria

AU – African Union

EU – European Union

ICJ – International Court of Justice

KRG – Kurdistan Regional Government

LN – League of Nations

NATO – North American Treaty Organisation

NPT – Non-Proliferation of Nuclear Weapons

OSCE – Organisation for Security and Co-operation in Europe

PA – Palestinian Authority

PKK – Kurdistan Workers' Party

PLA – People's Liberation Army

PMR – Pridnestrovian Moldavian Republic

PLO – Palestine Liberation Organisation

PRC – People's Republic of China

ROC – Republic of China

SADR – Sahrawi Arab Democratic Republic

SFG – Somali Federal Government

SNA – Syrian National Army

UN – United Nations

UNCLOS – United Nations Convention on the Law of the Sea

UNESCO – United Nations Educational, Scientific and Cultural Organization

UNGA – United Nations General Assembly

UNHCR – United Nations High Commissioner for Refugees

UNPO – Unrepresented Nations and Peoples Organization

UNSC – United Nations Security Council

USMCA – United States-Mexico-Canada Agreement

USSR – Union of Soviet Socialist Republics

WTO – World Trade Organisation

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Union of Somaliland and Somalia Law 1960

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American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 17955

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

Conference on Security and Co-operation in Europe Final Act (Helsinki Final Act) (adopted and entered into force 1 August 1975)

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 2277 UNTS 539

Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accords) (signed 13 September 1993, entered into force 13 October 1993) UNTS A/48/486

Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (adopted by the European Community on 16 December 1991) 31 ILM 148

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI)

NATO Parliamentary Assembly Resolution 382 (2010)

The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 985 UNTS 14400

The International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, and came into force 3 January 1976) 993 UNTS 14531 UNGA Resolution 2200A (XXI)

The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934

The Sykes-Picot Agreement (entered into 26 April 1915 and entered into operation 1916)

The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

Treaty of Peace with Turkey (Treaty of Lausanne) (signed 24 July 1923, entered into force 6 August 1924).

UN Doc A/HRC/12/34

UN Doc A/HRC/45/34 2023

UN Human Rights Committee, CCPR/C/69/D/760/1997 (2000)

UNGA 31/152 (20 December 1976)

UNGA A/CN.4/2 (22 April 1949)

UNGA Res 1514 (XV) (14 December 1960)

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UNGA Res 61/295 (13 September 2007)

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UNGA S/1999/648 (23 February 1999)

UNSC Report Verbatim Record (18 February 2008) S/PV.5839

UNSC Res 1244 (10 June 1999) UN Doc S RES/1244

UNSC Res 216 (12 November 1965) UN Doc S Res/216

UNSC Res 446 (22 March 1979) UN Doc S Res/446

UNSC Res 206 (13 April 2007) UN Doc S/2007/206

Declaration

I confirm that this is my own work. It has not been submitted elsewhere for the award of a higher degree or any qualification. All the sources have been identified and specifically acknowledged and all quotations have been indicated and acknowledged.

Abstract

The thesis critically examines the Montevideo Convention of 1933, an international treaty which defines the requirements for statehood: a permanent population, defined territory, effective government, and capacity to enter into relations with other states. Although foundational, the thesis argues that the Convention's requirements are increasingly challenged by modern geopolitical realities. The study explores how the Convention has been applied across various case studies, including Palestine, Western Sahara, Somaliland, Taiwan, and the Kurdish regions, which present complexities that strain traditional definitions of statehood. Using a combination of doctrinal legal analysis and constructivist international relations theory, the thesis contends that the rigid requirements of the Montevideo Convention often fail to account for self-determination movements, indigenous rights, and non-traditional entities seeking recognition. Drawing on insights from prominent scholars, the research highlights the limitations of the Convention in a globalised world where statehood is as much a political and social construct as a legal one. Through case studies and comparative analysis, the thesis suggests a need for revisiting or modernising the Montevideo requirements, incorporating factors such as human rights, governance, and regional dynamics. Ultimately, the thesis provides a contemporary understanding of statehood in the 21st century, advocating for a more flexible, context-driven approach to recognising new states in international law.

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CHAPTER ONE INTRODUCTION

1.1. Introduction

The Montevideo Convention,[1] adopted in 1933, remains one of the most significant treaties in international law, particularly concerning the legal definition and recognition of statehood. Its requirements have served as a foundation for understanding what constitutes a state in the international arena. Despite its historical roots in the early 20th century, the Convention's principles remain relevant today, albeit amidst evolving global circumstances and the emergence of new forms of political entities that challenge traditional concepts of statehood. [2]

In the context of international law, the international legal community still look to the Convention for its role in establishing the four requirements for statehood: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states.[3] These requirements have long been considered the bedrock of state recognition, influencing how new states are accepted into the international community.[4] However, as the geopolitical landscape has shifted over the decades, so too have the challenges and interpretations surrounding these requirements. The world today is vastly different from that of 1933, marked by globalisation, complex international challenges like Israel and Palestine,[5] and challenges by indigenous peoples over corporations exploiting their natural resources that test the limits of traditional legal frameworks.[6]

The primary aim of this thesis is to critically examine the influence of the Montevideo Convention on statehood and its application in contemporary international law. The study seeks to explore the Convention's historical context, its role in recognising states within the modern legal framework, and its adaptability in the face of new challenges, such as self-determination movements

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[1] The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934 (hereinafter the Convention).

[2] Thomas D Grant, *'Defining Statehood: The Montevideo Convention and Its Discontent'* (1998) 37 Columbian Journal of Transnational Law 403 – 457, 433.

[3] 'The state as a person of international law should possess the following qualifications: (a) a permanent population (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'. The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, article 1.

[4] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law* (9th edn, Routledge 2022).

[5] Robert Heinsch and Giulia Pinzauti, 'To Be (a State) or Not to Be? The Relevance of the Law of Belligerent Occupation with regard to Palestine's Statehood before the ICC' (2020) 18 Journal of International Criminal Justice 927 – 945, 929.

[6] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 104.

that continue to challenge the international legal order. Regions such as Catalonia, Kurdistan, and others persist in their quests for independence, often without meeting all the Convention's requirements.[7] By doing so, the thesis aims to provide a comprehensive analysis of the Montevideo Convention's relevance in the 21st century and its capacity to address the complexities of modern statehood. This exploration is timely and necessary given the dynamic nature of international relations and the emergence of entities that defy the traditional state model. For instance, the Convention's application becomes increasingly problematic as more regions push for self-determination, sometimes backed by significant portions of their population but lacking the effective government or territorial integrity required by traditional standards.[8] These developments necessitate a re-evaluation of the Montevideo Convention and its requirements to ensure they remain relevant in addressing the realities of the contemporary international legal order. Moreover, the thesis will use specific case studies, such as Palestine, Western Sahara, Somaliland, Taiwan, and the Kurdish struggle for nationhood, to illustrate the practical application and limitations of the Convention in diverse geopolitical contexts. These cases highlight the ongoing tensions between legal principles and political realities, as entities that fulfil the Convention's requirements for statehood often find themselves in limbo due to the lack of international recognition or the complex back-and-forth of regional and global politics.[9]

The thesis will also engage with critical academic perspectives that challenge the traditional positivist approach to international law, which has long dominated the discourse surrounding state recognition. Scholars like Jure Vidmar[10] and Jan Klabbers[11] have questioned the adequacy of the Montevideo criteria in the face of contemporary challenges, advocating for a more refined understanding that takes into account the socio-political, historical, and cultural contexts in which statehood

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[7] Milena Sterio, 'Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia' (2018) 22 American Society of International Law Insights https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan accessed 2 September 2024.

[8] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186 – 206, 199.

[9] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.

[10] Jure Vidmar, 'Jure Vidmar - Chair of Public International Law' (Maastricht University, 2024) <https://www.maastrichtuniversity.nl/j-vidmar accessed 9 September 2024> This includes his academic positions at Oxford, Harvard, and Maastricht, as well as his roles at international institutions such as the European Court of Human Rights and the Permanent Court of Arbitration.

[11] Jan Klabbers, 'Jan Klabbers - Professor of International Law' (University of Helsinki, 2024) <https://researchportal.helsinki.fi/en/persons/jan-klabbers> accessed 9 September 2024. Jan Klabbers is a distinguished professor of international law at the University of Helsinki, specialising in the law of treaties, international organisations, and global governance. He has held prominent positions at institutions worldwide, authored several leading texts on international law, and is known for his interdisciplinary approach to legal studies.

is contested and negotiated.[12] This thesis will draw on these critical insights, as well as the contributions of other leading scholars like James Crawford[13] and James Summers,[14] to develop a more comprehensive theoretical framework for analysing statehood in the modern era. The thesis also aims to contribute to the ongoing academic debate regarding the need for reform or reinterpretation of the Convention to accommodate the evolving nature of statehood. By critically assessing the Convention's application in various contemporary scenarios, the study will provide valuable insights into whether the existing legal framework is sufficient or if a modernised interpretation is necessary. This will involve not only a doctrinal analysis of the Convention itself but also a comparative examination of how its principles are applied across different regions and in the context of emerging global challenges.

Ultimately, the introduction sets the stage for a detailed exploration of the Montevideo Convention, its historical roots, its current relevance, and its future in international law. The following sections of the thesis will build on this foundation, systematically addressing the research questions and hypotheses outlined here, and providing a thorough analysis of the Convention's role in shaping modern international law. The aim is to offer a sophisticated and critical perspective on the Convention's influence on state recognition, sovereignty, and the broader international legal order, with a particular focus on the challenges posed by new and non-traditional entities in the 21st century.

1.2 Historical Background of the Montevideo Convention

The Montevideo Convention was adopted in December 1933 during the Seventh International Conference of American States, held in Montevideo, Uruguay. It emerged in a period marked by significant geopolitical turmoil and transformation.[15] The early 20th century was a time of intense state-building efforts, decolonisation, and the reconfiguration of international boundaries following the aftermath of the First World War. The original drafters of the Convention were representatives of several Latin American states. The convention was adopted during the Seventh International Conference of American States in Montevideo, Uruguay, with significant contributions from nations such as

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[12] Jan Klabbers, 'The Concept of Statehood in International Law' (1996) 37 Netherlands International Law Review 331 – 350, 347.
[13] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 17.
[14] James Summers, *Peoples and International Law* (2nd rev edn, Brill 2014).
[15] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 21.

Argentina, Brazil, Chile, Mexico, Peru, and Uruguay.[16] The goal was to establish a clear legal framework for the recognition of statehood, particularly to address political tensions in the Americas and ensure adherence to international legal standards. The Convention was heavily influenced by the prevailing legal doctrines of the time, particularly the principles of sovereignty and territorial integrity, which were considered essential for maintaining international order.[17]

The historical context in which the Montevideo Convention was adopted is crucial for understanding its significance and the motivations behind its formulation. The early 1930s were a period of economic depression, political instability, and the rise of authoritarian regimes in Europe and the Americas. The United States, grappling with the Great Depression, adopted a policy of isolationism, which was reflected in its reluctance to engage in international conflicts and its focus on domestic issues. At the same time, Europe was witnessing the rise of Nazi Germany and Fascist Italy, both of which posed significant threats to the existing international order.[18] Against this backdrop, the American states sought to assert their sovereignty and establish a legal framework that would protect their independence and territorial integrity in an increasingly unstable world.[19]

The Montevideo Convention was not only a legal document but also a political statement, reflecting the concerns of its signatories about the potential for external interference in their domestic affairs. By codifying the requirements for statehood, the Convention sought to limit the influence of external powers in the recognition of new states and to assert the autonomy of American states in determining their political destinies.[20] This emphasis on sovereignty and non-intervention was a central theme of the Convention, and it remains a key principle in international law to this day. However, while the Montevideo Convention was initially intended to address the specific concerns of American states, its influence quickly spread beyond the Americas.[21] The principles enshrined in the Convention were soon adopted by other regions and became a foundational element of international law.

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[16] The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[17] James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 46.
[18] Francis R. Nicosia and David Scrase, *Jewish Life in Nazi Germany: Dilemmas and Responses* (Berghahn Books 2010).
[19] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 46.
[20] Anon, 'Convention on Rights and Duties of States' (1934) 28 American Journal of International Law 75 – 78, 78.
[21] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 411.

The Convention's requirements for statehood were incorporated into various international treaties and legal instruments, and they continue to be referenced in contemporary discussions about state recognition and sovereignty.

Despite its historical significance, the Montevideo Convention has faced criticism over the years, particularly regarding its applicability in the modern world. Some scholars argue that the Convention's criteria are too rigid and fail to account for the complexities of contemporary statehood, particularly in regions where territorial boundaries are contested or where non-traditional entities have emerged.[22] Others have questioned whether the Convention's emphasis on sovereignty and territorial integrity is still relevant in a globalised world where power is increasingly dispersed among non-state actors and transnational organisations. These debates highlight the need for a re-evaluation of the Montevideo Convention and its role in contemporary international law. By examining the historical context in which the Convention was adopted and its subsequent influence on international legal norms, this thesis aims to provide a comprehensive analysis of the Convention's strengths and limitations. The following chapters will explore how the Convention has been applied in various geopolitical contexts and assess its relevance in addressing the challenges of modern statehood. The aim is to determine whether the Convention's requirements remain sufficient for defining statehood in the 21st century or if a new framework is needed to accommodate the evolving nature of international relations.

1.3 Theoretical Framework and Methodology

This thesis undertakes an examination of the Montevideo Convention by employing a robust theoretical framework and methodology that combines doctrinal analysis with the insights of constructivist international relations theory. The doctrinal approach forms the core of the legal analysis, enabling a systematic and detailed examination of the Convention's principles as they have been applied across various legal contexts. This traditional method is vital for understanding how the criteria for statehood, as established by the Montevideo Convention, have been interpreted in both historical and contemporary international law.[23] Through precise scrutiny of key legal texts, such as the Convention itself, relevant treaties, and judicial decisions, the thesis aims to elucidate the foundational legal structures

[22] Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 International and Comparative Law Quarterly 361 – 387, 387.
[23] Jan Klabbers, *International Law* (CUP 2020) 88.

that govern state recognition. The thesis recognises that the scope of international law extends beyond the mere interpretation of legal texts.[24] The complexities of statehood in the 21st century cannot be fully understood through doctrinal analysis alone, especially in a global environment where legal principles are increasingly shaped by a variety of socio-political, historical, and cultural factors. In light of this, the research adopts a post-positivist paradigm, which challenges the limitations of traditional positivist approaches that tend to prioritise empirical data and objective legal norms.[25] Post-positivism acknowledges the inherent subjectivity and interpretative nature of legal knowledge, understanding that legal principles are not static but are continuously shaped and reshaped by the broader social and political contexts in which they operate.[26]

This paradigm shift is particularly pertinent for studying the Convention, as it allows for a more refined analysis that considers the diverse and evolving nature of statehood. By incorporating socio-political, historical, and cultural contexts into the analysis, the thesis aims to provide a deeper and more comprehensive understanding of how the Convention has been interpreted and applied in different geopolitical settings.[27] The application of this approach is essential for examining the Convention's relevance in modern international law, where the requirements for statehood must be evaluated against contemporary challenges. In expanding the scope of the study beyond the confines of doctrinal analysis, the research engages with a variety of sources and perspectives, thereby enriching the depth and breadth of the analysis. The study will not only draw upon traditional legal texts such as statutes, treaties, and case law, but will also encompass academic commentaries, historical documents, and political analyses.[28] This broad approach ensures a more rounded understanding of the Convention, highlighting its varied interpretations and applications across different temporal and geopolitical contexts. The integration of these diverse sources allows for a critical examination of how the Convention's principles have been internalised, contested, and adapted by different actors in the international arena.

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[24] Mónica García-Salmones Rovira, 'Introduction' in *The Project of Positivism in International Law, The History and Theory of International Law* (Online edn, OUP 2014) 15.
[25] Jan Klabbers, 'International Legal Positivism and Constitutionalism' in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 269.
[26] James E Penner and Emmanuel Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th edn, OUP 2012) 89.
[27] Jan Klabbers, *International Law* (CUP 2024) 158.
[28] Fiona Cownie and Anthony Bradney 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins (ed) *Research Methods for Law* (1st edn, Routledge 2013) 192.

The author believes that central to this approach is the incorporation of theories from the field of international relations, particularly the insights of Alexander Wendt.[29] Wendt's constructivist theories provide a unique lens through which the dynamics of international law and statehood can be explored. His emphasis on the social construction of state identity and interests offers a critical framework for understanding how international legal principles, such as those enshrined in the Convention, are not only interpreted but also shaped by the social and political interactions between states.[30] Wendt's perspective complements Vidmar's approach to the importance of examining the socio-political contexts in which legal texts operate, suggesting that the meaning and application of these texts are continually constructed and reconstructed through international discourse and practice. The author used Wendt's theories to explore the Convention beyond a purely legalistic interpretation. The theory of constructivism is concerned with how the social and political world works. Constructivists claim the social construction of international politics. In other words, social reality is not given or does not exist naturally, but is made up.[31] The assumption here is that the environment in which actors take action is both social and material. It reflects a view that material structures are given meaning and used within a context that is a product of human interaction in a social world. Here, three important themes emerge: social reality can be altered, there is a possibility to change international politics, and constructivists emphasise the social dimension of international relations by giving importance to social values and norms.[32] Opposed to the idea of an objective reality, international politics and arguable international law is a world of our making.[33] Constructivists emphasise the process of interaction and, as a result, bring historically, culturally, and politically distinct realities into being.

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[29] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.

[30] In his seminal work of 1999, "Social Theory of International Politics", Alexander Wendt explains the notion that the international system is shaped by ideas and shared understandings amongst states. This work argues that state identities and interests are malleable, subject to transformation through social interaction, thereby leading to varied outcomes in international politics. Wendt's contributions have been efficacious in the evolution of constructivist theory within international relations, highlighting the significance of ideational and social factors, such as norms, culture, and identities, in moulding the international landscape. His insights have profoundly influenced contemporary discourse and research in global politics.

[31] Dale C Copeland, 'The Constructivist Challenge to Structural Realism' in Stefano Guzzini and Anna Leander (eds), *Constructivism and International Relations: Alexander Wendt and His Critics* (Taylor & Francis 2005) 8.

[32] David M McCourt, *The New Constructivism in International Relations Theory* (Bristol University Press 2022) 9.

[33] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 22.

Wendt's constructivist approach can help resolve the interaction between legal norms and the power structures that shape them. For instance, in the case of recognising that Indigenous peoples have always retained a form of original sovereignty that predates state borders and colonial governance mechanisms.[34]

Moreover, Wendt's theories will be instrumental in analysing how international norms and ideas, disseminated through diplomatic interactions, international organisations, and global discourse, shape and reshape the principles of statehood.[35] This theoretical framework will enable the thesis to explore how the Convention's principles have been internalised, contested, and adapted by different actors in the international arena, offering a more dynamic and holistic view of international law and its interaction with global politics. The study will critically examine the social constructs, political manoeuvrings, and historical circumstances that have both shaped and been shaped by the Convention. This will involve exploring how the Convention has influenced notions of statehood and sovereignty in the international arena, as well as how it has been used, or misused, in political discourse and practice. Nicholas Onuf, as the founder of constructivism in International Relations, would likely approach the Montevideo Convention from the perspective that the criteria for statehood are not fixed or universally applied legal rules but are socially constructed and influenced by international norms, practices, and power dynamics.[36]

Onuf would argue that these formal requirements reflect deeper underlying social processes, where the recognition of statehood depends on how powerful actors, such as established states or international institutions, interpret and apply these rules within specific contexts. The constructivist framework asserts that statehood under the Convention is not simply a legal matter but involves ongoing social practices, wherein states are recognised not merely because they meet objective criteria, but because other states and actors in the international system agree to recognise them, shaped by their interests and norms.[37] Additionally, Onuf would likely contend that the Convention's rules create social realities. Through the repeated application and interpretation of these requirements, states and institutions construct a shared understanding of what a state is. However, these

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[34] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.
[35] David M McCourt, *The New Constructivism in International Relations Theory* (Bristol University Press 2022) 57.
[36] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 22.
[37] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 22.

understandings are fluid, as the meanings of sovereignty, territorial integrity, and statehood evolve through social interaction. Thus, Onuf would see the convention as a tool through which international actors make sense of and construct the international system, rather than as a set of rigid, universally applicable rules.[38]

The thesis argues that the Convention is a socially constructed framework that reflects the ongoing negotiation of norms and power relations in international society. Its effectiveness and interpretation depend on how these social factors play out over time. From a constructivist perspective, the effectiveness of the Montevideo Convention would be shaped by the social and political contexts in which it operates. For instance, while the legal framework provides clear guidelines for statehood, the recognition of states is often influenced by geopolitical interests, as seen in cases like Kosovo, Palestine, and Taiwan. The analysis provided in the following chapters emphasises how recognition is governed by informal rules, such as the political relationships between powerful states and how these relationships influence whether or not a new state is recognised, regardless of its compliance with Montevideo requirements. The thesis highlights the normative dimension of statehood and recognition. and argues that the international community's interpretation of statehood evolves, based on shared values, ideologies, and power structures.[39] For instance, self-determination and human rights might play an increasing role in the recognition of states today, compared to the strict adherence to territorial integrity and sovereignty in the past.[40] Therefore, the effectiveness of the Convention in modern international law depends on how these evolving norms and social constructions interact with legal standards.

The use of Alexander Wendt's constructivist theories allows the thesis to move beyond a purely doctrinal analysis, to consider the application of alternative solutions or processes rather than a reliance on the positivistic Montevideo Convention's principles. Furthermore, the research will consider the impact of contemporary geopolitical events and the emergence of *de facto* and *non-de facto* entities on the relevance and applicability of the Convention's principles. The case studies included in this thesis, including Palestine, Western Sahara, Somaliland, and the Kurdish struggle for nationhood, provide concrete examples of how these

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[38] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 131.

[39] Iver B Neumann, 'The Future of International Relations: Masters in the Making' in Iver B Neumann and Ole Waever (eds), *The Future of International Relations: Masters in the Making?* (Taylor & Francis 2005) 47 – 58.

[40] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.

factors play out in real-world scenarios. Each of these cases presents unique challenges to the traditional understanding of statehood, highlighting the ongoing tensions between legal principles and political realities in the recognition of new states.[41]

The study's methodological approach, combining doctrinal analysis with constructivist theory, allows for a richer and more nuanced exploration of these complex issues. By examining how the Montevideo Convention's principles have been applied in different geopolitical contexts, the thesis aims to assess the Convention's relevance in addressing the challenges of modern statehood. The goal is to provide a comprehensive analysis that not only deepens our understanding of the Montevideo Convention but also contributes to the broader field of international law by offering new insights into the evolving nature of statehood and sovereignty in the 21st century. The theoretical framework and methodology employed in this thesis are designed to provide a comprehensive and critical analysis of the Montevideo Convention and its application in contemporary international law. By integrating doctrinal analysis with the insights of constructivist international relations theory, the research offers a nuanced exploration of the Convention's principles, their interpretation, and their relevance in the modern world. This approach allows the thesis to engage with the complexities of statehood in the 21st century, providing valuable insights into how international legal principles are shaped by and shape the broader socio-political context in which they operate.

1.4 Research Design

The research design of this thesis is structured around a series of case studies and a comparative analysis, which together provide a comprehensive framework for examining the Convention and its application in contemporary international law. The case studies have been carefully selected to represent a diverse range of geopolitical contexts, each of which presents unique challenges to the traditional understanding of statehood as defined by the Convention. The case studies include Palestine, Western Sahara, Somaliland, Taiwan, and the Kurdish struggle for nationhood. Each of these cases offers a different perspective on the application of the Montevideo Convention's requirements for statehood, highlighting the ongoing tensions between legal principles and political realities in

[41] Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) 145.

the recognition of new states. By examining these case studies in detail, the thesis aims to provide a critical analysis of the Convention's strengths and limitations, as well as its relevance in addressing the complexities of modern statehood. In addition to the case studies, the thesis also employs a comparative analysis to examine how the Convention's principles have been applied in different regions and the context of emerging global challenges, such as the protection of territory occupied by Indigenous peoples, ethnic groups seeking autonomy from parent states and territories that form geopolitical buffer zones.[42] This comparative approach allows for a broader analysis of the Convention's adaptability and its ability to address the evolving nature of statehood in the modern world.

The legal sources used in the research include primary legal texts, such as the Montevideo Convention itself, relevant treaties, and judicial decisions, as well as secondary sources, such as academic literature and scholarly commentaries. The thesis draws on the work of leading scholars in the field of international law, including Jure Vidmar, Jan Klabbers, James Crawford, and James Summers, to develop a robust theoretical framework for analysing statehood in the modern era. The research methodology is grounded in a doctrinal approach, which involves close reading and interpretation of legal texts to understand the underlying principles and how they have been applied in various legal contexts.[43] This approach is essential for exploring the Convention's requirements for statehood and assessing its relevance in the modern world.

However, the thesis also recognises the limitations of a purely doctrinal approach, particularly in the context of international law, where legal principles are often shaped by socio-political, historical, and cultural factors. To address these limitations, the research adopts a post-positivist paradigm, which challenges the traditional positivist focus on objective, empirical data and instead emphasises the interpretative and subjective nature of legal knowledge.[44] This approach allows for a more sophisticated analysis that takes into account the diverse and evolving nature of statehood in the modern world.[45] The thesis is divided into several chapters, each of which focuses on a specific aspect of the Convention's application and its implications for state recognition, sovereignty, and self-determination in the modern world. This structure ensures that each chapter builds

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[42] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 104.
[43] Terry Hutchinson, *Doctrinal Research: Researching the Jury* (2nd edn, Routledge 2017) 156.
[44] Fiona Cownie and Anthony Bradney 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins (ed) *Research Methods for Law* (1st edn, Routledge 2013) 192.
[45] Stephen Hall, 'Researching International Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 255.

upon the preceding analysis, creating a cohesive and thorough exploration of the subject.

1.5. Significance and Contribution of the Study

The significance of this thesis lies in its critical examination of the Montevideo Convention and its relevance in contemporary international law. By exploring the Convention's historical context, its role in the recognition of states within the modern legal framework, and its adaptability in the face of new challenges, the thesis aims to contribute to the ongoing academic debate regarding the need for reform or reinterpretation of the Convention to accommodate the evolving nature of statehood.

The thesis is particularly relevant in light of the dynamic nature of international relations and the emergence of entities that defy the traditional state model. For instance, Indigenous peoples and people occupying territories seeking secession and de facto states have begun to exercise power and influence in ways previously reserved for sovereign states, challenging the notion of what constitutes effective government and territorial control. Similarly, supranational organisations like the European Union present unique cases where sovereignty is shared or pooled, further complicating the traditional understanding of statehood. These developments necessitate a re-evaluation of the Montevideo Convention and its requirements to ensure they remain relevant in addressing the realities of the contemporary international legal order. The thesis will also engage with critical academic perspectives that challenge the traditional positivist approach to international law, which has long dominated the discourse surrounding state recognition. Scholars like Jure Vidmar and Jan Klabbers have questioned the adequacy of the Montevideo requirements in the face of contemporary challenges, advocating for a more nuanced understanding that takes into account the socio-political, historical, and cultural contexts in which statehood is contested and negotiated. By drawing on these critical insights, as well as the contributions of other leading scholars like James Crawford and James Summers, the thesis aims to develop a more comprehensive theoretical framework for analysing statehood in the modern era.

1.6 Structure of the Thesis

The structure of the thesis is designed to systematically address the research questions and hypotheses outlined in the introduction, providing a comprehensive analysis of the Montevideo Convention[46] and its relevance in contemporary international law. The thesis is divided into several chapters, each focusing on a specific aspect of the Convention's application and its implications for state recognition and sovereignty in the modern world. Chapter Two provides a detailed historical context for the Convention, exploring its origins and adoption in 1933. This chapter examines the geopolitical dynamics of the time, particularly in the Americas, and how these influenced the formulation of the Convention's principles.[47] The analysis draws on the scholarship of James Crawford, whose extensive work on statehood offers a foundational understanding of the legal principles at play, and Jure Vidmar, who contextualises the significance of the Montevideo Convention within broader international legal traditions. The shift from legitimist theories of recognition, rooted in dynastic legitimacy, to the constitutive theory, which emphasised recognition by other states, is explored. The Convention is a central focus, as it codified the declaratory theory of statehood, establishing four objective criteria: population, territory, government, and foreign relations.[48] The chapter also addresses critiques of the Convention, particularly by Hersch Lauterpacht, and the evolving importance of global norms such as self-determination, human rights, and democratic governance in state recognition.[49] By considering post-World War II developments and the influence of the *Badinter Commission*,[50] the chapter demonstrates the shift towards a more holistic and normative approach to statehood.

Chapter Three focuses on the specific cases of Palestine and Western Sahara. The situations in Palestine and Western Sahara can be described as protracted territorial conflicts characterised by contested sovereignty, self-determination claims, and geopolitical rivalries.[51] Both regions feature struggles between indigenous populations seeking independence or recognition of their political rights

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[46] The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.

[47] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 411.

[48] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 45.

[49] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 43 – 44.

[50] Maria Grazia Melchionni, 'European Community, 'Declaration on Yugoslavia' (Extraordinary EPC Ministerial Meeting, The Hague, 27 August 1991)' (1992) 59 Rivista di Studi Politici Internazionali 69 – 71.

[51] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 70.

and occupying or administering states, Israel in the case of Palestine and Morocco in Western Sahara.[52] This chapter traces the complex legal and political challenges these two territories face in their quests for statehood. It critically examines how the Convention's requirements for statehood apply to these cases, and how these criteria are insufficient in capturing the full scope of their struggles.

In the case of Palestine, the chapter highlights the fragmented governance between the Palestinian Authority (PA) and Hamas, which complicates the application of the Montevideo requirements. Despite having a defined territory (the West Bank and Gaza Strip) and a permanent population, the division of control between the PA and Hamas undermines the notion of a single, effective government.[53] This fragmentation is further exacerbated by the ongoing Israeli occupation, which challenges Palestine's ability to function as an independent state. The chapter also discusses the international recognition of Palestine, which, while widespread, often reflects symbolic support rather than acknowledgement of actual statehood. The right to self-determination, a principle enshrined in various international documents and reinforced by the most recent International Court of Justice (ICJ) advisory opinion, delivered in July 2024,[54] addresses the legality of Israel's occupation of Palestinian territories, including East Jerusalem and the West Bank. The ICJ concluded that Israel's policies and practices in these territories amount to unlawful annexation, in violation of international law, specifically citing breaches of the prohibition on the use of force and the acquisition of territory by force.

Additionally, the Court found that Israel's actions, including settlement expansion and land confiscation, contribute to systemic discrimination and segregation, which could be classified as apartheid under international law. This ruling reinforces the longstanding legal arguments supporting Palestinian self-determination and statehood, but the International Court of Justice carefully avoided making a direct statement on whether Palestine qualifies as a fully recognized state under international law. Instead, the opinion focused on Israel's obligation to ensure that

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[52] Thomas M Hill, 'Western Sahara's Conflict Is Over. Negotiating the Terms Comes Next' (USIP, 14 August 2024) <https://www.usip.org/publications/2024/08/western-saharas-conflict-over-negotiating-terms-comes-next> accessed 9 September 2024.

[53] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 239.

[54] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) 2024 ICJ Rep <https://www.icj-cij.org/case/186/advisory-opinions> accessed 9 September 2024.

Palestinians can exercise their right to self-determination, which includes establishing an independent and sovereign state.[55]

Similarly, the chapter examines Western Sahara's struggle for self-determination under Moroccan occupation. The case of Western Sahara is framed within its colonial history and its status as a non-self-governing territory under the United Nations Charter. The Polisario Front's declaration of the Sahrawi Arab Democratic Republic and the subsequent recognition by the African Union are explored as examples of a political process toward statehood that bypasses traditional legal frameworks. The chapter discusses the impact of regional and international dynamics, particularly the contrasting approaches of the African Union which supports the Sahrawi right to self-determination and the European Union which balances legal obligations with political interests, particularly in its relations with Morocco. France recognised Morocco's sovereignty over Western Sahara in July 2024 as part of a strategic diplomatic shift. This move aligns with broader international recognition, directed by the United States' endorsement in 2020.[56] France's decision likely stems from a desire to strengthen ties with Morocco, a key regional partner, and reflects changing geopolitical dynamics in the region. The recognition also signals a pragmatic approach to resolving the long-standing conflict, prioritising stability over the Polisario's push for full independence.[57]

The chapter concludes by advocating for a broader perspective that goes beyond the traditional positivist legal framework of the Convention. It incorporates Alexander Wendt's constructivist theory, which emphasises that statehood is not solely determined by legal criteria but is also socially constructed through the identities, interests, and interactions of states and non-state actors.[58] This perspective is particularly relevant for understanding the statehood claims of Palestine and Western Sahara, where the traditional requirements of the Montevideo Convention fall short in capturing the social and political realities on the ground. Wendt's constructivist approach allows for a more nuanced understanding of statehood in contexts where governance is fragmented, and

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[55] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) 2024 ICJ Rep <https://www.icj-cij.org/case/186/advisory-opinions> accessed 9 September 2024.

[56] Anon, *'Proclamation on Recognizing The Sovereignty Of The Kingdom Of Morocco Over The Western Sahara'* (U.S. Embassy Rabat, 10 December 2020) <https://ma.usembassy.gov/proclamation-on-recognizing-the-sovereignty-of-the-kingdom-of-morocco-over-the-western-sahara/> accessed 10 September 2024.

[57] Thomas M Hill, 'Western Sahara's Conflict Is Over. Negotiating the Terms Comes Next' (USIP, 14 August 2024) <https://www.usip.org/publications/2024/08/western-saharas-conflict-over-negotiating-terms-comes-next> accessed 9 September 2024.

[58] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 57.

territorial control is contested. It highlights the importance of international recognition and the role of regional and global actors in legitimising these entities' aspirations for independence. The chapter demonstrates that statehood, as applied to Palestine and Western Sahara, is not a static legal concept but a dynamic and relational one, shaped by the ongoing struggles for self-determination and the evolving international order.

Chapter Four explores state formation and international recognition in post-Soviet regions, particularly focusing on Kosovo, Transnistria, Abkhazia, and South Ossetia. It examines the geopolitical, legal, and historical contexts that shaped these entities, utilising both doctrinal international law analysis and the arguments presented by Jure Vidmar. This chapter critiques the application of the Convention's requirements for statehood,[59] questioning its relevance in the context of contested territories that emerged after the dissolution of the Soviet Union and Yugoslavia.[60]

The case study of Kosovo highlights the contradictions within international recognition processes. The chapter explores the 2010 International Court of Justice Advisory Opinion, which ruled that Kosovo's unilateral declaration of independence did not violate international law but refrained from addressing Kosovo's statehood or secession directly.[61] Kosovo's recognition has been partial, with influential states such as the United States and most of the European Union supporting it, while Russia and China remain opposed, reinforcing the political dimensions of recognition.[62] The chapter also touches on Crawford's arguments concerning self-determination, suggesting that its application is shaped by both political and legal forces and that it is often treated as a territorial rather than purely human right.[63]

The involvement of external actors in state formation is significant. North Atlantic Treaty Oraganisation's military intervention in Kosovo and Russia's support for Transnistria, Abkhazia, and South Ossetia reflect how international intervention

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[59] The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[60] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 December 2023.
[61] Jure Vidmar, 'The Kosovo Advisory Opinion Scrutinized' (2011) 24 Leiden Journal of International Law 355 – 383, 361.
[62] James Ker-Lindsay, 'Kosovo, EU Member States and the Recognition-Engagement Nexus' in Ioannis Armakolas and James Ker-Lindsay (eds), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo* (Palgrave Macmillan 2019) 154.
[63] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 108.

shapes statehood.[64] These external influences can enable entities to function as *de facto* states despite lacking full international recognition. The *Badinter Arbitration Committee's* role in shaping European guidelines on state recognition during the Yugoslav dissolution further exemplifies the intersection of law and power politics in recognition processes.[65] Chapter Five illustrates that state formation and recognition in the post-Soviet space are ongoing, contested processes shaped by geopolitical interests, legal doctrines, and historical narratives.[66] By applying post-positivist and constructivist perspectives, the chapter provides an analysis commensurate with the overall framework of how contested territories like Kosovo and Transnistria navigate the international landscape for legitimacy and recognition.

Chapter Five examines the Kurdish struggle for nationhood, focusing on applying the Convention's requirements for statehood to Kurdish aspirations for recognition. Recent developments, including the Turkish military's operations against the Kurdish Workers Party and the political tensions between the Kurdistan Regional Government and Baghdad, highlight the challenges faced by the Kurdish people in pursuing autonomy.[67] Incorporating research on Kurdish nationalism, the chapter explores how socio-political dynamics, rather than purely legal requirements, influence Kurdish statehood aspirations. Wendt's constructivist approach further aids in understanding how Kurdish identity and claims to statehood are constructed and contested in the international legal framework.[68] The chapter reflects on the growing complexity of the Kurdish question, particularly in light of regional power plays, such as Turkey and Iran's interventions, and how these influence international perspectives on Kurdish statehood. The need for a more flexible and context-specific approach to state recognition is reinforced, considering both internal political fragmentation within the Kurdish movement and external geopolitical challenges.

Chapter Six of the thesis investigates the case of Somaliland, focusing on its quest for recognition and the challenges it faces in achieving statehood under the

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[64] James Ker-Lindsay, 'Kosovo, EU Member States and the Recognition-Engagement Nexus' in Ioannis Armakolas and James Ker-Lindsay (eds), *The Politics of Recognition and Engagement: EU Member State Relations with Kosovo* (Palgrave Macmillan 2019) 84.
[65] Maurizio Ragazzi, 'Opinion 3' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[66] Thomas D Grant, 'International Recognition and the Succession of States: Kosovo' (2010) 2 Journal of International Law 27, 34.
[67] Anon, 'Turkish Military Destroys 20 Targets of Kurdish Militant Group PKK, Ministry Says' (Reuters, 2 September 2024) <https://www.reuters.com/world/middle-east/turkish-military-destroys-20-targets-kurdish-militant-group-pkk-ministry-says-2024-09-02/> accessed 10 September 2024.
[68] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 57.

Convention's requirements. Somaliland's situation is particularly compelling, as it presents a unique case where the conventional criteria are largely met. However, the persistent lack of international recognition poses significant obstacles to its quest for sovereignty. This chapter provides a comprehensive analysis of the factors that have contributed to Somaliland's lack of recognition, despite its apparent fulfilment of the Convention's criteria for statehood.[69] In light of McGibbon's recent work, the chapter expands on the complexities surrounding non-state entities like Somaliland by critiquing the rigid state/non-state binary in international law. McGibbon argues that these entities, despite lacking formal recognition, operate effectively on the international plane and should be afforded functional legal capacities. This perspective aligns with Somaliland's experience, which, while demonstrating robust governance, struggles for recognition. McGibbon advocates for a more flexible framework that recognises the realities of entities functioning in the grey area of international law without full statehood.[70]

The chapter critically examines Somaliland's pursuit of recognition, as it positions itself as a locus of stability in the turbulent horn of Africa. Somaliland in contrast to the broader instability in Somalia, has developed effective governance, encouraged democracy, and maintained stability, marking it as a non-state territorial entity *or* in common parlance *a de facto* state. Despite these achievements, the lack of international recognition severely limits its participation in global affairs.[71] Somaliland meets the criteria for statehood as outlined in the Convention, but its path to recognition is blocked by political considerations, especially within the African Union, which impedes its sovereign functioning.[72] Recent developments in the region further highlight Somaliland's strategic importance. Ethiopia's 2024 port deal with Somaliland offers crucial economic opportunities, granting Ethiopia access to the Berbera port. This deal demonstrates how Somaliland has leveraged its de facto status to engage in regional partnerships.[73] However, as McGibbon's argument highlights, the international legal framework continues to struggle with entities like Somaliland

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[69] Sarah Jane McGibbon, *Non-State Effective Territorial Entities: A Critical Appraisal of International Legal Capacity and Responsibility* (Maastricht University 2023).
[70] Sarah McGibbon, 'Seceding from Failed States: Reconsidering the Case of Somaliland' in Jure Vidmar (ed), *Research Handbook in Secession* (Edward Elgar Publishing 2022) 293.
[71] Iqbal D. Jhazbhay, *Somaliland: An African Struggle for Nationhood and International Recognition* (Adonis & Abbey Publishers Ltd 2009).
[72] Temesgen Sisay Beyene, 'Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law' (2019) 10 Beijing Law Review 196 – 211, 202.
[73] Farouk Chothia, 'Ethiopia Warns Against Invasion Amid Regional Tensions' (BBC News, 8 September 2024) <https://www.bbc.co.uk/news/articles/c3vxqk9g43no> accessed 10 September 2024.

that defy the binary state/non-state categorisation. McGibbon advocates for legal recognition of such entities' capacity to act on the international stage without necessarily conferring full statehood status. This requires the need for a flexible and pragmatic approach to recognition, especially in cases where entities like Somaliland demonstrate effective governance and stability.

The chapter also engages with the views of James Crawford, a leading authority on international law and statehood.[74] Crawford's analysis is particularly relevant in assessing Somaliland's claim to statehood under the Convention. While Crawford acknowledges that Somaliland has established a functioning government and maintains control over its territory, he remains cautious about categorising Somaliland as a successful state. Crawford points out that the international community's reluctance to recognise Somaliland is partly due to concerns about setting a precedent that might encourage other secessionist movements, particularly in Africa where colonial boundaries are generally respected.[75] The chapter further explores the role of the African Union in shaping the international response to Somaliland's statehood claims. The African Union's general policy of preserving colonial-era boundaries to avoid encouraging separatist movements elsewhere on the continent has been a significant factor in the non-recognition of Somaliland.[76] The 2005 African Union fact-finding mission, which recommended recognition of Somaliland based on its unique historical and political circumstances, is discussed in detail.[77] However, the African Union's inability to reach a consensus on the issue has left Somaliland in a state of limbo, with its quest for recognition stalled despite its efforts to build a stable and democratic state.[78]

The implications of non-recognition for Somaliland are profound, affecting its economic development, diplomatic relations, and overall capacity to function as a sovereign state. Without formal recognition, Somaliland is excluded from international organisations such as the United Nations, limiting its ability to participate in global decision-making processes and to access international

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[74] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 45 – 46.
[75] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 149.
[76] Anon, *Somaliland Continues Quest for Independence'* (Africa Defense Forum, 13 February 2024) <https://adf-magazine.com/2024/02/somaliland-continues-quest-for-independence/> accessed 10 September 2024.
[77] Anon, 'AU Fact-Finding Mission to Somaliland: 30 April to 4 May 2005' (American Rhetoric, 2005) <https://www.americanrhetoric.com/speeches/PDFFiles/au-fact-finding-mission-to-somaliland-30-april-to-4-may-2005.pdf> accessed 10 September 2024.
[78] Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP 2024) 131.

financial assistance.[79] This lack of recognition also complicates Somaliland's efforts to enter into formal diplomatic and trade relations with other states, further isolating it from the international community. The chapter also examines the recent geopolitical developments involving Somaliland, particularly the reported interest of Ethiopia in establishing ties with Somaliland to gain access to the Red Sea.[80] This development, while not amounting to formal recognition, suggests a growing acknowledgement of Somaliland's strategic importance in the Horn of Africa. The chapter critically assesses the potential implications of such ties for Somaliland's quest for recognition, considering both the opportunities and risks involved.

Chapter Seven shines a light on the limitations of the Convention in dealing with Indigenous peoples' rights to self-determination and autonomy. The traditional Westphalian conception of statehood does not adequately account for the unique historical, cultural, and political identities of indigenous peoples.[81] These communities, often within existing states, have claims to self-determination and autonomy that challenge the rigid criteria of the Convention.[82] The chapter opens with a critique of the Convention's inability to accommodate Indigenous peoples within its framework, as the Convention's state-centric model is too inflexible to deal with the realities of Indigenous groups who have distinct cultural identities and legal claims. The chapter then turns to various international instruments that offer more robust protection of indigenous rights, such as the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[83] and the 2007 United Nations Declaration on the Rights of Indigenous Peoples.[84] Both instruments, while not legally binding, represent significant political commitments that recognise indigenous peoples' rights to self-determination, cultural preservation, and participation in public life.

To illustrate the weaknesses of the Convention, the chapter examines several case studies. The East Timor case, for instance, demonstrates how geopolitical interests can override self-determination. Despite the right of the East Timorese to

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[79] Jure Vidmar and Lea Raible, State Creation and the Concept of Statehood in International Law in Jure Vidmar, Lea Raible and Sarah McGibbon (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 15.
[80] Jutta Bakonyi, 'Somaliland-Ethiopia Port Deal: International Opposition Flags Complex Red Sea Politics' (*The Conversation*, 7 February 2024) <https://theconversation.com/somaliland-ethiopia-port-deal-international-opposition-flags-complex-red-sea-politics-221131> accessed 10 September 2024.
[81] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 8.
[82] Jure Vidmar and Lea Raible, Research Handbook on Secession (Edward Elgar Publishing 2022) 15.
[83] UNGA Res 47/135 (18 December 1992).
[84] UNGA Res 61/295 (13 September 2007).

self-determination, the International Court of Justice ruled that it could not adjudicate the case without Indonesia's participation.[85] This showed how powerful states can block self-determination efforts when their strategic interests are at stake. In the *Chagos Archipelago case*, the International Court of Justice found that the United Kingdom acted illegally by detaching the islands from Mauritius and displacing the Indigenous Chagossians, but the initially United Kingdom refused to comply with the ruling, again highlighting the tension between state sovereignty and indigenous rights.[86] The chapter also references the *Awas Tingni case*, where the Inter-American Court of Human Rights recognised the collective land rights of the Mayagna community, setting a precedent for using human rights frameworks to protect indigenous land rights in ways the Montevideo Convention could not.[87]

The work of scholars such as Stephen James Anaya is instrumental in the chapter's analysis, particularly his argument that indigenous peoples' self-determination should not necessarily imply independent statehood or secession, but rather autonomy over their lands and internal affairs within existing states.[88] Anaya's reconceptualisation of sovereignty aligns with the evolving norms of international law, recognising that indigenous peoples have inherent sovereignty based on their historical and cultural connections to their land. This approach departs from the rigid Westphalian model and emphasises a more flexible and inclusive understanding of self-determination, one that accounts for the distinctive legal identities of indigenous groups. The chapter concludes by advocating for a more pluralistic international legal framework, which recognises indigenous sovereignty and incorporates human rights principles, as outlined in instruments like UNDRIP, to provide greater protection for indigenous peoples.[89]

1.7 Conclusion

The thesis reflects on the enduring relevance of the Montevideo Convention in international law while addressing its limitations in the modern world, especially with new political entities and evolving geopolitical challenges. Chapter One sets the foundation for the thesis by presenting the research questions, methodologies,

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[85] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://icj-cij.org/case/84> accessed 23 February 2024.
[86] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] <https://www.icj-cij.org/case/169> accessed 12 September 2024.
[87] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* 2001 <http://hrlibrary.umn.edu/iachr/AwasTingnicase.html> accessed 30 August 2024.
[88] Stephen J Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 109.
[89] UNGA Res 61/295 (13 September 2007).

and theoretical framework, drawing on both doctrinal analysis and constructivist international relations theories to critique the rigid criteria of statehood as outlined in the Convention. Entities like Palestine, Somaliland, and Western Sahara challenge the traditional understanding of statehood and sovereignty, pushing for a refined and flexible interpretation that includes socio-political, historical, and cultural contexts. The chapter concludes that the Montevideo Convention's principles, while historically significant, need to be reconsidered in today's global political landscape, as the legal frameworks around state recognition may no longer fully address the complexities of modern statehood. To transition into Chapter Two, it is essential to build on the foundational ideas discussed in the introduction. Chapter Two provides historical context for the development of the Convention and its contribution to the evolution of statehood since 1933, and the geopolitical climate that provided the conditions for such a convention to be agreed upon.

CHAPTER TWO: THE HISTORICAL CONTEXT AND EVOLUTION OF THE MONTEVIDEO CONVENTION

2.1 Introduction

Chapter Two explores the historical development and evolution of statehood criteria in international law, beginning with the Peace of Westphalia in 1648. This seminal event established foundational principles such as territorial sovereignty and non-intervention, marking the rise of sovereign states as the primary actors in international relations.[90] The chapter traces the transition from legitimist theories of state recognition, rooted in dynastic legitimacy, to more modern notions of effective control and political reality. It examines the shift from the constitutive theory of statehood, where recognition by other states was paramount, to the declaratory theory, codified by the Convention of 1933.[91]

While influential, the Convention faced criticism, notably from Hersch Lauterpacht, and was gradually overtaken by post-World War II developments, including the rise of self-determination and human rights.[92] The chapter concludes by analysing how the *Badinter Commission*[93] and recent scholarship, including calls for a 'Montevideo Plus,' have expanded statehood criteria to include adherence to democratic governance, human rights, and minority protection, reflecting the complex realities of state recognition in the modern era.[94]

2.2 Historical context

The Peace of Westphalia (1648) is widely regarded as a seminal moment in the development of modern international law and state sovereignty. The treaties that concluded the Thirty Years' War introduced key principles such as territorial sovereignty and non-intervention, which have become foundational to the modern state system.[95] These agreements affirmed that states possess supreme authority within their borders and must be treated as legally equal, regardless of their size or power, thereby creating a framework that governs international relations to this

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[90] Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 American Journal of International Law 20 – 41, 28.
[91] The Montevideo Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[92] Hersch Lauterpacht, Recognition in International Law (CUP 1947) 43 – 44.
[93] Anon, 'Declaration on Yugoslavia and other Guidelines for the Recognition of New States' (1992) 31 International Legal Materials 1485 – 1487.
[94] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.
[95] Antonio Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (CUP 2017) 257.

day. The Westphalian system effectively shifted the locus of power to sovereign states, making them the primary actors in international law, as noted by James Crawford, who emphasises the pivotal role of these treaties in formalising the recognition of states as independent entities under international law.[96] The legal principles underlying Westphalian sovereignty were further developed by scholars such as Jean Bodin[97] and Hugo Grotius.[98] Bodin advanced the idea of the state as possessing absolute authority within its territory, while Grotius contributed to the development of international law through natural law theories. Both thinkers drew on the concept of state sovereignty that had been institutionalised by the Peace of Westphalia, which provided the framework for a world of independent, legally equal states. This marked a departure from earlier forms of political organisation, such as empires or religious authorities, which often exercised overlapping jurisdictions. By solidifying the notion of the state as the principal unit of governance, the Peace of Westphalia laid the foundation for the modern state system.[99]

Wheaton explained how the predominant models of state recognition were rooted in legitimist theories and notions of effectiveness.[100] Legitimism, which thrived during the age of monarchy, was built on the principle that sovereignty and statehood were derived from dynastic legitimacy. According to this theory, rulers inherited their sovereign rights, and even when displaced, they maintained their sovereignty. An example of this is the phrase *"L'État, c'est moi"* attributed to

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[96] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 5 – 8.

[97] Jean Bodin (1530–1596) was a French jurist, political philosopher, and professor of law, widely regarded as one of the most influential theorists of sovereignty. His seminal work, Les Six Livres de la République (1576), introduced the concept of sovereignty as the absolute and indivisible power of a state, vested in its ruler or government. Bodin's theory of sovereignty became a foundational concept in the development of modern political and legal thought, particularly about the Westphalian system of sovereign states that emerged in 1648.

[98] Hugo Grotius, born in the Netherlands in 1583, was a pioneering figure in international law. Often referred to as the "father of international law," he made landmark contributions to the field, particularly through his work "On the Law of War and Peace" ("De Jure Belli ac Pacis"), published in 1625. This seminal text laid the foundation for modern international law by systematically addressing the rules of war and the notion of justice between nations. Grotius' work was groundbreaking in its argument for a natural law basis for international relations, independent of religious or sovereign authority. He advocated for the principle of the freedom of the seas and emphasized the importance of treaties and agreements between states as binding legal instruments. His concepts of just war and the rights of individuals and nations in times of conflict have profoundly influenced the development of international humanitarian law.

[99] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 10.

[100] Henry Wheaton (1785–1848) was an influential American lawyer, diplomat, and scholar, widely recognized for his contributions to the field of international law. His most notable work, *Elements of International Law*, published in 1836, became a foundational text in the development of modern international law. Wheaton was deeply involved in diplomatic service, serving as a U.S. chargé d'affaires and minister to Denmark, and later as a minister to Prussia. His diplomatic experiences heavily informed his scholarly work, especially on the laws governing state relations and international disputes.

French King Louis XIV, which directly equated the ruler to the state itself.[101] However, the French Revolution fundamentally challenged legitimist assumptions, as revolutionary change started to assert political reality over dynastic rights.[102] Although monarchies initially resisted this shift, Napoleon's ability to establish himself as an emperor and secure negotiations with monarchs such as Tsar Alexander I signalled the growing acceptance of political change as a basis for statehood. The legitimist perspective began to falter, giving way to theories focused on effective control as a key criterion for statehood.[103] This shift was apparent in the *Congress of Aix-la-Chapelle* in 1818, which was part of the broader effort of post-Napoleonic European diplomacy to maintain the balance of power and prevent further conflict through international collaboration.[104]

By the 19th century, effectiveness became a more decisive element in determining statehood, as seen in William Hall's assertion that effective control over territory and population was integral to statehood.[105] The contiguity doctrine was a legal concept in international law during the period of European imperialism, particularly in the 19th century. It posited that a state could claim sovereignty over a territory adjacent to land it already controlled, even if it did not yet exercise actual control or effective governance over the new territory. The doctrine suggested that controlling one piece of land could give a sovereign a legitimate claim to nearby or connected lands, often without effective occupation or administration. This doctrine was often used to justify European claims over large tracts of land in Africa, Asia, and the Americas. In essence, if no other recognised sovereign state laid claim to the adjacent territory, the doctrine allowed a European power to extend its influence into the area.[106] The doctrine dovetailed with the practice of treating land not under European-style state control as *terra nullius* empty land, which ignored the presence of indigenous populations and their claims to sovereignty.[107] The contiguity doctrine was one of the tools of imperial expansion, enabling European powers to claim vast territories without effective occupation, so long as the land was near existing colonial possessions.[108] The consequences of this doctrine will

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[101] Henry Wheaton, 'Elements of International Law' in Mortimer NS Sellers (ed) *Republican Principles in International Law* (Springer 2006) 31.
[102] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 419.
[103] Henry Wheaton, 'Elements of International Law' in Mortimer NS Sellers (ed) *Republican Principles in International Law* (Springer 2006) 63.
[104] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 378.
[105] William Edward Hall, *A Treatise on International Law* (Clarendon Press 1884) 98.
[106] William Edward Hall, *A Treatise on International Law* (Clarendon Press 1884) 109.
[107] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 237.
[108] Surya P Sharma, *Territorial Acquisition, Disputes and International Law* (Brill 2024) 32.

be analysed in more detail in Chapters Three and Six. This legal notion gradually faded in the 20th century as international law evolved to emphasise effective control, recognition, and the rights of indigenous peoples.

In the 19th century, the constitutive theory of statehood became dominant, particularly after the Congress of Vienna in 1815. This theory holds that a state only exists as a subject of international law if other states recognise it.[109] Recognition, therefore, became a political tool used by powerful states to determine which entities would be allowed to join the international community. This led to inconsistent and often politically motivated practices of state recognition, as states were frequently recognised or denied recognition based on strategic interests rather than legal requirements.[110] The limitations of the constitutive theory prompted a shift toward the declaratory theory of statehood, which posits that a state's existence is independent of recognition and is instead based on its ability to meet certain objective requirements.[111] The Montevideo Convention of 1933[112] codified the declaratory theory of statehood, establishing four key requirements for statehood: a permanent population, a defined territory, an effective government, and the capacity to engage in relations with other states. According to this theory, a state exists as soon as it fulfils these factual requirements, regardless of whether it is recognised by other states. This legal framework sought to depoliticise the process of state recognition by grounding it in objective facts rather than political considerations, aligning with the Westphalian principle of sovereignty that emphasised state autonomy. The declaratory theory became the predominant legal standard for determining statehood, as evidenced by its widespread acceptance in contemporary international law.[113] These requirements reflect a 19th-century positivist view that relied on clear, measurable benchmarks, derived largely from Austro-German legal positivism.[114] This framework was most famously articulated by Georg Jellinek,[115] who defined the state as a combination of land,

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[109] David Raic, *Statehood and the Law of Self-Determination* (Brill 2002) 29.
[110] Hersch Lauterpacht, *Recognition in International Law* (CUP 2012) 62.
[111] Thomas Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (OUP, 1999) 32.
[112] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[113] James Crawford, *The Creation of States in International* Law (2nd edn, OUP 2006) 34.
[114] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 418.
[115] Georg Jellinek (1851–1911) was a prominent Austrian legal scholar and political theorist. He is best known for his contributions to the theory of the state and public law, particularly through his concept of the "three elements" of statehood: territory, people, and government. Jellinek played a key role in shaping modern legal thought regarding state sovereignty and international law. His influential work *Allgemeine Staatslehre* (General Theory of the State) remains an important

people, and ruler, reinforced by the effectiveness of governance over a territory.[116] Jellinek's ideas, particularly his theory that a state must have a defined territory, permanent population, and a government, influenced the development of criteria for statehood, such as those formalised in the Montevideo Convention. His work bridged the gap between legal theory and political reality in state formation and international law. The Montevideo criteria, in essence, mirrored this thinking, emphasising the functional elements that demonstrated a state's control and authority over its territory and population.[117]

Grant argued that the *Deutsche Continental Gas-Gesellschaft v. Polish State* case highlighted how control, not formal recognition, determines a state's authority over assets. Deutsche Continental owned property in Warsaw when it was part of the Russian Empire. [118] After Poland's reconstitution in 1918, Warsaw fell under Polish control. Poland expropriated the company's property under Article 297 of the Versailles Treaty, which allowed states to seize German assets. The company contested, claiming Poland lacked authority because Russia had not ceded Warsaw by the treaty's effective date. They argued Poland only had authority over former German territories, not Russian ones. The tribunal rejected this, ruling that control, not recognition, was decisive. Poland's effective control upheld the expropriation. The arbitrators held that; 'a state does not exist unless it fulfils the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory contributions.' This principle of territorial control later contributed to the Convention's requirements in 1933, which defined statehood based on a defined territory, permanent population, effective government, and capacity for foreign relations, reflecting the tribunal's emphasis on control over recognition.[119]

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reference in legal and political philosophy. He was also a professor of law, holding academic positions at universities such as the University of Vienna and the University of Heidelberg. Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, O Haring 1914) 398.

[116] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 410.

[117] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 416.

[118] *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 Ann. Dig. 11 (Germano-Polish Mixed Arbitral Tribunal).

[119] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 418.

2.3 The creation of the Montevideo Convention

The Montevideo Convention laid down the fundamental principles of statehood that continue to influence legal and diplomatic relations to this day.[120] However, the development of these ideas did not occur in isolation, and the intellectual backdrop against which the Montevideo Convention was framed is crucial to understanding its provisions. This backdrop is rooted in the broader movement for codifying international law, particularly through the contributions of publicists, scholars, and non-governmental organisations throughout the late 19th and early 20th centuries.[121] One of the most significant influences on the Montevideo Convention was the work of *M. Albert de Lapradelle,* who, in the early 1920s, submitted a *Declaration of the Rights and Duties of Nations* to the Institute of International Law at its sessions in Rome (1921) and The Hague (1925).[122] Lapradelle's draft reflected a growing need to formalise the status and obligations of states within the international system, offering a vision that strongly emphasised the principles of sovereignty and equality among nations. His ideas, along with similar created a foundation for the state-centric model of international law that would later be enshrined in the Montevideo Convention.

In 1931, *Victor M. Maurtua* presented a draft text, which was communicated by the American Institute of International Law to the Seventh International Conference of American States in Montevideo. Maurtua's contribution further developed the notion that statehood could be determined by certain objective requirements. This draft closely aligned with what would later become the defining elements of the Montevideo Convention: permanent population, defined territory, government, and the capacity to enter into relations with other states. These requirements embodied the declaratory theory of statehood, which holds that the existence of a state is determined by factual conditions rather than recognition by other states, a central tenet of the Convention.[123] Similarly, Dr. Alejandro Alvarez presented his Declaration of Great Principles of Modern International Law to various international bodies in 1931.[124] His proposals, which focused on the codification of international law principles, contributed to the intellectual momentum that sought to formalise the legal conditions of statehood and international obligations. Alvarez's ideas

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[120] Jan Klabbers, *International Law* (CUP 2020) 76.
[121] UNGA A/CN.4/2 (22 April 1949).
[122] Albert de Lapradelle and Victor M. Maurtua presented key drafts to the Institute of International Law and the Seventh International Conference of American States, respectively. UNGA A/CN.4/2 (22 April 1949) paragraphs 1 – 3.
[123] UNGA A/CN.4/2 (22 April 1949).
[124] Alejandro Alvarez, 'The New International Law' (1929) 15 Transactions of the Grotius Society 35 – 71, 45 – 47.

were echoed in the growing consensus among legal scholars and practitioners that the existing state of international law required clearer rules and standards to accommodate the changing geopolitical landscape.[125]

Institutions such as the International Law Association and the Inter-Parliamentary Union had long advocated for the codification of the rights and duties of states, reflecting the desire of international actors to systematise and formalise international relations.[126] Earlier initiatives, such as those put forward by the Universal Peace Congress in the late 19th century, were crucial precursors to the Convention's formalisation of statehood requirements. These organisations consistently pushed for declarations that would establish clear legal standards for recognising states and their obligations, thus providing a foundation upon which the Montevideo Convention could build.[127]

The Montevideo Convention did not emerge in a vacuum. Its drafting was deeply influenced by decades of intellectual and legal developments, both within Latin America and the broader international community. Contributions from key publicists such as Lapradelle, Maurtua, and Alvarez, combined with the efforts of non-governmental organisations, created an intellectual environment that sought to provide clarity and structure to the concept of statehood. The Montevideo Convention thus represents not only a codification of these ideas but also a reflection of the broader movement toward the formalisation of international law in the 20th century.

When the Convention, was signed in 1933, it was an international treaty and a regional legal instrument. It was adopted by the Seventh International Conference of American States and is legally binding only on the states that ratified it, primarily the Pan-American nations.[128] Its significance extends beyond its regional application because it has contributed to the customary international law on statehood.[129] The Convention is often cited in discussions of state recognition, and Article 1 provides the most widely accepted formulation of the basic criteria for

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[125] William Samore, 'The New International Law of Alejandro Alvarez' (1958) 52 American Journal of International Law 41 – 54, 41.
[126] UNGA A/CN.4/2 (22 April 1949) paragraph 2.
[127] Anon, 'The Universal Peace Congress. Paris, 1889' (1889) 51 The American Advocate of Peace and Arbitration 97 – 101.
[128] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[129] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.

statehood: territory, population, government, and capacity for foreign relations.[130] While the Convention is not globally binding, its criteria have influenced the understanding of statehood in international law and have been referenced by other international instruments and bodies, including the International Court of Justice.[131] The Convention is a regional treaty; however, its principles have contributed to the development of international legal norms on statehood and recognition. Its influence can be seen in subsequent legal debates and its frequent citation in international legal practice. The Convention must be understood within the broader context of Latin American legal and political developments, as well as the diplomatic efforts of the United States during this period.

2.3.1The Political and Legal Landscape in the Americas

By the early 20th century, Latin America had emerged as a region deeply concerned with questions of sovereignty, non-intervention, and legal equality among states. These concerns were largely a product of the region's tumultuous political history, marked by wars of independence, the consolidation of new republics, and repeated interventions by foreign powers most notably the United States. The independence movements of the early 19th century, which freed Latin America from Spanish and Portuguese colonial rule, led to the creation of a host of new states. However, these newly independent states faced numerous challenges to their sovereignty, both from external interference and from internal instability.[132] The United States, through the Monroe Doctrine of 1823, had positioned itself as the protector of the Western Hemisphere, seeking to prevent further European colonisation or intervention in the Americas. However, this protective stance often veered into interventionism, particularly in the late 19th and early 20th centuries, when the U.S. frequently intervened in the domestic affairs of Latin American countries.[133] This period, sometimes referred to as the era of U.S. imperialism in Latin America, saw the United States justify its interventions through policies like the Roosevelt Corollary to the Monroe Doctrine, which claimed the right to intervene in Latin American countries to maintain stability and protect American interests. It was against this backdrop that Franklin D. Roosevelt's *Good Neighbor*

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[130] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[131] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 5.
[132] Julie Cupples, *Development and Decolonization in Latin America* (Taylor & Francis 2022) 36.
[133] Alan McPherson, A Short History of U.S. Interventions in Latin America and the Caribbean (Wiley 2016) 42.

Policy emerged. Upon taking office in 1933, Roosevelt sought to reverse decades of United States interventionism in Latin America, recognising that such policies had alienated many countries in the region. The *Good Neighbor Policy* emphasised mutual respect and non-intervention, aligning with Latin American calls for greater legal equality and respect for state sovereignty.[134] This policy was a leading factor in the convening of the Seventh International Conference of American States, where the Montevideo Convention was crafted. The *Good Neighbor Policy* was instrumental in fostering a diplomatic environment conducive to creating a legal framework that would guarantee the sovereignty of Latin American states. Roosevelt's administration, keen to rebuild trust with its southern neighbours, supported efforts to codify the principles of non-intervention and legal equality.[135] This emphasis on sovereign equality became a central theme of the Montevideo Convention, which sought to formalise the criteria for statehood in a way that would prevent external powers from arbitrarily denying recognition to new states based on political expediency.[136]

2.3.2 Drafting the Montevideo Convention

The drafting of the Convention was led by a coalition of Latin American jurists and diplomats who were acutely aware of the need for a legally binding treaty that could protect the sovereignty of their states. Many Latin American countries had experienced instability in the form of military coups, revolutions, and foreign interventions, all of which had led to questions about the legitimacy of their governments.[137] The convention was therefore designed to provide clear, objective criteria for statehood, which would safeguard against foreign interference, particularly from the United States.[138] One of the key provisions in the Montevideo Convention was Article 3, which states: "*The political existence of the state is independent of recognition by the other states."*[139] This provision is crucial in understanding the convention's intent. It reflects a rejection of the constitutive

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[134] Anon, 'The Good Neighbor Policy, 1933' (U.S. Department of State Office of the Historian, date unknown) <https://history.state.gov/milestones/1921-1936/good-neighbor> accessed 16 September 2024

[135] Earl R Beck, 'The Good Neighbor Policy, 1933-1938' (1939) 1 The Historian 110 – 131, 115

[136] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 52.

[137] Lawrence A. Clayton, 'The 1930s: 16 Years of Depression and Upheaval' in Lawrence A. Clayton et al, *A New History of Modern Latin America* (University of California Press 2017) 346.

[138] Lawrence A. Clayton, 'Reform and Revolution' in Lawrence A. Clayton and others, *A New History of Modern Latin America* (University of California Press 2017) 254.

[139] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, article 3.

theory of state recognition, which held that a state only existed when recognised by other states. Instead, the convention embraced the declaratory theory of statehood, asserting that the existence of a state is a factual matter, determined by whether the state meets certain objective criteria, regardless of whether it is recognised by other states. This was a direct response to the history of foreign powers particularly the United States refusing to recognise governments in Latin America that they deemed illegitimate, often for political reasons.[140]

Article 1 of the Montevideo Convention laid out the four fundamental criteria for statehood: (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with other states. These requirements were designed to be clear and objective, providing a legal framework that could be applied consistently across different cases.[141] By defining statehood in this way, the drafters sought to eliminate the ambiguity and political manipulation that had often characterised the recognition of new states.[142] The influence of Latin American legal scholars was particularly evident in the drafting process. Many of these scholars were heavily influenced by European legal thought, particularly the works of Emer de Vattel and Hugo Grotius, who laid the foundations for modern international law in the 17th and 18th centuries. Vattel's emphasis on the rights and obligations of sovereign states underpinned much of the legal thinking behind the Montevideo Convention.[143] At the same time, the Latin American drafters sought to adapt these ideas to the specific political context of the Americas, where questions of sovereignty and non-intervention were paramount.[144]

2.3.3 The Role of Pan-Americanism in Shaping the Convention

The Montevideo Convention cannot be understood without reference to the broader political movement of Pan-Americanism, which sought to promote

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[140] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 52.
[141] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law 404 – 457, 411.
[142] Tom Long and Carsten-Andreas Schulz, 'Republican Internationalism: The Nineteenth-Century Roots of Latin American Contributions to International Order' (2021) 35 Cambridge Review of International Affairs 639 – 661, 661.
[143] Thomas White, 'Whence Came the Law of Nations? Emer de Vattel in the Confines of Brazil, 1835-1845' (University of Oxford, 11 May 2021) <https://intellectualhistory.web.ox.ac.uk/article/whence-came-law-nations-emer-de-vattel-confines-brazil-1835-1845> accessed 16 September 2024.
[144] Anon 'Convention on Rights and Duties of States' (1934) 28 American Journal of International *Law* 75 – 78, 75. https://doi.org/10.2307/2213410 accessed 16 September 2024.

cooperation and unity among the countries of the Americas.[145] By the early 20th century, Pan-Americanism had become a powerful force in inter-American relations, with regular conferences being held to discuss issues of mutual concern.[146] These conferences often focused on legal and diplomatic matters, reflecting the desire of many Latin American states to assert their independence and sovereignty in the face of U.S. dominance. The Seventh International Conference of American States, where the Convention was adopted, was a key moment in the history of Pan-Americanism. The conference took place at a time when Latin American countries were seeking to consolidate their sovereignty and establish legal norms that would protect them from external interference.[147]

The Montevideo Convention, in this context, was not merely a legal document but a political statement, affirming the right of Latin American states to exist independently of external recognition or interference. This regional focus provides a useful context for understanding both the strengths and limitations of the Montevideo Convention. While the convention provided clear and objective criteria for statehood, its scope was initially limited to the Americas. It was designed to address the specific concerns of Latin American states, particularly about U.S. interventionism.[148] The convention's principles were not intended to be a universal guide to state recognition, even though they would later be adopted in other regions and by international bodies such as the International Court of Justice.

While the Convention was a product of Latin American diplomacy, the United States played a significant role in shaping its final form. Despite Roosevelt's commitment to the *Good Neighbor Policy*, the United States was still a dominant power in the region, and its interests inevitably influenced the drafting process. The United States delegation at the Montevideo Conference supported the adoption of the declaratory theory of statehood, as it aligned with Roosevelt's desire to reduce direct interventions in Latin America.[149] However, the United States also sought to preserve its flexibility in dealing with political instability in the

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[145] Ezequiel Padilla, 'The Meaning of Pan-Americanism' (1954) 32 *Foreign Affairs* 270, 273 <http://ezproxy.staffs.ac.uk/login?url=https://www.proquest.com/scholarly-journals/meaning-pan-americanism/docview/198255675/se-2> accessed 16 September 2024.
[146] Herbert Wright, 'The Montevideo Conference and Organization for Peace' (1934) 97 World Affairs 100 – 103, 100.
[147] Laurence A Clayton, 'Changing Worlds and New Empires' in Lawrence A Clayton et al, *A New History of Modern Latin America* (University of California Press 2017) 231.
[148] Lawrence A. Clayton, 'The 1930s: 16 Years of Depression and Upheaval' in Lawrence A. Clayton et al, *A New History of Modern Latin America* (University of California Press 2017) 346.
[149] Anon, 'Instructions to the Delegates to the Seventh International Conference of American States, Montevideo, Uruguay' (U.S. Department of State,1933) <https://history.state.gov/historicaldocuments/frus1933v04/d56> accessed 16 September 2024.

region. The Montevideo Convention contains a reservations section, allowing signatory states to express exceptions or limitations to their acceptance of specific provisions. Reservations play a critical role in international treaties as they enable states to join agreements without fully accepting every clause, allowing for flexibility while still adhering to the broader framework of the treaty.[150]

At the Convention in Montevideo, several states made reservations regarding the Convention's more controversial articles. Article 11, which prohibited the use of force to gain territory, was met with reservations from Brazil and Peru. These countries were concerned that the article could interfere with ongoing territorial disputes or be interpreted too strictly in situations involving national defence. The United States also submitted a broad general reservation, reflecting the country's concerns about being bound by certain limitations in the hemisphere, particularly regarding non-intervention in Latin American affairs, a cornerstone of the *Good Neighbour Policy* being pursued by President Franklin D. Roosevelt.

These reservations highlight the tension between the desire for a codified legal framework and the political realities of the time, where states sought to protect their sovereignty and strategic interests while still engaging in cooperative regional diplomacy.[151] As a result, the United States made several reservations to the Convention, most notably to Article 11,[152] which prohibits the use of force to acquire territory. The United States expressed concerns that this article could restrict its ability to protect its interests in the region, particularly in cases where it believed intervention was necessary to maintain stability.[153] At the time of the Conference, Paraguay and Bolivia were engaged in the *Chaco War*. This conflict was fought over the control of the Gran Chaco region, which was believed to be rich in oil. The war started in 1932 and continued until 1935. During the conference, efforts were made to encourage a peaceful resolution of the conflict, and the United States and Brazil took the initiative to mediate between the warring

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[150] Anon, 'Guide to Practice on Reservations to Treaties' (United Nations International Law Commission, 2011) <https://legal.un.org/ilc/texts/instruments/word_files/english/draft_articles/1_8_2011.doc> accessed 16 September 2024.

[151] George Howland Cox, 'Was the Seventh Pan American Conference a Success?' (1934) 97 World Affairs 38 – 44, 41 – 42.

[152] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.

[153] George Howland Cox, 'Was the Seventh Pan American Conference a Success?' (1934) 97 World Affairs 38 – 44, 44.

countries.[154] The Chaco War's significance at the time was a reflection of the broader geopolitical tensions in the region, but it did not stop the efforts at the Pan-American Conference to lay down important foundations for non-intervention and peaceful resolution of dispute.

While much attention is often placed on Article 1 of the Convention,[155] the subsequent articles (2 – 11) also play a pivotal role in establishing the rights and duties of states within the international community.[156] Article 2 emphasises the sovereignty and equality of states, ensuring that each state, regardless of its size or power, holds equal legal standing in international relations. This principle was particularly significant in the 1930s, as the world grappled with colonialism and the rise of fascism.[157] The concept of legal equality challenged imperialist ideologies that sought to dominate weaker states. The historical context of this article can be linked to the broader development of Westphalian sovereignty, a concept dating back to the Peace of Westphalia in 1648, which established the foundations for modern sovereign states by affirming that each state has authority over its territory and internal affairs without interference from external powers.[158] Article 3 reinforces the declaratory theory of statehood, which asserts that the political existence of a state is independent of recognition by other states.[159] This stands in contrast to the constitutive theory, which claims that a state only exists once it has been recognised by other states. The declaratory theory, as espoused in Article 3,[160] reflects the growing trend of emphasising a state's factual existence over the subjective act of recognition, thereby granting greater autonomy to emerging states. James Crawford notes that the declaratory theory under the Convention has been waning in shaping modern state recognition practices, particularly in the context of post-colonial states.[161] Articles 4 and 8 enshrine the principle of non-

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[154] Michael L Gillette, 'Huey Long and the Chaco War' (1970) 11 Louisiana History: The Journal of the Louisiana Historical Association 293 – 311, 294.
[155] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[156] Jan Klabbers, *International Law Documents* (CUP 2016) 2– 4.
[157] Howard Davis, 'Human Rights: The Idea and the Law' in *Human Rights Law Directions* (5th edn, OUP 2021) 18.
[158] Stephen C Neff, 'A Short History of International Law' in Malcolm Evans (ed), *International Law* (OUP 2024) 12.
[159] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 3.
[160] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 3.
[161] James Crawford, 'Creation and Incidence of Statehood' in James Crawford (ed), *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 122.

intervention, prohibiting any state from intervening in the internal or external affairs of another state.[162] This principle became increasingly relevant during the early 20th century as Latin American nations sought to distance themselves from the frequent interventions of external powers, particularly the United States. The Montevideo Convention, therefore, is often seen as a response to U.S. interventions in Latin America and a formalisation of the *Good Neighbor Policy* under Franklin D. Roosevelt.[163]

Article 5 expands on this by asserting that a state's jurisdiction extends to all persons and property within its territory, further strengthening the principle of state sovereignty and reinforcing the importance of non-interference.[164] Articles 9-11 focus on peaceful resolution of conflicts and the protection of territorial integrity. Article 10, in particular, prohibits the acquisition of territory through the use of force, a principle that aligns with international humanitarian law and has become a cornerstone of post-World War II legal norms. The Convention's emphasis on territorial integrity and non-aggression is reflected in subsequent international treaties, including the United Nations Charter (1945)[165] and the Friendly Relations Declaration (1970).[166] The *uti possidetis juris* doctrine, although not directly mentioned, can be linked to these articles. It argues that newly formed states should inherit the borders that they had under the previous political entity (e.g., colonial borders).[167] The Montevideo Convention's focus on non-intervention and respect for existing borders implicitly supports the doctrine, which has been widely applied in decolonisation contexts, notably in Africa and Latin America.

2.4 Criticisms

Hersch Lauterpacht was a prominent legal scholar and judge, widely regarded as one of the most influential figures in the development of modern international

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[162] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Articles 4 and 8.
[163] Irwin Gellman, *Good Neighbor Diplomacy: United States Policies in Latin America, 1933-1945* (Johns Hopkins University Press 2019) 15.
[164] Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalà, 'The Fundamental Principles Governing International Relations' in Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalà, *Cassese's International Law* (3rd edn, OUP 2020) 47.
[165] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[166] UNGA Res 2625 (XXV) (24 October 1970).
[167] James Summers, *Kosovo, a Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-determination and Minority Rights* (Martinus Nijhoff Publishers 2011) 321.

law.[168] Lauterpacht critically examined the theories of recognition in international law, focusing on the debate between the declaratory and constitutive models incorporating an analysis of the Convention. He identifies flaws in both approaches. The declaratory theory holds that recognition is a mere acknowledgement of the factual existence of a state, meaning that a state exists if it meets the basic legal requirements, regardless of whether it is recognised by other states.[169] Lauterpacht critiques this model for being overly simplistic, noting that it fails to capture the political complexities of recognition. He argued that even though an entity may fulfil the requirements for statehood, such as a permanent population, defined territory, and effective government, its legal rights in the international community remain ineffective unless recognised by other states.[170] This view is reflected in examples like Somaliland (Chapter 6), which functions as a state in practice but remains unrecognised internationally, limiting its participation in global affairs.

Lauterpacht also argues that the constitutive theory, which asserts that statehood only exists upon recognition by other states, is equally inadequate. He believes that recognition should not be entirely dependent on the discretion of political actors. Ultimately, he proposes a middle ground: recognition, while declaratory of a factual situation, also has constitutive effects in granting a state its legal rights and duties under international law. Recognition, therefore, plays both a legal and political role, and its importance cannot be minimised, as it brings an entity into the legal realm of the international community.[171]

The Convention is silent on both recognition and secession in explicit terms and does not address recognition directly, either in terms of how states should be recognised or the consequences of recognition or non-recognition.[172] It follows the declaratory theory of statehood, meaning that a state exists once it meets the objective criteria outlined in Article 1, regardless of whether other states recognise it.[173] This contrasts with the constitutive theory, which holds that statehood only comes into effect when other states recognise the entity as a state. Although recognition plays a significant role in practice, the Convention does not delve into

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[168] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) xxxv.
[169] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) xxxvi.
[170] Hersch Lauterpacht, Recognition in International Law (CUP 1947) xxxv.
[171] Hersch Lauterpacht, Recognition in International Law (CUP 1947) xxx.
[172] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 3.
[173] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 4.

its specifics. The Convention is also silent on secession, meaning it does not address the process by which a region or entity breaks away from an existing state to form a new, independent state. In contemporary geopolitics, secession has become a key issue with cases like Kosovo and South Sudan, but the Convention does not guide when or how secession can result in legitimate statehood. The requirements of the Convention could theoretically apply to seceding entities, but the process of breaking away from an established state and gaining international legitimacy is not discussed.

The Montevideo Convention focuses on the requirements for statehood but leaves questions about recognition and secession to other areas of international law, which remain complex and often political. In practice, both recognition and secession have become critical issues in modern statehood, but the Convention does not explicitly address them. While Article 1 of the Montevideo Convention is often highlighted for its requirements for statehood, the subsequent articles are equally important in establishing the principles of state sovereignty, non-intervention, and territorial integrity. These principles were particularly significant in the context of the early 20th century, as Latin American nations sought to protect their sovereignty from external powers and as the international legal community began to move towards a more rules-based international order. The Montevideo Convention remains a key document in understanding the development of modern statehood and international law.

2.5 Impact on Global Legal Standards

Although the Montevideo Convention originated as a regional treaty aimed at addressing the specific political and legal concerns of the Americas, its influence on global legal standards has been enduring. The requirements for statehood have since been adopted, implicitly or explicitly, by international legal bodies and states across the world.[174] The Convention's principles have shaped the legal discourse on state recognition, codifying the declaratory theory of statehood and providing a framework for evaluating claims to statehood in international law. The most significant contribution of the Montevideo Convention to international law has been its codification of the declaratory theory of statehood.[175] This theory asserts that a state exists independently of its recognition by other states, as long as it

[174] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 158.
[175] Andreas Henriksen, *International Law* (4th edn, OUP 2023) 63.

meets certain objective requirements. These requirements were explicitly defined in the Convention, removing much of the ambiguity that had previously characterised the recognition of new states.

By establishing clear guidelines, the Convention was intended to create a more predictable and stable international system, where statehood could be assessed based on legal principles rather than political expediency.[176] Written using a positivist framework and set in a time of colonialism, the Convention was created against a backdrop of significant changes in the geopolitical global dynamic. The Soviet Union was consolidating its control over the territories that made up the union, which had expanded since its creation in 1922. The USSR was governed under the centralised authority of Joseph Stalin, who had begun enforcing a series of brutal policies that would shape the internal dynamics of the Soviet state during this period.[177] By 1933, the European colonial empires were still vast and powerful, but they were beginning to face increasing resistance from nationalist movements in many parts of the world.[178] The Great Depression severely weakened the economic foundations of these empires, and unrest in places like India, Indochina, and Africa was setting the stage for the major decolonisation movements that would follow after World War II.[179] Many colonial powers were also struggling to balance their control over territories with the growing pressures of international diplomacy, economic recovery, and domestic unrest. The year 1933 marked a crucial point where the seeds of future decolonisation movements were being sown across the globe. The aftermath of Empires and the decolonisation process in the mid to latter part of the 20th century will be explored in the chapters that follow.

2.6 Post-WWII

The influence of the Convention, which established the declaratory model of statehood, has been steadily eroded since the Second World War. The Convention's objective requirements approach reflected the political reality of the early 20th century, where the sovereignty of new states depended largely on their

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[176] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 4.
[177] Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalá, 'The Historical Evolution of the International Community' in Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalá, *Cassese's International Law* (3rd edn, OUP 2020) 34.
[178] Gleider Hernández, *International Law* (2nd edn, OUP 2022) 13.
[179] Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalá, 'The Historical Evolution of the International Community' in Paola Gaeta, Jorge E Viñuales, and Salvatore Zappalá, *Cassese's International Law* (3rd edn, OUP 2020) 38.

ability to exert effective control over their territory and people, irrespective of external recognition.[180] However, after World War II, the nature of international relations and statehood evolved. One of the most significant shifts came with the adoption of the UN Charter in 1945, which enshrined the principles of self-determination and non-intervention.[181] These developments introduced a more normative framework for statehood, meaning that merely fulfilling the Montevideo requirements was no longer sufficient to guarantee recognition as a sovereign state. Entities seeking recognition had to demonstrate their adherence to new global norms, such as respecting human rights, democratic governance, and international law.[182]

During the decolonisation process of the 1950s and 1960s, the principle of self-determination increasingly took precedence over the Montevideo Convention's focus on territorial control and effective governance. Newly emerging states in Africa and Asia were recognised based on their right to self-determination, even if they did not fully meet all the requirements laid out in the Montevideo Convention.[183] Furthermore, entities formed through violations of *jus cogens* norms,[184] such as the illegal use of force or violations of the right to self-determination, were denied recognition, even if they fulfilled the factual elements of statehood, reflecting the shift away from the pure declaratory model.[185] The creation of new states during the Cold War and after also revealed the growing complexity of the statehood process. Scholars such as Crawford and Vidmar provided considerations about the notion of 'additional statehood criteria' based on legality.[186] which go beyond the traditional Montevideo Convention requirements. While the Montevideo criteria focus on the effective control of a territory and its population, these additional criteria emphasize the legal aspects of statehood. In

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[180] Cedric Ryngaert, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 Leiden Journal of International Law 478.
[181] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[182] Anon, *'Chapter I: Purposes and Principles'* (UN, 1945) <https://www.un.org/en/about-us/un-charter/chapter-1> accessed 16 September 2024.
[183] Rhona K. M. Smith, *International Human Rights Law* (10th edn, OUP 2021) 344.
[184] Jus cogens refers to a set of fundamental, overriding principles of international law that no state can violate. These norms hold the highest legal status, and agreements or laws that conflict with them are considered void. Jus cogens norms include prohibitions on genocide, slavery, torture, and the aggressive use of force. They are universal and non-derogable, meaning no country can deviate from them, even by treaty. The concept helps to ensure certain core values are upheld across the global legal order.
[185] Gleider Hernández, International Law (2nd edn, OUP 2022) 34.
[186] Jure Vidmar, 'The Concept of the State and its Right of Existence' (2015) 4 Cambridge Journal of International and Comparative Law 1 – 19, 15 – 16.

other words, beyond mere effectiveness, a state's legitimacy is also judged based on its adherence to international legal principles. Crawford examined the example of Southern Rhodesia as an 'illegal state'.[187] Southern Rhodesia (now Zimbabwe) declared unilateral independence in 1965 under a white minority government, which sought to maintain control in defiance of decolonisation movements and international opposition. Vidmar highlights that Southern Rhodesia was widely condemned as an illegal regime because its independence violated the principle of self-determination. The United Nations rejected Southern Rhodesia's declaration of independence, and the entity was not recognised by the international community.[188] Vidmar argues that the case of Southern Rhodesia demonstrates how a state can exist de facto, exercising control over a population and territory, yet still be considered illegal under international law due to how its independence was achieved.[189] The international community viewed Southern Rhodesia's regime as illegitimate, and economic sanctions were imposed to undermine its ability to function.[190] Vidmar uses this example to reinforce his broader point that statehood is not only a matter of meeting factual criteria but must also conform to legal norms, particularly those related to self-determination and non-discrimination.[191]

The breakup of Yugoslavia in the 1990s, for instance, led to the establishment of new standards for state recognition. The *Badinter Arbitration Commission*,[192] set up by the European Community, outlined additional requirements for statehood beyond the Montevideo requirements, including respect for human rights, democracy, and minority rights.[193] This was a significant departure from the declaratory model, indicating a shift towards a constitutive approach, where international recognition was not merely a recognition of fact but a process that involved political discretion and adherence to global norms. The Badinter Commission's decisions illustrated that statehood was no longer a matter of legal

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[187] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 148.
[188] UNSC Res 216 (12 November 1965) UN Doc S Res/216.
[189] UNSC Res 216 (12 November 1965) UN Doc S Res/216, Article 1. Condemns the unilateral declaration of independence made by a racist minority in Southern Rhodesia; Article 2. Determines that the situation resulting from this declaration of independence constitutes a threat to international peace and security; Article 3. Calls upon all States not to recognize this illegal authority and to refrain from rendering any assistance to it.
[190] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Bloomsbury Publishing 2013) 58.
[191] Jure Vidmar, 'The Concept of the State and its Right of Existence' (2015) 4 Cambridge Journal of International and Comparative Law 1 – 19, 17.
[192] Maurizio Ragazzi, 'Opinion 3' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[193] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples' (1992) 3 European Journal of International Law 178 - 185, 178.

formality but a complex process tied to global expectations of governance. while the Convention remains a key historical document, its influence has diminished in light of the evolution of international law. Post-World War II developments have imposed normative conditions on statehood, with principles such as self-determination and human rights altering the criteria by which statehood is assessed and recognised.[194]

2.7 Montevideo Plus

In Thomas D. Grant's detailed critique of the Convention in 1999 he opined on the concept of a 'Montevideo Plus'.[195] He argued that although no multilateral agreement has officially replaced or supplemented the Montevideo Convention's definition of statehood, scholars such as Crawford have suggested updates to its criteria.[196] Despite efforts to re-codify the term 'state' these attempts have not progressed, likely due to political obstacles. Nonetheless, it appears that certain new criteria have begun to emerge alongside those outlined in the 1933 convention. These new requirements, often discussed in academic writings, are slowly gaining traction in state practice.[197] Should the international community or parts of it, attempt to draft a new instrument defining statehood, certain new elements would likely be considered for inclusion. Whether any of these proposed requirements would be adopted or rejected by bodies such as the International Law Commission or the United Nations Sixth Committee would depend on a mix of political and legal factors.

One key element likely to be debated is independence, which could be described in terms of self-containment, impermeability, or self-determination.[198] Closely related is the notion of a claim to statehood, often rooted in a popular process of self-determination. A claim of this nature has a separate origin but is closely tied to the question of independence.[199] Another element that might be considered is external legality, meaning compliance with *jus cogens* norms, including the renunciation of territorial ambitions and adherence to disarmament treaties.

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[194] Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 The International and Comparative Law Quarterly 361 - 387, 382.
[195] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Columbia Journal of Transnational Law, 449.
[196] James Crawford, *The Creation of States in International Law* (OUP 2007) 97.
[197] Thomas D Grant, *'Defining Statehood: The Montevideo Convention and Its Discontent'* (1998) 37 Columbian Journal of Transnational Law 403 – 457, 450.
[198] James Crawford, *The Creation of States in International Law* (OUP 2007) 63.
[199] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 120.

Internal legality, however, is more contentious and would include standards such as democratic governance and minority rights an extension of the right to self-determination.[200]

The organic bonds within the community asserting statehood, such as shared historical, cultural, religious, or ethnic ties, could also be discussed, though difficult to formally define. While United Nations membership is often mentioned in connection with statehood, it is not a requirement for statehood itself.[201] John Ruggie's contributions to constructivist theory in international relations, particularly about statehood, focus on the interplay between norms, institutions, and the social construction of reality.[202] Ruggie argued that international systems are not solely defined by material power, as suggested by realism, but by socially constructed norms and identities.[203] This perspective is essential in understanding statehood because it highlights how the identities and interests of states are shaped by social interactions and shared understandings.[204] Moreover, Ruggie highlighted international institutions like the United Nations or multilateral agreements can transform the interests and behaviours of states by embedding them within a normative framework that shapes their identity and legitimises their sovereignty.[205]

Lastly, recognition continues to be a contentious issue, with some arguing that it plays a critical role in statehood while others see it as merely a political tool. While recognition and statehood are difficult to separate, this debate is unlikely to offer much clarity on the definition of statehood.[206] These proposed elements vary in their likelihood of being included in any new definition of statehood. Some, like independence, are broadly seen as essential, while others, like United Nations membership, are not. Nevertheless, each would need to be considered in any formal effort to redefine statehood under international law.[207]

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[200] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 581.
[201] James Summers, *Kosovo, a Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-determination and Minority Rights* (Nijhoff Publishers 2011) 265.
[202] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 International Organization 139 – 174, 147.
[203] John Gerard Ruggie, 'What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge' (1998) 52 International Organization 855 – 885, 855.
[204] John Gerard Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379 – 415, 379.
[205] Emanuel Adler and Kathryn Sikkink, 'What Made John Ruggie's World Transformation Theory and Practice Hang Together' (2022) 77 International Organization 871 – 880, 878.
[206] Paola Gaeta, Jorge E. Viñuales, and Salvatore Zappalà, *Cassese's International Law* (3rd edn, OUP 2020) 83.
[207] Thomas D Grant, *'Defining Statehood: The Montevideo Convention and Its Discontent'* (1998) 37 Columbian Journal of Transnational Law 404 – 457, 453.

Jure Vidmar posited the breakup of Yugoslavia, and the emergence of new norms surrounding human rights and governance served as a paradigm shift in state creation.[208] During the breakup of Yugoslavia, the European Community intervened in managing the crisis occurring within its geographical sphere. One of the first challenges it had to address was the recognition of newly formed republics, a matter that immediately revealed deep divisions within Europe.[209]

Amongst other states, France preferred maintaining a federal Yugoslavia, while Germany and Belgium were inclined towards recognising the independence of Slovenia and Croatia. To navigate these tensions, the European Community, established legal criteria relating to state sovereignty, recognition, self-determination, and succession.[210] These guidelines were formalised in a declaration issued on 23 December 1991, which laid down the conditions that entities needed to fulfil before being recognized as independent states.[211]

This framework introduced several key departures from the traditional requirements of statehood. Notably, it expanded the concept of self-determination beyond its usual colonial context and introduced democratic governance as a precondition for recognition. Whereas previously the internal political structure of a state was considered irrelevant for its recognition under international law, the European Community's guidelines explicitly demanded that the new states establish themselves on a democratic basis and respect human and minority

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[208] Jure Vidmar, *Territorial Status in International Law* (1st edn, Hart Publishing 2024) 84.

[209] Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 Leiden Journal of International Law 467 – 490, 476.

[210] The Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (adopted by the European Community on 16 December 1991) 31 ILM 148, outlined several key criteria that must be fulfilled by entities seeking recognition as new states. The criteria were as follows:

1. Respect for the United Nations Charter and the Helsinki Final Act: This includes adherence to international commitments, the rule of law, democracy, and human rights.
2. Guarantees for ethnic and national groups and minorities: States must protect the rights of minorities according to commitments made within the framework of the Conference on Security and Cooperation in Europe (CSCE).
3. Inviolability of frontiers: Boundaries can only be altered peacefully and with the agreement of the relevant parties.
4. Commitments to disarmament and nuclear non-proliferation: New states must accept obligations relating to disarmament, non-proliferation, and regional stability.
5. Peaceful settlement of succession and regional disputes: All matters of state succession and territorial disputes must be resolved through peaceful agreements, including arbitration if necessary.

[211] Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (adopted by the European Community on 16 December 1991) 31 ILM 148.

rights.[212] Colin Warbrick explored the evolving dynamics of state recognition, highlighting three central themes. First, he contrasted the traditional legal requirements for statehood set out in the Convention, such as effective control and foreign relations capability, with the growing influence of political discretion in recognition decisions.[213] Particularly in cases like Yugoslavia, geopolitical interests often overshadow strict legal doctrines. Second, he recognised the role of self-determination and minority rights as new conditions for recognition, especially in the context of the post-Cold War era, showing how human rights considerations have become integral to statehood recognition.[214] Finally, Warbrick emphasises the increasing involvement of international organisations, such as the European Community and the United Nations, in guiding recognition practices. This collective international approach reflected in the European Community's guidelines on recognition in Eastern Europe and the Soviet Union, marks a shift from unilateral state decisions to a more multilateral process, incorporating democracy, human rights, and regional stability as essential factors.[215]

At first glance, these criteria seemed to signal the ascendancy of international law over political discretion in state recognition. Yet, while the new rules appeared robust, in practice, their application proved far more flexible. On 15 January 1992, Slovenia and Croatia were recognised as independent states by the European Community, even though Croatia did not have a stable government in control of its entire territory.[216] This decision deviated from the classical requirement for effective governance over a defined territory, demonstrating the European Community's willingness to relax the traditional criteria. Additionally, Croatia's constitution at the time did not meet the standards for minority protection, a requirement in the new legal framework, but this was overlooked.

Similarly, Bosnia and Herzegovina were recognized on 7 April 1992, even though it lacked an effective government and was engulfed in a violent civil war. The recognition of Bosnia, despite the absence of territorial control and serious human

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[212] Colin Warbrick, 'Recognition of States' (1992) 41 International and Comparative Law Quarterly 473 – 482, 476.
[213] Colin Warbrick, 'Recognition of States' (1992) 41 International and Comparative Law Quarterly 473 – 482, 482.
[214] Colin Warbrick, 'Recognition of States' (1992) 41 International and Comparative Law Quarterly 473 – 482, 478.
[215] Colin Warbrick, 'Recognition of States' (1992) 41 International and Comparative Law Quarterly 473 – 482, 478.
[216] Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 Leiden Journal of International Law 467 – 490, 476.

rights violations, further highlighted the inconsistencies in applying the new criteria.[217] Conversely, Macedonia, which met all the requirements for statehood, was not widely recognised initially. Greece, for instance, vetoed Macedonia's recognition, leading to delays in its acceptance by the international community. Although the Badinter Commission had supported Macedonia's recognition, geopolitical and regional issues stalled its progress.[218]

Outside Europe, the approach to recognising the new Balkan republics was markedly different. Countries like the United States, Canada, and Australia did not align with the European Community's normative framework and felt no obligation to justify their decisions within it. Instead, these countries followed a more pragmatic approach, reflecting traditional practices where political considerations often outweighed legal principles.[219] The European Community's actions during the Yugoslav crisis set new legal precedents in state recognition by emphasising democratic governance, human rights, and minority protections. However, the inconsistent application of these norms revealed the enduring role of political discretion in state recognition, casting doubt on the binding force of these new guidelines. Moreover, the *Badinter Commission* established that recognition was not automatic, even if an entity fulfilled the factual requirements of statehood. Instead, it introduced a more discretionary, constitutive model of recognition, where states had to meet certain normative criteria before they could be recognized as sovereign entities. This approach reflected the post-Cold War shift towards a more holistic view of statehood, where international recognition was increasingly tied to compliance with international standards of governance and human rights.

2.8 Post-Badinter

The Badinter Arbitration Committee's decisions introduced several new criteria for state recognition, which have influenced international law in the years since.[220] One of the most significant developments has been the emphasis on human rights as a prerequisite for recognition.[221] States seeking recognition in the post-Badinter world must not only demonstrate their ability to control their territory and

[217] David Wippman, International Law and Ethnic Conflict (Cornell University Press 2018) 13.
[218] Jure Vidmar, *Territorial Status in International Law* (1st edn, Hart Publishing 2024) 77.
[219] Nicholas Gammer, *From Peacekeeping to Peacemaking: Canada's Response to the Yugoslav Crisis* (McGill-Queen's University Press 2001) 139.
[220] Maurizio Ragazzi, 'Opinion 1' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[221] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 207.

population but also their commitment to protecting the rights of their citizens, particularly minority groups.[222] Effective governance has also emerged as a key criterion for recognition. States must demonstrate that they have functioning institutions capable of maintaining law and order, providing public services, and upholding the rule of law.[223] This reflects a broader trend in international law towards ensuring that states meet certain standards of governance before they are admitted into the international community.

Another important requirement that has emerged in the post-Badinter world is the protection of Indigenous peoples' rights. International law now increasingly recognises that states must respect the rights of Indigenous peoples within their borders, particularly about land ownership and self-determination. This has added a new layer of complexity to the state recognition process, as states must now demonstrate that they are capable of protecting the rights of all their citizens, including Indigenous communities. [224]

2.9 Conclusion

In conclusion, the Badinter Commission's decisions have had a lasting impact on the law of state recognition, introducing new criteria focused on human rights, effective governance, and the protection of Indigenous peoples' rights.[225] These developments reflect the evolving nature of international law, where state recognition is increasingly tied to compliance with global norms and standards.[226]

Chapter Two has traced the historical development and evolving criteria of statehood in international law, centring on the Montevideo Convention of 1933.[227] Beginning with the Peace of Westphalia in 1648, the chapter highlighted how the treaties ending the Thirty Years' War laid the foundational principles of territorial

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[222] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 107 – 108.
[223] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 35.
[224] Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 99.
[225] Maurizio Ragazzi, 'Opinion 1' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[226] Steven R Ratner, 'The Badinter Commission: The Use of European Community Instruments for Peaceful Settlement' (1993) 5 European Journal of International Law 246 - 261, 253.
[227] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.

sovereignty and non-intervention.[228] These principles shifted the locus of power to sovereign states, making them the primary actors in international relations. Thinkers like Jean Bodin and Hugo Grotius further developed the concept of state sovereignty, emphasising absolute authority within defined territories.[229] The chapter then explored the transition from legitimist theories of state recognition, which were rooted in dynastic legitimacy, to notions of effective control.[230] The French Revolution and Napoleon's rise challenged the old order, leading to the decline of legitimism and the rise of the constitutive theory of statehood, where recognition by other states became paramount.[231] However, the inconsistencies and political motivations inherent in the constitutive theory prompted a shift toward the declaratory theory.

The Montevideo Convention codified this declaratory approach by establishing four objective requirements for statehood: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states. Influenced by positivist legal scholars like Georg Jellinek, the Convention sought to depoliticise state recognition by grounding it in factual circumstances rather than subjective acknowledgement by other states.[232] Despite its regional origin and initial focus on the Americas, the Convention had a lasting impact on global legal standards.[233] It was adopted in the context of Latin American nations asserting their sovereignty and resisting foreign intervention, particularly from the United States.[234] The *Good Neighbor Policy* under President Franklin D. Roosevelt facilitated a diplomatic environment that favoured the principles enshrined in the Convention, such as non-intervention and legal equality among states.[235]

Critiques of the Montevideo Convention, notably by Hersch Lauterpacht, highlighted its limitations. Lauterpacht argued that the declaratory theory was

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[228] Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 American Journal on International Law 20 – 41, 28.
[229] Jean Bodin, *Six Books of the Commonwealth* (first published 1576, M J Tooley tr, Basil Blackwell 1955); Hugo Grotius, *De Jure Belli ac Pacis* (first published 1625, FW Kelsey tr, Clarendon Press 1925).
[230] Thomas D Musgrave, *Self-Determination and National Minorities* (OUP 1997) 45.
[231] Lassa Oppenheim, *International Law: A Treatise* (1st edn, Longmans, Green 1905) 125.
[232] Georg Jellinek, *Allgemeine Staatslehre* (3rd edn, O Häring 1921) 194.
[233] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 37 – 39.
[234] Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014) 289.
[235] Anon, 'Franklin D Roosevelt, Address at Chautauqua, New York' (The American Presidency Project, 14 August 1936) <https://www.presidency.ucsb.edu/documents/address-chautauqua-new-york> accessed 19 September 2024.

overly simplistic and failed to account for the political complexities of recognition.[236] He suggested that recognition has both declaratory and constitutive effects, playing a legal and political role in bringing a state into the international community.[237] Post-World War II developments further eroded the Convention's influence. The adoption of the United Nations Charter introduced principles like self-determination and human rights, adding normative conditions to statehood beyond the Montevideo requirements.[238] The decolonisation process and the breakup of states like Yugoslavia illustrated a shift toward recognising states based on adherence to global norms, such as democratic governance and minority rights.[239] The *Badinter Arbitration Commission* emphasised that recognition was not automatic upon meeting factual criteria but required compliance with broader international standards.[240] In recent times, scholars like Thomas D. Grant have discussed the concept of a 'Montevideo Plus,' suggesting that new elements such as independence, self-determination, external and internal legality, and the protection of minority rights are increasingly significant in state recognition.[241] The evolving nature of international law reflects a move away from the strict requirements of the Montevideo Convention toward a more holistic approach that considers both legal and normative factors.[242]

Krasner's realist approach to international law can be applied to the Convention by highlighting the role of power dynamics in the recognition and sovereignty of states.[243] Krasner argued that, in practice, the recognition of a state is influenced more by the power and interests of existing states than by these legal criteria alone. From Krasner's perspective, international law, including conventions like Montevideo, is often shaped by the interests of powerful states rather than the objective application of legal principles.[244] As such, recognising a state's sovereignty under the Convention can be seen as a political act influenced by the distribution of power, with powerful states determining which entities are

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[236] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 40.
[237] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 44.
[238] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, articles 1 and 55.
[239] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 33 – 35.
[240] Maurizio Ragazzi, 'Opinion 1' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[241] Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 125 – 127.
[242] Jure Vidmar, *Territorial Status in International Law* (1st edn, Hart Publishing 2024) 22 – 24.
[243] Stephen D Krasner, 'Realist Views of International Law' (2002) 96 American Society of International Law 256 – 268, 266.
[244] Stephen D Krasner, *Power, the State, and Sovereignty: Essays on International Relations* (Taylor & Francis 2009) 15.

recognised as states based on their strategic interests.[245] This reflects his broader argument that international law tends to reflect the preferences of powerful states, and when power dynamics shift, the application and enforcement of international legal norms like those in the Convention can change as well.

As we transition to Chapter Three, the theoretical framework and historical evolution of statehood criteria set the stage for a detailed examination of specific case studies. The situations of Palestine and Western Sahara provide contemporary contexts in which the principles discussed in Chapter Two are tested against the complex realities of modern international relations. These cases will illustrate how the interplay of legal criteria, political recognition, self-determination, and adherence to international norms influence the quest for statehood in today's world.

[245] Stephen D. Krasner, 'Recognition: Organized Hypocrisy Once Again' (2013) 5 International Theory 170 – 176, 173.

CHAPTER THREE - CONTROL OF TERRITORY

3.1 Introduction

Chapter Three of this thesis focuses on the cases of Palestine and Western Sahara and critically analyses the Convention's requirements through these lenses. The chapter begins by exploring the complex political and historical context of Palestinian statehood. It examines the fragmented control of territories by the Palestinian Authority and Hamas, highlighting the challenges this fragmentation poses to meeting the Montevideo requirements for statehood. The main requirement examined in this chapter is that of effective government. The requirement of government is regarded as the most vital aspect of statehood, as other requirements like population and territory rely on it. A government must not only exist but also exert effective control over its territory, independently from foreign influence.[246] The International Commission of Jurists highlighted this principle when it ruled that Finland, during 1917 – 1918, did not achieve full sovereignty until its government could maintain control without relying on foreign troops.[247] This shows that a government's independent and effective authority is key to statehood. and the capacity to enter into relations with other states.[248] The relationship between the Palestinian Authority and the Palestinian Liberation Organisation further complicates the governance issue, as the Palestinian Authority manages internal affairs while the Palestinian Liberation Organisation handles international representation.[249]

The international recognition of Palestine is also a significant focus, with many states recognising Palestine's right to self-determination.[250] This recognition is often symbolic, acknowledging what Palestine could be rather than what it is, driven by political, strategic, and ethical considerations. The chapter dissects the legal and political implications of the right to self-determination, a principle enshrined in various international documents that supports Palestine's claim to statehood but complicates its comparison to traditional statehood requirements.

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[246] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 40.
[247] Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, *League of Nations Official Journal Special Supplement* 3 (1920) 8 – 9.
[248] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 40.
[249] John Quigley, 'Palestine is a State: A Horse with Black and White Stripes is a Zebra' (2011) 32 Michigan Journal of International Law 749 – 762, 754 – 756
[250] John Quigley, *The Case for Palestine: An International Law Perspective* (Duke University Press 2005) 227.

Recent legal developments, such as the International Court of Justice's Advisory Opinions and the United Nations General Assembly resolution in September 2024, demanding that Israel end its 'unlawful presence' in the Occupied Palestinian Territory. The resolution called for Israel to withdraw its military, cease new settlement activities, dismantle parts of the separation wall, and make reparations for the damages caused by the occupation. It also urged international mechanisms for reparations and sanctions against those involved in maintaining the occupation.[251] These instruments emphasise the illegality of Israeli settlements and the necessity for an end to occupation, bolstering Palestinian aspirations for statehood. However, practical implementation remains challenging, exacerbated by geopolitical dynamics, regional alliances, and rivalries, particularly among Arab states.

The chapter then transitions to the case of Western Sahara, another territory with limited control over its land due to occupation and enjoying varying levels of international recognition. Western Sahara's colonial history and its status as a non-self-governing territory under the United Nations Charter are discussed, highlighting the ongoing struggle for self-determination led by the Polisario Front against Moroccan rule.[252] The Advisory Opinion of the International Court of Justice in 1975, which affirmed the Sahrawi people's right to self-determination, is a significant legal document in this context.[253]

The chapter also examines the role of international and regional organisations such as the African Union and the European Union in the Western Sahara conflict. The African Union's consistent support for the Sahrawi Arab Democratic Republic contrasts with the European Union's more cautious approach, balancing legal obligations with political interests, particularly in its relations with Morocco. The European Union's involvement, including the jurisprudence of the Court of Justice of the European Union, is analysed, considering the complex relationship between legal commitments and political realities. Recent diplomatic shifts have bolstered Morocco's position. In 2020, the United States officially recognised Morocco's sovereignty over Western Sahara in exchange for Morocco's normalisation of

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[251] Anon, 'UN General Assembly Demands Israel End Unlawful Presence in Occupied Palestinian Territory' (UN News, 18 September 2024) <https://news.un.org/en/story/2024/09/1154496> accessed 20 September 2024.
[252] UNSC Res 206 (13 April 2007) UN Doc S/2007/206, paragraphs 1 – 5.
[253] *Western Sahara (Advisory Opinion)* 1975 <https://icj-cij.org/case/61> accessed 1 October 2024.

relations with Israel.[254] France followed suit in 2024, formally recognising Moroccan sovereignty, which marked a significant shift in its long-standing support for a United Nations-supervised referendum for the Sahrawi people's self-determination.[255] Despite these recognitions, the Polisario Front, backed by Algeria, continues to seek independence for Western Sahara, leading to ongoing regional tensions.[256]

In conclusion, in exploring the post-positivist approach to state recognition, the chapter highlights the limitations of traditional, positivist legal frameworks that strictly adhere to the Montevideo Convention requirements.[257] Instead, it advocates for a broader perspective that incorporates social and political realities. Wendt's theory of constructivism is particularly relevant here, as it emphasises the social construction of international relations and statehood. Wendt argues that the international system is shaped by the identities, interests, and interactions of states, rather than just legal criteria.[258] This approach allows for a more nuanced understanding of entities like Palestine and Western Sahara, recognising their self-determination status and the legitimacy of their aspirations for independence, despite not meeting all traditional legal requirements. By moving away from positivist solutions, the international community can better address the unique challenges faced by these territories and support their quests for self-determination and recognition.[259]

3.2 Introduction to Palestine

At the time of writing the situation with Palestine and arguments about the statehood of Palestine is considered to be the most contentious topic in international law and geopolitics globally. Chapter Four critically analyses the Convention through the lens of the Palestinian case study and assesses competing legal theories for state recognition or approaches applying the

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[254] Anon, 'What is Western Sahara and why does Morocco claim sovereignty over it?' (Middle East Eye, 10 December 2020) <https://www.middleeasteye.net/news/western-sahara-why-morocco-claim-sovereignty-over-it> accessed 20 September 2024.
[255] Safaa Kasraoui, 'France Officially Recognizes Morocco's Sovereignty Over Western Sahara' (Morocco World News, 30 July 2024) <https://www.moroccoworldnews.com/2024/07/364222/france-officially-recognizes-moroccos-sovereignty-over-western-sahara> accessed 20 September 2024.
[256] Houda Chograni, 'The Polisario Front, Morocco, and the Western Sahara Conflict' (Arab Center Washington DC, 22 June 2021) <https://arabcenterdc.org/resource/the-polisario-front-morocco-and-the-western-sahara-conflict/> accessed 20 September 2024.
[257] Anon, 'Convention on Rights and Duties of States' (1934) 28 *American Journal of International Law* 75 – 78.
[258] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.
[259] Jure Vidmar, Territorial Status in International Law (Hart Publishing 2024) 21.

convention in the 21st century. Indeed, Summers asserted that Palestine provided a '*suitably ambiguous foil to the Convention's broad and simplistic criteria'.*[260] He reminds us that the convention was intended as a Latin American regional instrument together with other arrangements on a range of topics to protect the sovereignty of South American states and ensure cooperation in the Americas. Moreover, Crawford's early evaluation and analysis of the Montevideo formula indicated the inherent challenges for the application of such criteria to Palestine stating:

> [A]pplying the Montevideo Convention, in a relatively superficial way, in accordance with its terms, it is difficult to see how Palestine could constitute a state. Its whole territory is occupied by Israel, which functions as a government in the territory.[261]

This section of the Chapter will address a few of the more critical questions relevant to the issue of Palestinian statehood. In so doing, it addresses whether a government can be said, in any meaningful sense, to control territory and people when its governance is only partial, as with the Palestinian Authority.[262] Whether the Palestinian Authority could even meet the Montevideo statehood test? Second, the section will examine whether the Palestinian Authority can function as the government of a state, considering its lack of responsibility for external relations. This issue is further complicated by the fluid relationship between the Palestinian Authority and the Palestine Liberation Organisation, which represents Palestine internationally. Third, it will consider the question of Palestine's broad international recognition and the reasons behind it, often, such recognition is based on the rhetorical statement, '[W]e recognise Palestine's right to independence' thus showing recognition of what Palestine could be rather than what it is. Crawford used the analogy of considering the future rights of an embryonic entity *nasciturus pro jam natus habetur* but provided the caveat that Palestine was a long way from nearing a sense of *nasciturus.*[263] Finally, this section will detail to what extent the recognised right of self-determination in Palestine contributes to the statehood assessment under the Montevideo requirements. While such a principle of self-determination brings much moral and legal value to Palestinian claims of

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[260] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 239.
[261] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 European Journal of International Law 307 – 313, 308.
[262] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Studies in International Law, Hart Publishing 2013) 40.
[263] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 European Journal of International Law 307 – 313, 313.

statehood, it also creates difficulties in its comparison to traditional requirement of statehood.

The International Court of Justice recently issued an advisory opinion declaring Israel's occupation of Palestinian territories, including East Jerusalem, the West Bank, and Gaza, as illegal under international law.[264] The court emphasised that Israeli settlement activities violate international law and called for an end to the occupation, reinforcing Palestine's claims for statehood and self-determination. Efforts towards reconciliation between Fatah and Hamas have seen new diplomatic initiatives, notably influenced by external actors like China.[265] The issue of government control and fragmentation is central to understanding the complexities of Palestinian statehood. The Palestinian Authority governs parts of the West Bank, while Hamas controls the Gaza Strip. This bifurcation not only weakens the Palestinian political structure but also complicates any efforts toward establishing a unified, sovereign state.

3.3 Historical Context

In April 1947, the United Nations called a special session to address the future governance of Palestine. The session led to the formation of the United Nations Special Committee on Palestine tasked with investigating and recommending solutions. After hearings from various organisations, the General Assembly adopted the committee's recommendations, including the partition plan and economic union for Palestine, aiming for a peaceful resolution and the cessation of hostilities until further deliberations.[266] The Jewish community accepted the plan, but the Arab states and Palestinian leaders rejected it. On 14 May 1948, Israel declared independence. The following day, neighbouring Arab countries invaded, leading to the first Arab-Israeli war. The conflict resulted in significant territorial gains for Israel and the displacement of hundreds of thousands of Palestinians, an event known as the *Nakba* (catastrophe).[267]

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[264] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem'* (Advisory Opinion) 2024 <https://www.icj-cij.org/node/204176> accessed 26 July 2024.

[265] Robert Barron, Andrew Scobell and Adam Gallagher, 'Palestinian Factions Pledge Unity: Another Diplomatic Win for China?' (United States Institute of Peace, 25 July 2024) <https://www.usip.org/publications/2024/07/palestinian-factions-pledge-unity-another-diplomatic-win-china> accessed 26 July 2024.

[266] UNGA Res 181 (II) (29 November 1947).

[267] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP USA, 2023) 104.

The aftermath of the 1948 war and subsequent conflicts further complicated the Palestinian quest for statehood. The West Bank came under Jordanian control, while Egypt administered the Gaza Strip. The Palestinian national movement began to take shape during this period. The Palestine Liberation Organisation was established to liberate Palestine through armed struggle. Under the leadership of Yasser Arafat, the Palestinian Liberation Organisation emerged as the primary representative of the Palestinian people. The 1967 war between Israel and its Arab neighbours resulted in Israel capturing the West Bank, Gaza Strip, Sinai Peninsula, and Golan Heights. The Israeli occupation of these territories became a central issue in the Israeli-Palestinian conflict.[268]

The latter half of the 20th century saw significant uprisings and attempts at peace negotiations, reflecting the evolving dynamics of the conflict. The First Intifada, a Palestinian uprising against Israeli occupation, marked a turning point in the conflict. It highlighted the Palestinians' desire for self-determination and brought international attention to their plight. *The Oslo Accords*[269] were a major breakthrough in the peace process. They established the Palestinian Authority as an interim self-governing body and set the framework for future negotiations.[270] However, the accords failed to resolve key issues such as borders, refugees, and the status of Jerusalem. The collapse of peace talks and continued Israeli settlement expansion led to the Second Intifada, a period of intense violence and further entrenchment of the conflict.

The roots of this fragmentation can be traced back to the early 2000s. After the *Oslo Accords* in the 1990s, the Palestinian Authority was established as a provisional self-governing body. However, the Second Intifada (2000-2005) and subsequent Israeli military operations further complicated the political landscape. The internal Palestinian divide reached its peak in 2007 when Hamas took control of Gaza following a violent conflict with Fatah, the dominant party in the

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[268] Eric Schewe, 'Settlements and the Israel-Palestine Conflict: Background Reading' (Daily JSTOR, 19 May 2021) <https://daily.jstor.org/israeli-settlement-palestine-background-readings/> accessed 25 November 2023.

[269] Anon, *'Declaration of Principles on Interim Self-Government Arrangements (Oslo Accords)'* (1993 United Nations Peacemaker 1993) <https://peacemaker.un.org/israelopt-osloaccords93> accessed 27 July 2024, Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accords) (signed 13 September 1993, entered into force 13 October 1993) UNTS A/48/486.

[270] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 242.

Palestinian Authority. This resulted in two parallel governments: the Palestinian Authority in the West Bank and Hamas in Gaza.[271]

On 9 July 2004, the International Court of Justice delivered its Advisory Opinion entitled '*Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.*'[272] Under the ruling, the construction of the wall and its associated regime executed by Israel were illegal according to international law. It also relied on some basic principles in international law in support of its judgment, amongst others, that the threat or use of force is illegal and that the territory may not be acquired through such means; this had found expression earlier in *Article 2(4) of the United Nations Charter*[273] and later in General Assembly *Resolution 2625 (XXV).*[274] It also invoked the right of peoples to self-determination, international humanitarian law as crystallised in the Hague Regulations of 1907,[275] and the Fourth Geneva Convention of 1949,[276] which applies to the Palestinian territory occupied since the war of 1967. Furthermore, it admitted relevant international instruments on human rights to the occupied territories, such as the International Covenant on Civil and Political Rights.[277]

The International Court of Justice ruled that the construction of the wall seriously impeded the right of the Palestinian people to self-determination and violated several provisions in international humanitarian and human rights law.[278] In addition the court finally stated that the route of the wall was such as would enable large numbers of Israeli settlements previously condemned by the Security Council as being contrary to Article 49 of the 4th Geneva Convention to remain on

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[271] Hayder Al-Shakeri, Tim Eaton, and Dr Renad Mansour, *'Ignoring the roots of violence in the Israel–Palestine conflict challenges any future peace'* (Chatham House, 27 October 2023) <https://www.chathamhouse.org/2023/10/ignoring-roots-violence-israel-palestine-conflict-challenges-any-future-peace> accessed 25 November 2023.

[272] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023.

[273] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2(4).

[274] UNGA Res 2625 (XXV) (24 October 1970).

[275] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 2277 UNTS 539.

[276] The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 985 UNTS 14400.

[277] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI).

[278] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023.

the Western side of that wall.[279] The International Court of Justice concluded that Israel, under international law, must stop building the wall, demolish works built in the area of the occupied Palestinian territory, and nullify the acts adopted for its construction.[280] Israel was ordered to pay compensation for damage caused by the construction of the wall.[281] Furthermore, the court focused on the duties of other states, specifying that all States must refrain from recognising the illegal situation arising from the construction of the wall and see to it that Israel respects international law.[282]

The international community had varied reactions to the International Court of Justice's *Wall* Opinion. The United Nations General Assembly and the European Union supported the ruling, urging Israel to dismantle the wall.[283] The United States and Israel rejected the opinion, citing security concerns. The Palestinian Authority and many non-governmental organisations welcomed the decision, calling for international pressure on Israel. Various states and legal scholars also discussed the ruling, with general support for the International Court of Justice's interpretation of international law, despite some dissenting voices advocating for Israel's right to self-defence.[284]

3.4 Effective Government

Jure Vidmar draws attention to the primary challenge caused by the lack of a unified government that can effectively control and administer both territories.[285] The Palestinian Authority's control is limited to certain areas of the West Bank, fragmented by Israeli settlements and military zones. Hamas, on the other hand, exerts control over Gaza but faces severe economic and military blockades imposed by Israel and Egypt, restricting its ability to govern effectively.[286] The

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[279] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI).
[280] UNSC Res 446 (22 March 1979) UN Doc S Res/446.
[281] The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 985 UNTS 14400, Article 49.
[282] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023.
[283] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023.
[284] Alexander Orakhelashvili, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction' (2006) 11 Journal of Conflict & Security Law 119 – 139, 125.
[285] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 142.
[286] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 104.

internal governance issues are profound; the Palestinian Authority and Hamas have fundamentally different governing ideologies and strategies. The Palestinian Authority, under Mahmoud Abbas, has pursued a strategy of negotiation and diplomacy with Israel and the international community.[287] Conversely, Hamas, designated as a terrorist organisation by several countries, advocates armed resistance against Israel.[288] This ideological divide makes reconciliation and unified governance highly challenging. Both entities face significant external pressures that hinder effective governance. The Palestinian Authority is dependent on international aid, primarily from Western countries, which often comes with political conditions.[289] Hamas, isolated diplomatically and economically, relies on support from countries like Iran and Qatar, which also imposes certain constraints.[290]

The fragmented governance structure severely impacts the viability of Palestinian statehood. The Convention was intended to protect the sovereignty of newly emerged South American States and was doubtfully intended for cases with the complexity of Palestine.[291] The fragmented control and governance in the Palestinian territories make it difficult to meet these criteria cohesively. While Palestine has a defined territory, the West Bank and Gaza, the Palestinian Authority controls a mere fraction of it.[292] Although Palestine has a defined territory, the West Bank and Gaza, the Palestinian Authority controls a mere fraction of it. Of course, this is not necessarily a bar to recognition. Bosnia did not control all its claimed territory when it joined the United Nations in 1992.[293] However, in the Palestinian case, Israel has now effectively annexed so much land it calls into question the viability of a Palestinian state.[294]

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[287] Khaled Elgindy, *Blind Spot: America and the Palestinians, from Balfour to Trump* (Brookings Institution Press 2019) 98 – 100.
[288] Council of the European Union, 'Council Decision (CFSP) 2019/25 of 8 January 2019 Updating the List of Persons, Groups and Entities Subject to Articles 2, 3, and 4 of Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism' [2019] OJ L6/6.
[289] Nathan J. Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* (University of California Press 2003) 211 – 213.
[290] Beverley Milton-Edwards, Hamas: *The Islamic Resistance Movement* (Polity Press 2018) 158 – 160.
[291] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (CUP 2010) 226.
[292] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (CUP 2010) 227.
[293] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 245.
[294] Michele Pitta, *'Statehood and Recognition: the Case of Palestine'* (CEI International Affairs, 20 April 2018) <https://diposit.ub.edu/dspace/bitstream/2445/123175/1/TFM_Michele_Pitta.pdf> accessed 25 November 2023.

Numerous attempts have been made to reconcile the Palestinian Authority and Hamas, but these efforts have largely failed. Agreements such as the *Cairo Declaration* (2005),[295] the *Mecca Agreement* (2007), and the *Doha Agreement* (2012) have all aimed at forming a united government but have not succeeded due to deep-seated mistrust and ideological differences. The *Cairo Declaration* (2005) aimed to unify Palestinian factions under a single political platform and to prepare for legislative elections. However, competing interests and a lack of trust between Fatah and Hamas made it a failure. *The Mecca Agreement* was brokered by Saudi Arabia in 2007, and it focused on forming a national unity government.[296] Again the power struggle between the two sides, particularly relating to control over security proved too problematic.[297] *The Doha Agreement*, in 2012,[298] aimed at the formation of a transitional government to prepare for elections. However, differences over implementation and continued external pressures prevented it from succeeding. Probably the main barrier standing in the way of Palestinian statehood is the fragmented governance between the Palestinian Authority and Hamas. Reaching the criteria of statehood and fulfilling a vision of an independent state by the Palestinians rests on effective reconciliation and unified governance.[299]

The relationship between the Palestinian Authority and the Palestinian Liberation Organisation although one of cooperation is nonetheless complicated. Formally, the Palestinian Authority is an organ of the Palestinian Liberation Organisation; the President of the Palestinian Authority, in this case, Mahmoud Abbas is also Chairman of the Palestinian Liberation Organisation.[300] The latter seeks to facilitate a united Palestinian political front on the world theatre. On the other hand, the Palestinian Authority administers the day-to-day governance of the Palestinian territories in matters such as such as Education, Health care, and Infrastructural development.[301] Then the Palestinian Liberation Organisation, on its part, deals with diplomatic relations with other countries and International advocacy. This

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[295] Tamer Qarmout, 'What Is behind the Palestinian Split and What Makes It Difficult to End? A Historical Institutional Analysis from a Settler Colonial Lens' (2023) 44 Third World Quarterly 686 – 704, 670.
[296] Khaled Hroub, *Hamas: A Beginner's Guide* (2nd edn, Pluto Press 2010) 122.
[297] Beverley Milton-Edwards, *Hamas: The Islamic Resistance Movement* (Polity Press 2018) 140.
[298] Nathan J Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* (University of California Press 2003) 220 – 222.
[299] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) 241.
[300] John Quigley, *The Case for Palestine: An International Law Perspective* (Duke University Press 2005) 210.
[301] Kali Robinson, *'Who Governs the Palestinians*?' (Council on Foreign Relations, 28 May 2024) <https://www.cfr.org/backgrounder/who-governs-palestinians> accessed 20 September 2024.

division of labour enables the Palestinian Authority to concentrate on internal governance of the Palestinian Liberation Organisation to address the international community. Though this relationship works in theory, the Israeli occupation affects the effectiveness of the partnership. The Palestinian Authority often clashes with the broad diplomatic objectives pursued by the Palestinian Liberation Organisation.[302]

The issue of conflicting interests and bureaucratic inefficiency also remains with key leaders doubling as representatives for both organisations. The Palestinian Liberation Organisation's role as the international representative of the Palestinian people is vital for maintaining global support for Palestinian statehood. This includes membership in international organisations such as the United Nations and the United Nations Educational, Scientific and Cultural Organization and participation in global diplomatic forums.[303] The United Nation has recognised the Palestinian Liberation Organisation as the representative of the Palestinian people since 1974.[304] In 2012, Palestine was granted non-member observer state status, allowing it to participate in General Assembly debates and activities.[305] This status is crucial for advocating Palestinian rights and aspirations on the international stage. The Palestinian Liberation Organisation has signed numerous international agreements on behalf of the Palestinian people, including the Oslo Accords with Israel.[306]

The Palestinian Authority's authority within the Palestinian territories is limited and often contested. The Oslo Accords divided the West Bank into Areas A, B, and C, with varying degrees of Palestinian Authority control. Area A is under full PA control, Area B is under Palestinian civil control and Israeli military control, and Area C, which constitutes about 60% of the West Bank, is under full Israeli control.[307] The Palestinian Authority manages civil affairs in Areas A and B,

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[302] Tamer Qarmout, 'Predictable in Their Failure: An Analysis of Mediation Efforts to End the Palestinian Split' (2024) 31 International Peacekeeping 283 – 308, 286.
[303] Anon, 'UNESCO Votes to Admit Palestine as Full Member' (UN News, 31 October 2011) <https://news.un.org/en/story/2011/10/393562> accessed 20 September 2024.
[304] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff 2013) 256.
[305] Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood' (2013) 12 Chinese Journal of International Law 19 – 41, 24.
[306] Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accords) (signed 13 September 1993, entered into force 13 October 1993) UNTS A/48/486.
[307] Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accords) (signed 13 September 1993, entered into force 13 October 1993) UNTS A/48/486.

including education, health, and municipal services.[308] However, its inability to exercise full sovereignty, particularly in Area C, hampers its effectiveness and credibility among Palestinians. Security in the West Bank is divided between the Palestinian Authority and Israel. The Palestinian Authority has control over police forces in Areas A and B, but Israeli military operations often undermine its authority. This dual security arrangement creates tensions and complicates the Palestinian Authority's ability to maintain law and order.[309]

3.5 Political Legitimacy and Challenges

The Palestinian Authority and the Palestinian Liberation Organisation face significant challenges in maintaining political legitimacy and unity among Palestinians. The division between the West Bank and Gaza, with Hamas controlling Gaza since 2007, further complicates the political landscape.[310] The Palestinian Authority's limited control and reliance on international aid have led to perceptions of ineffectiveness and corruption. The lack of democratic elections since 2006 has also eroded its legitimacy among Palestinians, who increasingly see the Palestinian Authority as disconnected from their daily struggles and aspirations. The split between Fatah (the dominant party in the Palestinian Authority) and Hamas has resulted in a divided Palestinian polity.[311] The relationship between the Palestinian Authority and the Palestinian Liberation Organisation is crucial for any future Palestinian state. For unification and statehood to be realised, several key issues need to be addressed; genuine efforts to reconcile Fatah and Hamas are essential. This includes addressing ideological differences, power-sharing arrangements, and mutual trust.[312]

Successful reconciliation would strengthen Palestinian governance and enhance the prospects for statehood. Continued international support for the Palestinian Liberation Organisation as the representative of the Palestinian people is vital. This includes recognition of Palestinian statehood and support for Palestinian

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[308] Nathan J. Brown, *Palestinian Politics after the Oslo Accords: Resuming Arab Palestine* (University of California Press 2003) 115 – 120.
[309] Jeremy Pressman, *The Second Intifada: Causes and Consequences* (University of Chicago Press 2011) 188 – 190.
[310] See International Rights Watchdog Freedom House classifies the PA as "authoritarian" and the West Bank as "not free" due to poor Palestinian governance and Israel's occupation.
[311] Kali Robinson, '*Who Governs the Palestinians*?' (Council on Foreign Relations, 28 May 2024) <https://www.cfr.org/backgrounder/who-governs-palestinians> accessed 3 August 2024.
[312] Tamer Qarmout, 'Predictable in Their Failure: An Analysis of Mediation Efforts to End the Palestinian Split' (2024) 31 International Peacekeeping 283 – 308, 286.

participation in international organisations and diplomatic forums.[313] The PA needs to implement governance reforms to enhance its credibility and effectiveness. This includes anti-corruption measures, democratic elections, and improved public services. Strengthening the Palestinian Authority's governance capabilities would improve its standing among Palestinians and the international community. The relationship between the Palestinian Authority and the Palestinian Liberation Organisation is a cornerstone of Palestinian governance and international representation. Despite the challenges, this dual structure provides a framework for both internal administration and diplomatic advocacy. Addressing the complexities and strengthening this relationship is essential for advancing Palestinian aspirations for statehood and self-determination.[314]

3.6 International Recognition of Palestine

The international recognition of Palestine is a significant aspect of its quest for statehood. Recognition by other states and international organisations lends legitimacy to Palestine's claims and supports its efforts to achieve self-determination. However, the motivations behind such recognition and its implications are complex. The recognition of Palestine has evolved over several decades, shaped by geopolitical dynamics and international law. The pivotal moment came in 1988 when the Palestine Liberation Organisation declared the establishment of the State of Palestine. This declaration was met with widespread recognition from Arab and Muslim-majority countries, as well as many members of the Non-Aligned Movement and the Eastern Bloc.[315] On 15 November 1988, the Palestinian Liberation Organisation proclaimed the establishment of the State of Palestine. This declaration was a strategic move to garner international support and assert Palestinian claims to statehood. It led to immediate recognition from over 70 countries, signalling broad international support for Palestinian aspirations.

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[313] Marwa Fatafta and Alaa Tartir, '*It's Time for Palestinians to Reclaim the PLO*' (Foreign Policy, 20 August 2020) <https://foreignpolicy.com/2020/08/20/palestinians-reclaim-plo-palestinian-authority-democracy/> accessed 21 September 2024.

[314] Tamer Qarmout, *'A Roadmap for the Future of Palestine: At This Critical Juncture, Palestine's Leaders Should Come Together to Craft a Clear Strategy for Reunifying the Palestinian People'* (Al Jazeera, 23 November 2023) <https://www.aljazeera.com/opinions/2023/11/23/a-roadmap-for-the-future-of-palestine> accessed 21 September 2024.

[315] Anon, 'History' (NAM, date unknown) <https://nam.go.ug/history> accessed 2 August 2024. The Non-Aligned Movement (NAM) is an international organization of countries that do not formally align themselves with any major power bloc. Established in 1961 in Belgrade, the movement aims to promote peace, sovereignty, and economic development among its member states. NAM originated from the 1955 Bandung Conference and now includes over 120 member countries, primarily from Africa, Asia, and Latin America. It seeks to avoid involvement in conflicts between major world powers, advocating instead for mutual cooperation, disarmament, and socio-economic equality.

In 2012, the United Nations General Assembly passed *Resolution 67/19,*[316] upgrading Palestine's status to a non-member observer state. This was a significant diplomatic victory, allowing Palestine to participate in General Assembly debates and activities. The resolution passed with an overwhelming majority, reflecting broad international support for Palestinian statehood.

The motivations for recognising Palestine vary among states, influenced by political, strategic, and ethical considerations. Understanding these motivations provides insight into the complexities of international diplomacy and the quest for Palestinian statehood. For many countries, recognising Palestine aligns with their political and strategic interests. Arab and Muslim-majority countries support Palestine as part of their broader regional policies and solidarity with the Palestinian cause.[317] Similarly, countries in the Non-Aligned Movement see recognition as part of their anti-colonial and pro-sovereignty stances. For some states, recognition of Palestine is driven by ethical and humanitarian concerns.[318] The prolonged occupation and the humanitarian plight of the Palestinian people resonate with countries that prioritise human rights and international justice. These states view recognition as a moral obligation to support the Palestinian right to self-determination.[319]

The implications of international recognition of Palestine are profound, affecting its legal status, diplomatic standing, and political dynamics. Recognition provides both opportunities and challenges for Palestine in its pursuit of statehood. Recognition strengthens Palestine's legal status under international law. As a recognised entity, Palestine can join international organisations and treaties, enhancing its ability to advocate for its rights and interests. This includes participation in bodies like the International Criminal Court and the International Court of Justice. The International Criminal Court Pre-Trial Chamber I concluded that the Court has jurisdiction over the Situation in Palestine. This jurisdiction extends to the territories occupied by Israel since 1967, namely the West Bank, including East Jerusalem, and Gaza. The decision was based on Palestine's

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[316] UNGA Res 67/19 (29 November 2012).
[317] Anon, 'Special Rapporteur: Israel Has Imposed an Apartheid Reality in Palestine' (UN Office of the High Commissioner for Human Rights, 25 March 2022) <https://www.ohchr.org/en/press-releases/2022/03/special-rapporteur-situation-human-rights-occupied-palestinian-territories> accessed 20 September 2024.
[318] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 254.
[319] Maya Kahanoff, 'Collective Trauma, 'Recognition and Reconciliation in the Israeli–Palestinian Conflict' in Paula Rayman and Yoram Meital (eds), *Recognition as Key for Reconciliation: Israel, Palestine, and Beyond* (Brill 2017) 74.

accession to the Rome Statute and its subsequent referral of the situation to the International Criminal Court. The Chamber found that Palestine qualifies as a state for the purposes of the Statute, thereby allowing the International Criminal Court to exercise its jurisdiction in these areas.[320]

Recognition enables Palestine to engage more effectively in international diplomacy. With recognised statehood, Palestine can negotiate on equal footing with other states, participate in multilateral forums, and forge bilateral agreements. This diplomatic engagement is crucial for advancing Palestinian interests and securing international support.[321] Recognition can facilitate access to economic and development aid. As a recognised state, Palestine can receive financial assistance from international donors and institutions, supporting its development goals and improving living conditions for its people. This aid is essential for building the infrastructure and institutions of a viable state.[322]

3.7 Right to Self-Determination

The right to self-determination is a fundamental principle of international law, enshrined in key international instruments such as the Charter of the United Nations.[323] and the International Covenant on Civil and Political Rights.[324] For Palestine, this right is central to its claim for statehood. However, assessing Palestinian statehood against the Convention's requirements reveals significant challenges and complexities. The principle of self-determination asserts that peoples have the right to freely determine their political status and pursue their economic, social, and cultural development. This right is particularly relevant for peoples under colonial rule, occupation, or facing significant oppression. The international community widely recognises the Palestinian right to self-determination, as reflected in numerous United Nations resolutions and declarations affirming the Palestinian people's right to establish an independent

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[320] *Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine* 2021 <https://www.icc-cpi.int/court-record/icc-01/18-143> accessed 6 February 2024.
[321] Michele Pitta, *The Statehood of Palestine under International Law* (CEI International Affairs, 2017) 75.
[322] Yara Asi, 'Aid to Palestinians Has Failed. Here's How to Fix It' (The New Humanitarian, 3 May 2022) <https://www.thenewhumanitarian.org/opinion/2022/05/03/aid-to-palestinians-has-failed-heres-how-to-fix-it> accessed 21 September 2024.
[323] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 1(2).
[324] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI), Article 1.

state.[325] The legal foundation for this right is robust, supported by various international treaties and customary international law.[326] The International Court of Justice has also acknowledged this right in its advisory opinions, reinforcing its applicability to the Palestinian context.[327]

However, as Vidmar argues, the legal uncertainties surrounding international judicial proceedings involving Palestine arise from a lack of sufficient theoretical grounding concerning territorial status and legal personality in international law, leading to an excessive focus on the term ‘state’ as it appears in certain treaties and treaty mechanisms.[328] These ambiguities cannot be resolved simply by appealing to the traditional criteria of statehood, such as those outlined in the Montevideo Convention, as some have suggested in the context of the International Court of Justice and International Criminal Court proceedings involving Palestine.[329] Instead, a more comprehensive approach is required one that considers the unique historical and political context of Palestine and the evolution of international legal norms concerning self-determination and statehood.[330] Evaluating Palestinian statehood against the Convention criteria highlights both strengths and challenges. Palestine meets the requirement of a permanent population. The Palestinian territories, including the West Bank, Gaza Strip, and East Jerusalem, are home to a significant and stable population with a distinct national identity. Despite displacement and migration due to conflict, the Palestinian population remains substantial and deeply connected to the land. The criterion of a defined territory is more complex. While the Palestinian territories have internationally recognised boundaries, the ongoing Israeli occupation and settlement activities complicate territorial integrity.[331] The fragmentation of the West Bank, with areas of Palestinian control interspersed with Israeli settlements, poses a challenge to the clear definition of Palestinian territory. The governance criterion is perhaps the most contentious. The Palestinian Authority exercises administrative control over parts of the West Bank, while Hamas governs Gaza.[332]

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[325] UNGA Res 67/19 (29 November 2012).
[326] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 107 – 111.
[327] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023, paragraph 88.
[328] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 34.
[329] Jure Vidmar, Territorial Status in International Law (Bloomsbury Publishing 2024) 35.
[330] Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2015) 44 *Georgia Journal of International and Comparative Law* 101 – 149, 105.
[331] Gleider I Hernández, *International Law* (2nd edn, OUP 2022) 119.
[332] Mkhaimar Abusada and others, *'Governing Gaza After the War: Palestinian Debates'* (Carnegie Endowment for International Peace, 9 February 2024)

This dual governance structure, combined with Israeli control over significant portions of the territories, complicates the notion of a single, effective government. Palestine has demonstrated its capacity to enter into relations with other states. The Palestinian Liberation Organisation, representing Palestine, has established diplomatic relations with numerous countries and is a member of various international organisations, including United Nations Educational, Scientific and Cultural Organization. This diplomatic capacity demonstrates Palestine's ability to engage with the international community.[333]

In 2003, the relationship between Israelis and Palestinians improved then Israel began to construct settlements quickly in the West Bank and built a separation barrier. These actions of Israel were condemned by the international community. In December 2003, the General Assembly of the United Nations adopted a resolution asking the International Court of Justice to provide an advisory opinion on whether the construction of the barrier known as the 'wall' was contrary to international law.[334] On 9 July 2004, the International Court of Justice defined the barrier beyond the 1967 limits as *de facto* annexation and stated that it must be demolished. No heed was given to this directive by Israel. International Court of Justice Ruling on the Wall In 2004, the International Court of Justice ruled that Israel's building of a wall in the occupied Palestinian territories, including East Jerusalem, was illegal according to international law.[335] The court maintained that the barrier hindered the Palestinian right to self-determination and ruled that it should be dismantled forthwith in any area where the wall is beyond the 1967 borders, with compensation to be paid for affected Palestinians. It also insisted that United Nations member states see to it that Israel complied with international

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<https://carnegieendowment.org/posts/2024/02/governing-gaza-after-the-war-palestinian-debates?lang=en> accessed 2 August 2024.

[333] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 249.

[334] UNGA Res ES-10/14 (8 December 2003).

At the 23rd meeting of its tenth emergency special session, on 8 December 2003, the General Assembly, by resolution ES-10/14, decided, in accordance with Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice to urgently render an advisory opinion on the following question: What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

[335] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for Advisory Opinion) 2004 <https://www.un.org/unispal/document/auto-insert-178825/> accessed 2 December 2023.

law. However, Israel dismissed the ruling as it said it would press on with building its separation barrier.[336]

Summers alluded to how the Palestinians could rely on Article 1 of the *Twin Human Rights Covenants 1966*.[337] Palestine may also be encompassed by Article 1(4) of Additional Protocol I 1977 to the Geneva Conventions 1949[338] which referred to: 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and racist régimes in the exercise of their right of self-determination.'[339] In 2021, the United Nations Human Rights Council investigated human rights abuses in these territories and recommended that this matter be taken before the General Assembly for further guidance from the International Court of Justice about legal consequences regarding Israeli actions since 1967. Contrary to opposition from Israel, the United States, and many Western countries, in December 2022, the United Nations General Assembly decided to seek an advisory opinion from the International Court of Justice concerning the legality of the occupation with voting support from countries like China, Russia, and a number of European Union member states. The key decision in the International Court of Justices's Advisory Opinion of 19 July 2024 was that Israel's continued presence in the Occupied Palestinian Territory is illegal due to violations of the prohibition on the acquisition of territory by force and the right of the Palestinian people to self-determination. The Court emphasised the unlawfulness of Israel's prolonged occupation and urged for an immediate end to these actions, alongside resuming negotiations for a two-state solution.[340]

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[336] Anon, 'Foreign Office Minister Comments on Israel Supreme Court Decision Regarding Separation Barrier' (GOV.UK, 9 July 2015) <https://www.gov.uk/government/news/foreign-office-minister-comments-on-israel-supreme-court-decision-regarding-separation-barrier> accessed 21 September 2024.

[337] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in *Carlo Panara and Gary Wilson (eds), The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 247.

[338] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979).

[339] The International Covenant on Civil and Political Rights (adopted 16 December 1966, and entered into force 23 March 1976) UNGA Res 2200A (XXI), and The International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, and came into force 3 January 1976) 993 UNTS 14531 UNGA Resolution 2200A (XXI). These covenants are reinforcements concerning the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 214.

[340] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) 2024 <https://www.icj-cij.org/node/204176> accessed 1 August 2024.

3.8 Conclusion to Palestinian Analysis

In conclusion, The Palestinian Authority faces significant challenges in establishing statehood under the Montevideo Convention requirements due to fragmented governance and limited control over its territories.[341] While the Palestinian Authority administers parts of the West Bank, Israeli settlements, military zones, and Hamas's control of Gaza impede its ability to provide unified governance.[342] The Palestinian Authority's restricted role in foreign relations, largely managed by the Palestine Liberation Organisation, further complicates its function as a government of a state.[343] The complex relationship between the Palestinian Authority and Palestinian Liberation Organisation highlights governance issues within Palestinian leadership.[344] International recognition of Palestine is widespread but often based on political, strategic, or moral motivations, recognising potential statehood rather than current realities.[345] The right to self-determination strengthens Palestine's claim for statehood; however, traditional criteria of statehood present challenges.[346] The International Court of Justice has declared Israel's occupation of Palestinian territories illegal under international law, reinforcing Palestine's claims.[347] Nonetheless, internal divisions between the Palestinian Authority and Hamas weaken effective governance, a key criterion for statehood. Reconciliation efforts have largely failed due to ideological differences and external pressures.[348] Consequently, the fragmented control and governance complicate meeting the Montevideo requirements cohesively, impacting Palestine's quest for recognised statehood.[349]

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[341] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 34.
[342] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 240.
[343] Gleider I Hernández, *International Law* (2nd edn, OUP 2022) 119.
[344] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 446 – 447.
[345] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 *European Journal of International Law* 307 – 313, 309.
[346] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 *European Journal of International Law* 307 – 313, 308.
[347] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) 2024 <https://www.icj-cij.org/node/204176> accessed 1 August 2024.
[348] Tamer Qarmout, *'A Roadmap for the Future of Palestine: At This Critical Juncture, Palestine's Leaders Should Come Together to Craft a Clear Strategy for Reunifying the Palestinian People'* (Al Jazeera, 23 November 2023) <https://www.aljazeera.com/opinions/2023/11/23/a-roadmap-for-the-future-of-palestine> accessed 21 September 2024.
[349] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 142.

3.8 An Introduction to Western Sahara

Western Sahara is a disputed territory in North Africa, claimed by both the Sahrawi Arab Democratic Republic and Morocco. Despite international recognition of its right to self-determination, Morocco controls much of the region, leading to ongoing conflict and unresolved legal and political status.[350] Mauritania initially claimed part of Western Sahara after Spain's withdrawal in 1976 but relinquished its claim in 1979 following pressure and military defeats by the Polisario Front. The Sahrawi Arab Democratic Republic, proclaimed by the Polisario Front in 1976, operates a government-in-exile based in Tindouf, Algeria. The Sahrawi Arab Democratic Republic has limited recognition internationally and administers parts of Western Sahara not controlled by Morocco.[351] The case of Western Sahara provides ample opportunity to examine theories around statehood, de-colonialisation, self-determination, and doctrinal examination of legal authorities.

3.9 The Case of Western Sahara

The Chapter now moves on to explore the case of Western Sahara, a case similar to that of Palestine concerning a government that has very limited control over its territory as a result of occupation, against the background of enjoying different levels of international recognition. The history of colonisation and political status is very complicated in Western Sahara, located in the area of North-Western Africa.[352] Colonised by Spain in 1884, this area was further listed in the United Nations list of non-self-governing territories under Article 73 of the United Nations Charter. This designation remains to date, as captured in the United Nations Secretary-General's report dated 1 February 2016.[353]

The 1975 International Court of Justice *Western Sahara* advisory opinion examined two key questions relating to the decolonisation of the region.[354] First, the Court was asked whether Western Sahara was *terra nullius* at the time of its colonisation by Spain.[355] The International Court of Justice determined that it was

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[350] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 446 – 447.
[351] Adriana Kalicka-Mikołajczyk, 'The International Legal Status of Western Sahara' (2021) 18 Opolskie Studia Administracyjno-Prawne 35 - 47, 40.
[352] Michael Baers, *A History of the Western Sahara Conflict: The Paper Desert* (Cambridge Scholars Publishing 2022) 105-106.
[353] Adriana Kalicka-Mikołajczyk, 'The international legal status of Western Sahara' (2021) 18(4) Opolskie Studia Administracyjno-Prawne 35 – 48, 35.
[354] *Western Sahara* (Advisory Opinion) 1975 <https://icj-cij.org/case/61> accessed 12 September 2024, paragraph 12.
[355] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 270.

not *terra nullius*, as the region was inhabited by socially and politically organised tribes under chiefs who had the authority to represent them. Spain's own actions did not treat the territory as *terra nullius*; instead, Spain engaged in agreements with local chiefs to establish its presence, recognising pre-existing social structures and legal ties.[356]

The second question focused on the legal ties between Western Sahara and both Morocco and the Mauritanian entity. The Court found that there were legal ties of allegiance between the Sultan of Morocco and some of the tribes in Western Sahara, as well as some rights connected to the land between the territory and the Mauritanian entity.[357] However, the Court emphasised that these ties did not amount to territorial sovereignty for either Morocco or Mauritania. Consequently, these legal ties did not affect the application of the principle of self-determination, as outlined in General Assembly Resolution 1514 (XV), in the decolonisation of Western Sahara.[358] The Court affirmed that the right of the population to self-determination remained paramount and should be determined by the free and genuine expression of the will of the people. while there were historical legal ties, they did not preclude the population's right to self-determination, and the territory could not be classified as *terra nullius* at the time of colonisation.

The Polisario Front, formally known as the *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro*, was founded in 1973 as a national liberation movement aimed at securing full independence and sovereignty for the Sahrawi people over the territory of Western Sahara and the Sahrawi Arab Democratic Republic.[359] Following Spain's withdrawal from the region in 1975, Morocco and Mauritania sought control of Western Sahara, prompting the Polisario Front to declare the establishment of the Sahrawi Arab Democratic Republic (SADR)[360] in 1976.[361] Since then, the Polisario Front has waged an armed conflict against Moroccan rule, advocating for the Sahrawi people's right to self-determination, a

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[356] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 270.
[357] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 270.
[358] UNGA Res 1514 (XV) (14 December 1960).
[359] Martin Dixon, Robert McCorquodale, and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 270.
[360] Anon, 'UK Parliament, Western Sahara' (House of Commons Library, 29 November 2023) <https://commonslibrary.parliament.uk/research-briefings/cbp-9906/> accessed 21 September 2024.
[361] *Front Polisario v Council of the European Union* (Judgment of the General Court Eighth Chamber) 2015 <https://www.europeanpapers.eu/en/europeanforum/the-front-polisario-v-council-case-general-court-and-volkerrechtsfreundlichkeit> accessed 9 July 2024, paragraph 6.

right acknowledged by numerous United Nations resolutions but hindered by the absence of a referendum.[362]

The Sahrawi people, indigenous to Western Sahara, have a distinct cultural identity rooted in their nomadic lifestyle and tribal organisation.[363] They have consistently sought independence under the leadership of the Polisario Front. Following Morocco's annexation of the territory post-Spanish withdrawal, the Sahrawi people have been divided between the Moroccan-controlled areas and those governed by the Polisario Front, which operates a government-in-exile based in Tindouf, Algeria.[364] This prolonged confrontation with Morocco has left the Sahrawi people in a state of limbo, unable to realise their aspirations for independence.[365] The conflict with Morocco has broader implications for regional stability, involving international actors like Algeria and Mauritania. Despite the United Nation's recognition of the Sahrawi right to self-determination, no referendum has been conducted, preventing a final resolution of the conflict. The Sahrawi government-in-exile continues to push for international recognition and a referendum, while the ongoing deadlock poses a significant threat to peace in the region.[366]

The Sahrawi Arab Democratic Republic and the State of Palestine have become synonymous with self-determination in the face of protracted territorial disputes and foreign occupations. However, the extent of international backing and recognition varies enormously, with Palestine generally receiving much more comprehensive support than Western Sahara.[367] Recent practices by the African Union and the European Union illustrate well the current international dynamics about these conflicts. The African Union has also continued to be an outspoken defender of Western Sahara's right to self-determination by persisting in having Sahrawi Arab Democratic Republic as a member and continuing to call for the resolution of this situation. On the other hand, the position of the European Union

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[362] James Summers, 'Decolonisation Revisited and the Obligation not to Divide a Non-Self-Governing Territory' (Questions of International Law, 2019) <https://www.qil-qdi.org/decolonisation-revisited-and-the-obligation-not-to-divide-a-non-self-governing-territory/> accessed 27 July 2024.
[363] John Mercer, '*The Sahrawis of Western Sahara*' (Minority Rights Group, 1984) <https://minorityrights.org/resources/the-sahrawis-of-western-sahara/> accessed 7 August 2024.
[364] Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law: Recognition Doctrine and Self-Determination* (Taylor & Francis Group 2024) 13.
[365] Damien Kingsbury, *Western Sahara: International Law, Justice and Natural Resources* (Taylor & Francis 2018) 3.
[366] Damien Kingsbury, *Western Sahara: International Law, Justice and Natural Resources* (Taylor & Francis 2018) 6.
[367] *Western Sahara* (Advisory Opinion) 1975 <https://icj-cij.org/case/61> accessed 12 September 2024, paragraphs 31 – 32 and 55 – 56.

remains ambiguous, seeking to balance its legal obligations against political interests, especially in terms of its agreements with Morocco.[368] The European Union negotiated with Morocco to establish fishing rights in the territorial waters of Western Sahara. The exiled Sahrawi Arab Democratic Republic government is powerless in the face of the exploitation of its resources. Thus, even the rulings by the International Court of Justice and widespread recognition have had little impact.[369] In *Polisario Front v Council of the European Union,* the General Court of the European Union found that trade agreements between the EU and Morocco, including the territory of Western Sahara were void.[370] The Polisario Front had put forward the argument that the agreements broke the principle of self-determination and international law by Morocco acting *ultra vires* usurping the Sahrawi Arab Democratic Republic. The General Court ruled that the Council's decisions on the European Union-Morocco agreements were null and void. The Court ruled that Western Sahara was included in the mentioned agreements without the Sahrawi people's consent, and hence their right to self-determination had been overridden.[371] In the case of Western Sahara, self-determination was thwarted from the beginning within the story of a colonial legacy that was so obvious that the Western Sahara is still referred to as 'Africa's last colony'.[372] This situation could be compared to the Palestinian struggle, in that an indigenous population's aspirations toward self-determination are sabotaged by occupation and competing national interests.

Algeria has been more proactive in standing behind the Polisario Front than just giving its members refuge to support their calls for independence. This is linked to its wider regional competitiveness and its strategic reasons for trying to limit

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[368] Stephen Allen, 'Exploiting Non-Self-Governing Territory Status: Western Sahara and the New EU/Morocco Sustainable Fisheries Partnership Agreement' (2020) 9 Cambridge International Law Journal 24 – 50, and Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law: Recognition Doctrine and Self-Determination* (Taylor & Francis 2024).

[369] Eva Kassoti, 'The EU's Duty of Non-Recognition and the Territorial Scope of Trade Agreements Covering Unlawfully Acquired Territories' (2019) 3 Europe and the World: A Law Review 1 – 18.

[370] *Front Polisario v Council of the European Union* (Judgment of the General Court Eighth Chamber) 2015 <https://www.europeanpapers.eu/en/europeanforum/the-front-polisario-v-council-case-general-court-and-volkerrechtsfreundlichkeit> accessed 9 July 2024.

[371] Annuls Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

[372] Oscar Güell, 'Western Sahara: Africa's Last Colony' (openDemocracy, 2 January 2015) <https://www.opendemocracy.net/en/opensecurity/western-sahara-africas-last-colony/> accessed 2 August 2024.

Moroccan influence.[373] Further tensions were added after the 1991 collapse of the cease-fire and the resurgence in hostilities in recent years, whereby Morocco has reportedly tried to cash in on its diplomatic and economic contacts to strengthen its side.[374] The 2020 victory for the United States, since the recognition of its territory by Morocco under the claim of Western Sahara, was in exchange for Rabat to normalize its relations with the State of Israel, a geopolitical tectonic move. Seemingly, there is a blow in the quest for self-determination by the Sahrawi people, which only escalates tensions in the area. Conversely, the European Union has remained at the core of the quagmire between many legal obligations and political interests at each level it operates on.

3.10 International Legal and Human Rights

The international legal context of the conflict in Western Sahara encompasses the interaction between different legal institutions and human rights considerations, taking into account the advisory opinion of the International Court of Justice in 1975 and the subsequent resolutions of the United Nations considering this opinion for the affirmation of the Sahrawi people's right to self-determination.[375] In the process, the combination of lack of enforcement mechanisms, as well as the geopolitical interests of powerful states, has proved impeding. The involvement of the African Court on Human and Peoples' Rights showed that self-determination is at the crux in major issues in Africa.[376] Western countries have shown a reluctance to support Sahrawi self-determination fully because of its strategic interests with Morocco, such as migration control and counter-terrorism cooperation.[377] Things get more complicated still by human rights violations in Western Sahara, such as freedom of expression and freedom of association. The Polisario Front, among many organisations smelling a rat, has been tracking this and urging more international attention and responsibility. The illegal exploitation of the natural resources the phosphate deposits and fisheries without the consent of the Sahrawi people is also a big element of controversy in both legal and moral points of

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[373] Michael J Willis, *Politics and Power in the Maghreb: Algeria, Tunisia and Morocco from Independence to the Arab Spring* (C Hurst & Co Publishers Ltd 2014).
[374] Alice Wilson, *Sovereignty in Exile: A Saharan Liberation Movement Governs* (University of Pennsylvania Press 2016) 140.
[375] Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law: Recognition Doctrine and Self-Determination* (Taylor & Francis Group 2024) 47.
[376] Robert McCorquodale, 'Group Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022) 365.
[377] Laurence Ammour and Rashid El-Houdaigui, *Research Paper - No. 30 - November 2006* (NATO Defense College 2006) <http://www.jstor.org/stable/resrep10358> accessed 21 September 2024.

view.[378] In summary, the Western Sahara conflict represents an issue of frustrated self-determination, geopolitical dynamics, and international legal and human rights considerations that must be taken into account in the resolution of the dispute. To do so, one needs an appreciation of its historicity, regional interest, and the role of international legal frameworks in the attainment of a just and lasting solution.

The case of *Mornah v. Benin* from the African Court of Human and Peoples' Rights is useful to demonstrate some of the key legal principles in operation. This judgment demonstrated how the court focused on democratic principles and human rights; further enhancing the notion that electoral processes should not be only fair but also inclusive. This case concerning Western Sahara provided a precedent open to courts to tackle questions relating to self-determination and human rights in occupied territories. On December 10, 2020, the United States, under the Trump administration, officially recognised Moroccan sovereignty over Western Sahara as part of an agreement where Morocco normalized relations with Israel. This decision marked a significant shift in United States policy, which had previously maintained a neutral stance regarding the status of Western Sahara.[379] The Trump administration justified this move by emphasising Morocco's autonomy plan as the only viable solution to the dispute and dismissing the possibility of an independent Sahrawi state as unrealistic.

3.11 Conclusion

Applying a post-positivist approach to the statehood of Western Sahara and Palestine acknowledges the limitations of traditional legal frameworks like the Montevideo Convention, which strictly adheres to criteria such as defined territory, permanent population, effective government, and capacity for international relations. This approach considers the socio-political dynamics and historical contexts influencing both territories. Western Sahara's struggle for self-determination under Moroccan occupation and Palestine's fragmented governance between the Palestinian Authority and Hamas highlights the inherent weakness of relying on late nineteenth-century requirements.[380]

In Western Sahara, despite international recognition of the Sahrawi people's right to self-determination, Morocco controls most of the territory. The Polisario Front's

[378] Raquel Ojeda-García, 'The Role of Non-State Actors in the Exploitation of Western Sahara's Natural Resources' (2022) 27 The Journal of North African Studies 1229 – 1254, 1234.
[379] Anon, 'United States Recognizes Morocco's Sovereignty Over Western Sahara' (2021) 115 American Journal of International Law 318 – 323, 318.
[380] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 20.

declaration of the Sahrawi Arab Democratic Republic in 1976 and the subsequent recognition by the African Union illustrate a political rather than purely legal process of statehood.[381] Similarly, Palestine's fragmented control over the West Bank and Gaza Strip complicates its claim to effective governance. The Palestinian Authority's limited authority and the role of the Palestine Liberation Organization in international representation further challenge the application of the Montevideo requirements.[382]

The post-positivist perspective emphasises the importance of international recognition and political will. Palestine has gained broad international recognition, reflecting support for its right to self-determination despite not fully meeting the Montevideo requirements. The symbolic recognition acknowledges the potential for Palestinian statehood and the moral and ethical dimensions reinforcing this support. This approach also considers recent legal developments, such as the International Court of Justice advisory opinions, which reinforce Palestine's claims to statehood and self-determination despite practical implementation challenges.[383]

For Western Sahara, international support from the African Union and the European Union's cautious stance demonstrates the political realities influencing statehood recognition. The African Union's consistent backing of Sahrawi Arab Democratic Republic contrasts with the European Union's balancing of legal obligations and political interests, particularly in its relations with Morocco. These dynamics highlight the need for a critical understanding of statehood that incorporates social, political, and historical factors beyond legalistic criteria.

Alexander Wendt's theory of constructivism offers a compelling lens for understanding statehood where government control is limited. Wendt argues that international relations and statehood are socially constructed through the identities, interests, and interactions of states and non-state actors. This perspective is particularly relevant for Western Sahara and Palestine, where the traditional notion of statehood is challenged by fragmented governance and external occupation. In Western Sahara, the Sahrawi Arab Democratic Republic

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[381] James Summers, *Peoples and International Law* (2nd edn, Brill 2014) 425.
[382] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 240.
[383] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Request for Advisory Opinion) 2004 <https://www.icj-cij.org/case/131#:~:text=The%20Court%20stated%20that%20Israel,ineffective%20all%20legislative%20and%20regulatory> accessed 2 December 2023, paragraph 136.

operates as a government-in-exile with limited control over the territory. Wendtian constructivism suggests that statehood is not solely determined by territorial control but also by the recognition and support from other states and international organisations.[384] The African Union's recognition of Sahrawi Arab Democratic Republic and its membership in international bodies reflect a social construction of statehood, legitimizing the Sahrawi people's aspirations for independence despite Moroccan occupation.[385] Similarly, Palestine's statehood is shaped by its interactions with the international community and the internal dynamics between the Palestinian Authority and Hamas.[386] The Palestinian Authority's governance over parts of the West Bank and Hamas's control over Gaza represent a dual governance structure that complicates the notion of a single, effective government. However, the broad international recognition of Palestine and its non-member observer status at the United Nations highlight the social construction of its statehood. This recognition and the moral and ethical support from the international community supports the legitimacy of Palestinian claims to self-determination.[387]

Wendtian constructivism emphasises that statehood is a dynamic and relational concept, shaped by the identities, interests, and interactions of states and non-state actors. For Western Sahara and Palestine, this means that their statehood is constructed through their struggles for self-determination, international recognition, and the support of regional and global actors. Vidmar argues that this perspective allows for a more nuanced understanding of statehood that goes beyond the rigid requirements of the Convention, recognising the social and political realities influencing their aspirations for independence.[388] Applying a post-positivist approach to the statehood of Western Sahara and Palestine acknowledges the limitations of traditional legal frameworks like the Convention, which strictly adheres to criteria. Post-positivism recognises that statehood is not merely a legal construct but also a social and political one, influenced by historical contexts, geopolitical dynamics, and international recognition. For Western Sahara, the post-positivist approach highlights the ongoing struggle for self-determination despite Moroccan control. The International Court of Justice advisory opinion in

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[384] Alexander Wendt, *Social Theory of International Politics* (CUP 1999).
[385] Damien Kingsbury, *Western Sahara: International Law, Justice and Natural Resources* (Taylor & Francis 2018) 3.
[386] Gleider I Hernández, *International Law* (2nd edn, OUP 2022) 119.
[387] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 *European Journal of International Law* 307 – 313, 308.
[388] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 21.

1975 affirmed the Sahrawi people's right to self-determination, yet practical implementation remains stymied by geopolitical interests and regional dynamics.[389] The Polisario Front's declaration of the Sahrawi Arab Democratic Republic and its limited international recognition contrast sharply with Morocco's entrenched control and exploitation of Western Saharan resources. The African Union's support for Sahrawi Arab Democratic Republic provides an indication of a regional endorsement of Sahrawi self-determination, while the US and European Union's approach reflects a balance between legal obligations, political interests and trade.[390]

In the case of Palestine, the post-positivist approach is evident in the fragmented control by the Palestinian Authority and Hamas. The Palestinian Authority's governance is limited to parts of the West Bank, while Hamas controls Gaza, complicating the fulfilment of the Montevideo requirements. International recognition of Palestine is widespread, driven by political, strategic, and ethical considerations, but often remains symbolic, acknowledging what Palestine could be rather than its current reality. The right to self-determination is enshrined in various international documents and reinforced by International Court of Justice advisory opinions and UN resolutions condemning Israeli settlements and occupation.

In the context of Western Sahara, the Wendtian perspective highlights the role of the Polisario Front and Sahrawi Arab Democratic Republic in constructing a Sahrawi national identity despite Moroccan occupation. The recognition of Sahrawi Arab Democratic Republic by the African Union and various states supports the notion that statehood can be socially constructed through international support and legitimacy, even if traditional criteria are not fully met. The European Court of Justice's ruling in *Polisario Front v Council of the European Union* voided trade agreements between the European Union and Morocco that included Western Sahara without Sahrawi consent, emphasising the importance of respecting the principle of self-determination in international relations. For Palestine, the Wendtian perspective highlights the dual role of the Palestinian Authority and the Palestine Liberation Organisation in representing Palestinian interests domestically and internationally. The Palestine Liberation Organisation's

[389] *Western Sahara* (Advisory Opinion) 1975 <https://icj-cij.org/case/61> accessed 12 September 2024, paragraphs 31 – 32.
[390] Eleonora Vasques, 'US Open to Western Sahara Options as Morocco Steps Up Lobbying Effort' (Euractiv, 20 April 2022) <https://www.euractiv.com/section/global-europe/news/us-open-to-western-sahara-options-as-morocco-steps-up-lobbying-effort/> accessed 2 August 2024.

recognition by the United Nations as the representative of the Palestinian people and the upgrading of Palestine's status to a non-member observer state in 2012 reflect the social construction of Palestinian statehood on the international stage. Despite internal political fragmentation, the widespread international recognition of Palestine and its ability to engage in diplomatic relations proves that statehood is not solely dependent on effective governance but also on the shared beliefs and support of the international community.

CHAPTER FOUR STATE FORMATION AND INTERNATIONAL RECOGNITION IN THE POST-SOVIET SPACE

4.1 Introduction

Chapter Four dissects the complex dynamics of state formation and international recognition in the post-Soviet space, focusing on Transnistria, Abkhazia, South Ossetia, and Kosovo. It investigates the general geopolitical and legal frameworks that contributed to the formation of these kinds of contested entities after the dissolution of the Soviet Union and the Socialist Federal Republic of Yugoslavia. The Chapter will briefly discuss the dissolution of the Soviet Union and the impact it had on the formation of new countries by including some doctrinal analysis of international law, and the processes adopted by the international community concerning concepts of self-determination, recognition of states and spatial entities before a detailed examination of *Kosovo Advisory Opinion*. The Chapter considers the influence of the European Union and Russia over emerging claims for statehood for territories in Eastern Europe, particularly by referring to guidelines given by the Badinter Commission.[391]

Chapter Four builds on the claims made in chapter Two about the development of state recognition following the Badinter Commission's decisions during the Yugoslav crisis.[392] The Commission introduced a significant shift, moving from the traditional Montevideo Convention requirements[393] towards new considerations of human rights, democracy, and minority protections. As seen in the post-Cold War practice, Jure Vidmar notes that this period marked a paradigm shift where democratic governance became a key criterion for state recognition, reflecting the evolving international legal framework.[394] States like Slovenia and Croatia were recognised despite not fulfilling traditional requirements like effective governance or control over their entire territory. This marked the beginning of the more flexible application of recognition rules, with political discretion often overriding strict legal

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[391] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 European Journal of International Law 178 – 185, 184.
[392] *Declaration on Yugoslavia by the Extraordinary EPC Ministerial Meeting* (EC, 27 August 1991) 31 ILM 1488.
[393] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[394] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 42.

doctrines.[395] Vidmar explained how states emerging outside the colonial context in this post-Cold War practice demonstrated the increasing emphasis on human rights and democratic norms as preconditions for statehood, rather than just control of territory and population.[396] Kosovo serves as a prominent example of this practice, where its declaration of independence in 2008 presented a unique case in international law.[397] Although Kosovo unilaterally seceded from Serbia, it gained recognition from many states despite not fully meeting the traditional Montevideo requirements.[398] Vidmar highlights that Kosovo's case, unlike most unilateral secessions, was deemed *sui generis*[399] due to the particular historical and legal circumstances, such as the previous international governance of Kosovo and its status under United Nations Security Council Resolution 1244.[400] This chapter focuses on Kosovo as a case study, noting that while Bangladesh and Kosovo are notable cases of unilateral secession, Kosovo's recognition is distinct due to the international community's engagement and unique geopolitical considerations.[401]

The constructivist approach of Alexander Wendt holds that state identities and interests are socially constructed, not fixed.[402] Drawing on these reflections and focusing on Kosovo and post-Soviet states like Transnistria, Abkhazia, and South Ossetia, Chapter Four sets out how their identities and international status were formed as a consequence of interaction with other states or international bodies in general. Chapter Four considers how these quests for recognition and legitimacy are influenced by their historical experiences, regional dynamics, and responses from the broader international community. Wendt's theory is useful in illustrating the relational and processual nature of state formation and recognition as it indicates that such states' legitimacy is not given but continuously negotiated through continued diplomatic engagement, regional conflicts, and international

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[395] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 91 – 94.
[396] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 75.
[397] Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57 International and Comparative Law Quarterly 675 – 690, 679.
[398] UNSC Res 1244 (10 June 1999) UN Doc S RES/1244 was adopted by the UN Security Council in the context of the Kosovo conflict. It authorized the establishment of an international civil and military presence in Kosovo, under the authority of the United Nations, aimed at maintaining peace and security. The resolution also reaffirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, while addressing the need for substantial autonomy and self-governance for Kosovo.
[399] UNSC Report Verbatim Record (18 February 2008) S/PV.5839, page 14.
[400] UNSC Res 1244 (10 June 1999) UN Doc S RES/1244.
[401] Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57 International and Comparative Law Quarterly 675 – 690, 675.
[402] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 213.

interventions.[403] Statehood is defined as having authority over a defined territory. The vast majority of entities that meet the criteria of statehood are states because they have those qualities inherently in their makeup.[404] The debate between constitutive and declaratory recognition is often redundant as the role of recognition can be either central or irrelevant to statehood depending upon the situation.[405] Recognition should only be treated as an expression of *opinio juris* in the formation of a new state. While some states are created by international treatises, the overwhelming majority of them achieve their statehood status through customary international law, which consists of state practice and *opinio juris*.[406] The entities discussed in this chapter draw attention to how the international community considers the notion of self-determination, as a human right, applies to peoples and is closely linked to territorial units. Crawford argues that the emphasis in practice has been on applying the principle of self-determination to territories either through recognition or treaty arrangements. He acknowledges that the scope of self-determination and the territories where it applies is influenced by politics as much as law. Territories are created through political processes that carry legal consequences, making a self-determination unit a politically created legal status over a spatial area. the International Law Commission relies on the Articles on Responsibility of International Organizations to set out principles for holding international organisations accountable for their actions.[407] The Articles on Responsibility of International Organizations addresses breaches of international obligations, responsibility for wrongful acts, and remedies, ensuring organisations operate within legal frameworks and maintain accountability.[408]

4.2 The Badinter Arbitration Committee

The *Badinter Arbitration Committee*, sometimes referred to as the *Badinter Commission*,[409] was established in 1991 by the then European Economic Community, at a time when the Socialist Federal Republic of Yugoslavia was

[403] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 215.
[404] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 107.
[405] Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 216.
[406] Jan Klabbers, *International Law* (CUP 2020) 32.
[407] Responsibility of States for Internationally Wrongful Acts (adopted and entered into force 12 December 2001) articles 40 and 41.
[408] Kristina Daugirdas, How and Why International Law Binds International Organizations (2016) 57 *Harvard International Law Journal* 325 – 382, 325.
[409] Steven R Ratner, 'The Badinter Commission: The Use of European Community Instruments for Peaceful Settlement' (1993) 5 European Journal of International Law 246 – 253, 248.

breaking up into territories.[410] This federation consisted of six socialist republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia.[411] Robert Badinter, French lawyer, politician, and publicist, known for his significant contributions to French law and human rights chaired the Commission.[412] The Commission was entrusted to provide legal advice over various issues arising from the breakup of the Socialist Federal Republic of Yugoslavia, mainly related to state recognition, borders, and human rights. Most importantly, it shaped the legal framework for recognising new states underlining the principles of self-determination, human rights, and the rule of law.[413] The commission indicated that the internal borders of the Yugoslav Republics must be considered as international borders subject to changes only by mutual agreement. In addition to this, protection of human and minority rights was taken as the cardinal factor for state recognition. Its institutional function was to act as an arbitrator.

The Commission itself was not without critics in the international legal community.[414] the role and decisions of the Badinter Arbitration Committee, established by the European Community during the dissolution of Yugoslavia. The Commission, active from 1991 to 1993, was tasked with providing legal opinions on issues related to the breakup of Yugoslavia. Pomerance was critical about how the Commission frequently relied on the jurisprudence of the International Court of Justice to legitimise its advisory role. Pomerance found that the Commission sometimes extended legal principles beyond their original contexts, particularly in its interpretation of the principle of *uti possidetis*, which concerns the preservation of existing borders upon state succession.[415] One criticism levelled at the Commission's approach suggested that while it aimed to bring legal clarity to a

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[410] Maurizio Ragazzi, 'Opinion 1 – 3' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488.
[411] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 122.
[412] Carolyn Hoyle, *'The DPRU Honours Robert Badinter* (1928-2024)' (Faculty of Law, University of Oxford, 14 February 2024) <https://www.law.ox.ac.uk/content/news/dpru-honours-robert-badinter-1928-2024> accessed 22 September 2024.
[413] Jure Vidmar, 'Confining New International Borders in the Practice of Post-1990 State Creations' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 320 – 355, 322.
[414] Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 American Journal of International Law 569 – 607, 569.
[415] Michla Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998) 20 Michigan Journal of International Law 31 – 58, 36.

complex geopolitical situation, it also occasionally misapplied International Court of Justice precedents, leading to contentious outcomes.[416]

4.3 The Kosovo Case Study

Kosovo, situated in the Western Balkans, declared independence in 2008 but remains a contentious issue globally. Although recognised by the United States, most European Union members, and around half of the United Nations, others, including Serbia, Russia, and China, still consider it Serbian territory under United Nations oversight.[417] Historically, Kosovo was part of the Ottoman Empire, later incorporated into Yugoslavia. Within Yugoslavia, it became an autonomous province of Serbia.[418] After the dissolution of Yugoslavia in the early 1990s, Serbia revoked Kosovo's autonomy, sparking increasing tensions between the majority ethnic Albanian population and the Serbian government. Serbia's apartheid-like policies in the region marginalised Kosovo Albanians, excluding them from employment and political participation.[419] In response, Kosovo Albanians formed the Kosovo Liberation Army and began an armed insurgency in the late 1990s, to which Serbia responded with a harsh military campaign.[420] The international community intervened, resulting in the *Rambouillet Agreement* talks in early 1999.[421] The agreement, brokered by Western powers, aimed to end the conflict by proposing a political settlement that would grant Kosovo substantial autonomy within Serbia. However, the talks failed as Serbia rejected North Atlantic Treaty Organisation's proposed terms, particularly those allowing North Atlantic Treaty Organisation troops free movement within Yugoslavia.[422] With peace efforts stalled, North Atlantic Treaty Organisation initiated a bombing campaign against Serbia, bypassing United Nations Security Council approval, a move that remains controversial. After two and a half months, Serbian forces withdrew, and Kosovo

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[416] Michla Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998) 20 Michigan Journal of International Law 31 – 58, 50.
[417] Dino Kritsiotis, 'The Kosovo Crisis and Nato's Application of Armed Force Against The Federal Republic Of Yugoslavia' (2000) 49 International And Comparative Law Quarterly 330 – 359, 332
[418] James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (I.B.Tauris 2011) 52.
[419] Sabrina P Ramet, 'The Albanians of Kosovo: The Potential for Destabilization' (1996) 3 The Brown Journal of World Affairs 353 – 372, 358 – 359.
[420] Henry H Perritt, Kosovo Liberation Army: The Inside Story of an Insurgency (University of Illinois Press 2010) 9.
[421] Anon, *Rambouillet Agreement: Interim Agreement for Peace and Self-Government in Kosovo* (Peacemaker UN, 23 February 1999) <https://peacemaker.un.org/kosovo-rambouilletagreement99> accessed 22 September 2024.
[422] Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57 International and Comparative Law Quarterly 675 – 690, 677.

was placed under United Nations administration via Security Council Resolution 1244.[423] Despite the establishment of democratic self-rule, tensions persisted, leading to riots in 2004. Consequently, the UN initiated status talks. However, the negotiations broke down as Serbia offered autonomy while Kosovo Albanians demanded independence.[424]

On 17 February 2008, Kosovo declared independence, with the support of the United States and several European Union countries, citing the *Rambouillet* process and Serbia's historical human rights violations.[425] Serbia and its allies, such as Russia and China, rejected the declaration. Kosovo's unilateral declaration of independence ignited considerable controversy in international law due to its implications for state recognition and territorial integrity.[426] Serbia, opposing Kosovo's independence, brought the case to the International Court of Justice, which ruled in 2010 that Kosovo's declaration did not violate international law. However, the International Court of Justice refrained from addressing Kosovo's statehood or the legality of its secession, leaving these questions unresolved.[427]

4.4 International Court of Justice

Serbia's stance regarding Kosovo's independence was clear: although Kosovo was under international administration, it was still part of Serbia, as recognised by the United N Charter[428] and the 1975 Helsinki Final Act,[429] both of which emphasise territorial integrity. Serbia argued that the principle of self-determination did not apply to Kosovo since, under international law, it pertains mainly to colonised regions at the point of decolonisation, not secession by a minority within

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[423] UNSC Res 1244 (10 June 1999) UN Doc S RES/1244.
[424] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 91.
[425] James Ker-Lindsay, *Kosovo*: *The Path to Contested Statehood in the Balkans* (I.B.Tauris 2009) 3.
[426] Anon, European Council on Foreign Relations, 'Mapping China's Rise in the Western Balkans: Kosovo' (ECFR, 2024) <https://ecfr.eu/special/china-balkans/kosovo/> accessed 22 September 2024.
[427] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 22 September 2024.
[428] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[429] *Conference on Security and Co-operation in Europe Final Act* (Helsinki Final Act) (adopted and entered into force 1 August 1975).

an established state.[430] Belgrade maintained that Kosovo, despite its autonomous rights within Yugoslavia, had no right to secede.[431] Serbia proposed extensive autonomy but rejected outright independence. As the issue reached the United Nations, Russia and Western members of the Security Council diverged significantly. While the United States saw independence as inevitable, Russia supported a mutually agreeable solution.[432]

Serbia began a major campaign to prevent countries from recognising Kosovo. As a part of this campaign, the Serbian Government decided to obtain an advisory opinion on the act of secession from the International Court of Justice. To do this, it needed ationsa resolution from the United Nations General Assembly. On 8 October 2008, the General Assembly passed resolution 63/3 by 77 votes in favour to 6 against with 74 abstentions.[433] This put the following question to the Court: Is the unilateral declaration of independence by the provisional institutions of self-government of Kosovo in accordance with international law?[434] The court proceedings got underway in early 2009 with written submissions. This was then followed by oral statements. From the start, the case attracted unprecedented international interest. Indeed, it marked the first time in the history of the Court that all five permanent members of the Security Council took part in a case; it was the first time China had ever taken part in an International Court of Justice case.

On 22 July 2010, the Court presented its opinion. In essence, the ruling could be broken down into four parts. The first issue the Court decided was whether it had the jurisdiction to hear the case and whether it should do so. The unanimous view was that it did have jurisdiction. The Court noted that it had jurisdiction to provide the advisory opinion under Article 65 of its Statute, as there was no limitation preventing it from doing so based on Article 12 of the United Nations Charter.[435] It then decided by votes of 9 to 5 that it should comply with the request for the opinion, noting that no compelling reasons were present to refuse such an

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[430] Jure Vidmar, 'Confining New International Borders in the Practice of Post-1990 State Creations' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 320 – 355, 352.
[431] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Request for an Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 9 August 2024, paragraph 6.
[432] Milena Sterio, 'The Case of Kosovo: Self-Determination, Secession, and Statehood Under International Law' (2010) 104 American Society of International Law 361 – 365, 363.
[433] UNGA Res 63/3 (8 October 2008).
[434] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 128.
[435] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraph 28.

opinion.[436] Turning to the main issue, the Court decided by 10 votes to 4 that, except in cases where it had been specifically outlawed, for example by a United Nations Security Council resolution, general international law contained no applicable prohibition on declarations of independence.[437] Moreover, having considered the case's specific circumstances, including whether Security Council Resolution 1244 (1999) specifically prohibited the move, the Court decided that Kosovo's declaration of independence did not violate general international law.[438] However, the Court also made it clear that its opinion was solely focused on the Declaration of Independence itself. As noted in paragraphs 82 and 83 of the opinion, it did not address broader issues of self-determination or remedial secession.[439] Even more importantly, it had deliberately avoided taking a position on Kosovo's statehood. As the justices stated in paragraph 51, the question put to the Court did not include any inquiry into Kosovo's statehood.[440]

In Kosovo, the outcome was seen as a victory. The Court had clearly stated that the Declaration of Independence was not contrary to international law. As can be seen, this is certainly the case. However, many erroneously also went on to claim that the court had confirmed its statehood. Even now, many will argue that the International Court of Justice case proves that Kosovo is a state. As shown, this is not correct.[441] The Court emphatically avoided touching on this. Meanwhile, although many read the opinion as a defeat for Serbia, it argued that its position had been vindicated. Although the Court decided that the Declaration of Independence had not been contrary to international law, by not ruling explicitly in

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[436] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraphs 30 – 48.
[437] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraph 79.
[438] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraphs 84 and 119
[439] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraphs 82 – 83
[440] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraph 51.
[441] Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 1 – 44, 2.

favour of Kosovo's statehood, Serbia was free to continue its campaign against recognition.[442]

The opinion appears to have been designed to be both narrow and ambiguous.[443] While the justices would have understood that their primary responsibility was to address a point of law, they would also have been acutely aware of the political significance of any decision they reached. On this, they were caught between two very different groups within the international community. A ruling that the Declaration of Independence was illegal would have caused a huge shock. It would also have created major problems for those countries that had supported Kosovo. There was even the very real possibility that some countries, notably the United States, would have ignored the advisory opinion altogether, thus weakening the Court's standing.[444] Equally, had the court said that the declaration was legal and that Kosovo was now a state, it would have created a precedent for a general principle of unilateral secession in international politics. Under these circumstances, taking the very narrow route of looking at the Declaration of Independence as a mere statement, rather than trying to pronounce on the consequences of that statement, was the less controversial route.

This all raises the question of whether Serbia asked the right question. The real issue was not so much whether Kosovo had broken international law by declaring independence, but whether other countries had violated international law by recognising it.[445] Under the United Nations Charter, members are bound to recognise the territorial integrity of one another.[446] This point has been repeatedly asserted in United Nations resolutions, including the 1970 Friendly Relations Declaration[447] and other international agreements, such as the Helsinki Final Act.[448] This was what Serbia needed clarifying. Indeed, the Court even alluded to

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[442] Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 234.
[443] Alexander Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the Foam on the Tide of Time' (2011) 15 Max Planck Yearbook of United Nations Law 65 – 104, 67.
[444] Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 1 – 44, 21.
[445] James Ker-Lindsay, 'Explaining Serbia's Decision to Go to the ICJ' in Marko Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 22 – 25.
[446] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2(4).
[447] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (adopted 24 October 1970) UNGA Res 2625 (XXV).
[448] *Conference on Security and Co-operation in Europe Final Act* (Helsinki Final Act) (adopted and entered into force 1 August 1975).

this in Paragraph 80 of the opinion, when it stated that: 'the scope of the principle of territorial integrity is confined to the sphere of relations between states'.[449]

The answers to the questions put to the participants in the oral proceeding provide useful information about why several states refused to recognise Kosovo as a state. Serbia's response to questions regarding the international legality of Kosovo's unilateral declaration of independence addresses whether international law allows secession without a sovereign state's consent, concluding that secession outside a colonial context is highly exceptional and generally requires the parent state's consent.[450] The document also discusses the relevance of United Nations Security Council Resolution 1244 and the *Rambouillet Accords*,[451] emphasising that substantial autonomy for Kosovo was intended without implying a right to secession. Serbia argued that Kosovo's situation did not meet the exceptional requirements for legitimate secession under international law.[452] Spain similarly asserted that international law does not permit unilateral secession outside colonial contexts and emphasises the principles of sovereignty and territorial integrity. Spain felt that the situation in Kosovo had been adequately addressed by United Nations Security Council Resolution 1244[453] and the *Rambouillet Accords*, arguing that they supported internal self-government for Kosovo within Serbia but did not endorse secession. Spain concluded that international law and existing frameworks do not legitimise Kosovo's unilateral declaration of independence and stressed the need for mutual agreement in determining Kosovo's status.[454]

The opinions of the dissenting judges in the case provide cause for further reflection. Judge Bennouna critiqued the International Court of Justice for engaging in a political issue outside its judicial purview, misinterpreting the scope of the question posed by the General Assembly, and failing to apply relevant

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[449] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, paragraph 80.
[450] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 12 September 2024, para 82.
[451] UNGA S/1999/648 (23 February 1999).
[452] *Answer to the Questions Put to the Participants in the Oral Proceedings by Judges Koroma, Bennouna, and Cançado Trindade* (Request for an Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo) 2009 <https://www.icj-cij.org/case/141> accessed 1 August 2024.
[453] UNSC Res 1244 (10 June 1999) UN Doc S RES/1244.
[454] *Answers Given by the Kingdom of Spain to the Questions Posed by Judges Koroma, Bennouna and Cançado Trindade* (Request for Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo) 2009 <https://www.icj-cij.org/case/141> accessed 1 August 2024.

international law principles and specific legal frameworks established by United Nations Security Council Resolution 1244.[455] Bennouna argues that the Court should have declined to provide an opinion, focused strictly on the specific legal context of the question, and recognised the binding nature of the legal regime governing Kosovo, which prohibits unilateral declarations of independence.[456]

In his dissenting opinion on Kosovo's unilateral declaration of independence, Judge Koroma argued that the International Court of Justice should have declined to provide an advisory opinion, stating that it involved the Court in a political issue reserved for the Security Council, undermining its judicial integrity.[457]Judge Skotnikov similarly expressed concerns, highlighting that the International Court of Justice was under no obligation to give an opinion as it required interpreting a Security Council decision under Chapter VII of the UN Charter. He further criticised the majority's interpretation of United Nations Security Council Resolution 1244, stating that it aimed for a negotiated settlement, not unilateral secession, and that the *lex specialis* of Resolution 1244 should have been prioritised. Lastly, Skotnikov pointed out that general international law does not explicitly address declarations of independence but views them within the context of statehood and recognition[458] Judge Keith, in his separate opinion, suggested that the Security Council should have requested the advisory opinion, given its central role in the situation, and that the General Assembly lacked sufficient interest in the matter.[459]

4.5 Kosovo's Declaration and International State Recognition

The case of Kosovo's declaration of independence in 2008 has significantly influenced the international community's approach to state recognition. Despite Kosovo fulfilling the four requirements set out by the Convention its status remains disputed due to the lack of universal recognition. While Kosovo technically meets

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[455] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024.
[456] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024, Dissenting Opinion of Judge Bennouna paragraphs 1 – 3.
[457] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024, dissenting opinion of Abdul G. Koroma.
[458] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024, dissenting opinion of Leonid Skotnikov.
[459] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024, dissenting opinion of Judge Keith.

these legal conditions, the case reveals the limitations of the Montevideo Convention.[460] Fulfilling these requirements alone does not guarantee statehood without political recognition. The case of Kosovo illustrates that political will, particularly from powerful states and regional alliances, often outweighs legal definitions of statehood, as seen in the opposition from Serbia, Russia, and China, which have withheld recognition. This shows that state recognition is more than just compliance with legal principles—it is a highly politicised process.[461]

In addition to the Montevideo requirements, the Badinter Commission's added conditions during the Yugoslav wars introduced new considerations, including human rights protections, respect for minority rights, and adherence to international law.[462] Kosovo's claim to independence can be supported by these additional requirements, given its history of ethnic oppression and the human rights abuses experienced by its population.[463] However, these requirements have not led to universal recognition despite Kosovo's history.[464] The Badinter Commission's emphasis on effective governance and human rights complicates the situation, particularly given the ethnic tensions within Kosovo itself. Moreover, the Commission considered the dissolution of Yugoslavia rather than secession.[465]

Recent events, such as the violence in September 2023 between the government and Serb-majority northern areas, reflect the continuing challenges Kosovo faces in fulfilling the governance and minority rights conditions set by the Badinter Commission.[466] These ongoing tensions, highlighted by the imposition of Albanian mayors in northern Kosovo, further complicate the prospects of stability and full international recognition, despite Kosovo's efforts to meet international standards.[467]

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[460] Jure Vidmar, *Territorial Status in International Law (*Hart Publishing 2024) 21.
[461] Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 *Max Planck Yearbook of United Nations Law* 44.
[462] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples' (1992) 3 European Journal of International Law 178 - 185, 179.
[463] Maurizio Ragazzi, 'Opinion 1' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497, paragraph 2.
[464] Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 Vanderbilt Journal of Transnational Law 779 – 851, 832.
[465] Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations Law 1 – 44, 6.
[466] Nikola Mikovic, 'On Northern Kosovo, Escalation or Normalization of Relations?' (Diplomatic Courier, 17 October 2023) <https://www.diplomaticourier.com/posts/on-northern-kosovo-escalation-or-normalization-of-relations> accessed 25 September 2024.
[467] Bekim Bruka, 'Kosovo Referendum to Remove Albanian Mayors in Serb-Dominated Northern Areas Fails Due to Low Turnout' (JURIST, 22 April 2024) <https://www.jurist.org/news/2024/04/referendum-to-remove-albanian-mayors-in-northern-kosovo-fails-due-to-low-turnout/> accessed 25 September 2024.

4.6 Concluding Kosovo

The case of Kosovo is a useful examination of the international community's reluctance to set a broader precedent for unilateral declarations of independence. Many countries fear that recognising Kosovo could encourage similar separatist movements worldwide.[468] As a result, Kosovo's path to recognition has been met with political resistance, even in cases where it meets both the Montevideo and Badinter requirements.[469] This selective recognition highlights the political nature of statehood in international relations, where recognition depends as much on political interests as it does on legal definitions.

While Kosovo has entered into international agreements and has been recognised by a substantial number of countries, the lack of universal recognition, particularly from influential states such as Russia and China, prevents it from achieving full membership in the United Nations.[470] This reality reflects the broader challenges of state recognition in the international system, where legal frameworks like the Montevideo Convention are often subordinate to geopolitical dynamics.[471] One alternative framework for recognising entities like Kosovo could be based on functional international legal capacity, where an entity is acknowledged for its ability to engage in international agreements and fulfil responsibilities akin to a state, even if not universally recognised.[472] This approach, as demonstrated by Kosovo's agreements with the European Union, allows for practical engagement and cooperation while avoiding contentious political debates over formal recognition.[473] Such a functional approach allows entities to operate effectively within the international system based on their ability to fulfil certain roles and obligations, without necessarily needing universal state recognition. This offers a more pragmatic way of managing the complexities of international relations and sovereignty in the modern world, particularly in cases like Kosovo.[474]

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[468] James Ker-Lindsay and Mikulas Fabry (eds), *Secession and State Creation: What Everyone Needs to Know* (OUP 2022) 92.
[469] Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 *Vanderbilt Journal of Transnational Law* 779 – 851, 832.
[470] Edward Newman and Gezim Visoka, 'The Foreign Policy of State Recognition: Kosovo's Diplomatic Strategy to Join International Society (2018) 14 Foreign Policy Analysis 367 – 387, 369.
[471] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 73.
[472] Jure Vidmar, Lea Raible, and Sarah McGibbon (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 14.
[473] Stabilisation and Association Agreement between the European Union and Kosovo (adopted 27 October 2015, entered into force 1 April 2016).
[474] Senada Nezirović, Ana Živko, Belma Durmišević, and Amna Hodžić, 'Stabilisation and Association Agreement between the Western Balkan Countries and the European Union' (2022) 12 Journal of Geography, Politics and Society 36 – 50, 47.

4.7 Comparison with South Sudan

The lack of unanimous international recognition has left Kosovo in a state of partial legitimacy, impacting its ability to join international organisations like the United Nations and function effectively on the international platform. South Sudan, on the other hand, experienced widespread international recognition shortly after its independence referendum in 2011.[475] The Comprehensive Peace Agreement provided a clear legal and procedural framework for South Sudan's independence, culminating in a near-unanimous vote for secession.[476] This process received broad international support, including from Sudan, which accepted the outcome, thereby facilitating South Sudan's acceptance into the international community.[477] South Sudan was admitted to the United Nations and other international bodies, solidifying its status as a legitimate sovereign state.[478] The differing levels of international recognition between Kosovo and South Sudan highlight the complexities of statehood in international law.[479] Kosovo's partial recognition demonstrates the contentious nature of unilateral secession, whereas South Sudan's broad acceptance demonstrates the efficacy of internationally sanctioned and negotiated pathways to independence. The legitimacy of a new state is significantly influenced by the extent and nature of international recognition it receives.[480]

The legal frameworks governing the paths to independence for Kosovo and South Sudan are markedly different, reflecting their unique historical and political contexts. The absence of a mutually agreed legal framework for secession has complicated Kosovo's quest for full international recognition and statehood.[481] In contrast, the Comprehensive Peace Agreement signed in 2005 clearly delineated

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[475] Peter A Nyaba, *South Sudan: The State We Aspire To* (Centre for Advanced Study of African Society, 2011).
[476] Anon, 'Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army' (Peacemaker UN, 9 January 2005) https://peacemaker.un.org/node/1369 accessed 26 September 2024.
[477] Anon, 'South Sudan Becomes Independent' (GOV.UK, 9 July 2011) <https://www.gov.uk/government/news/south-sudan-becomes-independent> accessed 26 September 2024.
[478] Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (Oxford University Press 2012) 214-215.
[479] Jan Klabbers, International Law (Cambridge University Press 2020) 88.
[480] Peter Radan, 'Recognition of States in International Law' in Gëzim Visoka, John Doyle and Edward Newman (eds), Routledge Handbook of State Recognition (1st edn, Routledge 2021) 48-49.
[481] Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42(3) *Vanderbilt Journal of Transnational Law* 832.

South Sudan's path to independence.[482] The Comprehensive Peace Agreement ended the Second Sudanese Civil War and included provisions for a six-year interim period of autonomy for southern Sudan, culminating in an independence referendum.[483] This legal framework, agreed upon by the Sudanese government and the Sudan People's Liberation Movement/Army, provided a structured and internationally supported process for secession.[484] The overwhelmingly positive referendum results and adherence to the Comprehensive Peace Agreement signed in 2005 clearly delineated South Sudan's path to independence.[485] The Comprehensive Peace Agreement signed in 2005 clearly delineated South Sudan's path to independence.[486] The Comprehensive Peace Agreement terms facilitated South Sudan's peaceful transition to independence in July 2011. The structured legal approach in South Sudan, as opposed to the unilateral declaration by Kosovo, underscores the importance of negotiated agreements and international legal frameworks in achieving recognised statehood. The Comprehensive Peace Agreement's comprehensive nature ensured international support and legitimacy for South Sudan's independence. At the same time, Kosovo's lack of a similar framework has led to ongoing disputes about its legal status and recognition.[487]

External interventions played central roles in both Kosovo and South Sudan's paths to statehood, though with differing impacts and outcomes. In Kosovo, North Atlantic Treaty Organisation's military intervention in 1999 was a significant turning point. The intervention, aimed at stopping the humanitarian crisis and ethnic cleansing perpetrated by Serbian forces, resulted in the withdrawal of Serbian troops and the establishment of a United Nations administration under Resolution 1244.[488] While the North Atlantic Treaty Organisation intervention was fundamental in ending immediate conflict, it left unresolved questions regarding Kosovo's final status, leading to its unilateral declaration of independence in

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[482] *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army* (9 January 2005)
[483] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 68.
[484] Matthew LeRiche and Matthew Arnold, *South Sudan from Revolution to Independence* (Hurst & Co. London, 2012) 159 – 62.
[485] *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army* (9 January 2005).
[486] *Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army* (9 January 2005).
[487] Mollie Zapata, 'Sudan: Comprehensive Peace Agreement and South Sudan Independence' (Enough Project, 20 December 2011) <https://enoughproject.org/blog/sudan-comprehensive-peace-agreement-and-south-sudan-independence> accessed 26 September 2024.
[488] Nikoloz Samkharadze, *Russia's Recognition of the Independence of Abkhazia and South Ossetia* (ibidem-Verlag 2021) 78.

2008.[489] This action has been met with mixed international reactions, partly because it lacked a follow-up comprehensive agreement endorsed by the international community.

South Sudan's journey to independence was also significantly influenced by external actors, though through diplomatic and developmental means rather than military intervention. The Comprehensive Peace Agreement was brokered with significant input and support from the international community, including the Intergovernmental Authority on Development, the United States, and other international actors.[490] The presence of international observers and the commitment to a clear timeline for the referendum provided legitimacy and ensured compliance from both the Sudanese government and the Sudan People's Liberation Movement/Army.[491] The peaceful referendum and subsequent recognition of South Sudan's independence highlight the positive role that coordinated international support and intervention can play in resolving secessionist conflicts.

While both Kosovo and South Sudan benefited from international intervention, the nature and aftermath of these interventions were markedly different. Kosovo's path, characterised by military intervention and a lack of a subsequent comprehensive agreement, contrasts with South Sudan's negotiated and internationally supervised process. These differences reiterate the critical role that external interventions, whether military or diplomatic, play in shaping the outcomes of secessionist movements and the importance of international legal and political support in achieving recognised statehood. Although the legal process of state recognition went smoothly, South Sudan is on the brink of becoming a failed state.[492] Unlike Kosovo, South Sudan has been devasted by civil war, humanitarian disasters and significant breaches of human rights.[493]

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[489] Anon, 'Increased Tensions in Kosovo 24 Years After the NATO Intervention' (The European Institute for International Law and International Relations, 2024) <https://www.eiir.eu/international-relations/increased-tensions-in-kosovo-24-years-after-the-nato-intervention/> accessed 26 September 2024

[490] Scott P Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011) 60 International and Comparative Law Quarterly 423 – 458, 440.

[491] Andrew S Natsios, *Sudan, South Sudan, and Darfur: What Everyone Needs to Know* (OUP 2012) 201.

[492] Anon, 'UN Report Highlights Risk of More and Gross Human Rights Violations if South Sudan's Situation Deteriorates Further' (OHCHR, 29 March 2024) <https://www.ohchr.org/en/press-releases/2024/03/un-report-highlights-risk-more-and-gross-human-rights-violations-if-south> accessed 29 July 2024.

[493] Tirana Hassan, *'World Report 2024: South Sudan'* (Human Rights Watch, 2024) <https://www.hrw.org/world-report/2024/country-chapters/south-sudan> accessed 29 July 2024.

4.8 Transnistria, South Ossetia and Abkhazia

Vidmar's analysis of statehood in international law is highly relevant when applied to the cases of Transnistria, Abkhazia, and South Ossetia,[494] all of which are non-state territorial entities.[495] These regions function as *de facto* independent states but lack widespread international recognition.[496] Applying Vidmar's framework to these cases allows for a better understanding of their ambiguous legal statuses. Transnistria, a breakaway region in Moldova,[497] meets these requirements in practice, it has a stable population, controls a defined territory, and maintains a functioning government.[498]

However, as Vidmar notes, meeting these requirements alone does not automatically grant statehood under international law.[499] Although Transnistria operates as an independent state, its lack of international recognition and Moldova's legal claim over the territory prevent it from being considered a legitimate state under international law. Vidmar would likely categorise Transnistria as a non-recognised territorial entity that lacks the status of statehood due to the principle of territorial integrity and the absence of recognition by the international community.[500] Abkhazia and South Ossetia similarly meet the Montevideo criteria. Both have populations, defined territories, and functioning governments. However, these regions also face the challenge of territorial integrity. Georgia's sovereignty is internationally recognised, and these regions are regarded as part of Georgia.[501] Like Transnistria, Abkhazia and South Ossetia are considered de facto states, but they remain non-recognised entities under international law because their

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[494] Jure Vidmar, 'International Organizations and Non-State Territorial Entities' (2021) 45 Review of Central and East European Law 30 – 45, 30 – 31.
[495] Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 235.
[496] James Summers, 'Russia and Competing Spheres of Influence: The Case of Georgia, Abkhazia and South Ossetia' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2011).
[497] Natalya Belitser, 'The Transnistrian Conflict' in Anton Bebler (ed), Frozen Conflicts in Europe (Verlag Barbara Budrich 2013) 46 – 50.
[498] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[499] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 54.
[500] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 28.
[501] Sergey Markedonov, 'The Conflict in and over Abkhazia' in Anton Bebler (ed), *Frozen Conflicts in Europe* (Verlag Barbara Budrich 2013) 72 – 83.

secession conflicts with the principle of territorial integrity.[502] Russia's recognition of these entities does not change their ambiguous status, as recognition by one state or a handful of states does not suffice to grant full statehood in the international system.[503]

Vidmar emphasises that recognition is a key factor in statehood, and this is where these regions fall short. Recognition is both a declaratory and a constitutive act in international law, meaning that while a region may fulfil the Montevideo criteria, widespread recognition is necessary for it to fully participate as a sovereign entity in the international community.[504] For Transnistria, Abkhazia, and South Ossetia, this is a major obstacle. These entities have received recognition from a limited number of states (mainly Russia), but the overwhelming majority of the international community, including major international organisations like the United Nations and the European Union, do not recognise their independence.[505] Vidmar argues that such entities are better classified as non-state territorial entities because they have not achieved the necessary level of recognition and legitimacy to be fully considered states. Vidmar's analysis also emphasises the importance of territorial integrity in maintaining the boundaries of existing states.[506] In the case of these breakaway regions, their parent states (Moldova for Transnistria, and Georgia for Abkhazia and South Ossetia) continue to exist in law, even if their control over these territories is minimal or non-existent.[507] The international legal community, prioritising the principle of territorial integrity, supports the continued legal existence of Moldova and Georgia within their internationally recognised borders.[508] Thus, Transnistria, Abkhazia, and South Ossetia remain caught in a legal limbo. Despite operating as independent entities, they are not recognised as sovereign states because doing so would violate the territorial integrity of Moldova

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[502] Cauasia Knot and Alan Parastaev, *'South Ossetia: Rights and Freedoms in an Unrecognised State'* (Foreign Policy Centre, 26 September 2019) <https://fpc.org.uk/south-ossetia-rights-and-freedoms-in-an-unrecognised-state/> accessed 28 September 2024.
[503] Charlotte Hille, 'The Recognition of Abkhazia and South Ossetia: A New Era in International Law' in Françoise Companjen, László Marácz, and Lia Versteegh (eds), *Exploring the Caucasus in the 21st Century: Essays on Culture, History and Politics in a Dynamic Context* (CUP 2021).
[504] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 40.
[505] Gleider Hernández, *International Law* (2nd edn, OUP 2022) 133.
[506] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 40.
[507] Júlia Miklasová, 'Status of Transnistria Under International Law' in Kevin M Gray (ed), *Global Encyclopedia of Territorial Rights* (Springer 2022) 6.
[508] NATO Parliamentary Assembly Resolution 382 on Georgia's occupied territories of Abkhazia and South Ossetia (2010)**:** NATO Parliamentary Assembly, *The Situation in Georgia* (Res 382, 2010).

and Georgia.[509] Vidmar's framework highlights the tension between the practical realities of *de facto* independence and the legal norms of international recognition and territorial integrity. According to Vidmar's approach, Transnistria, Abkhazia, and South Ossetia are best understood as non-state territorial entities.[510] They function as *de facto* independent regions but fail to achieve statehood due to their lack of recognition and the principle of territorial integrity. While they meet the criteria for statehood under the Montevideo Convention, this alone is insufficient in the absence of international recognition, thus preventing them from achieving full legal status as states.[511]

4.9 Legal and Diplomatic Risks of Recognising Unrecognised Territories

United Nations member states that choose to recognise the independence of entities like Abkhazia, South Ossetia, or Transnistria could face significant legal and political ramifications under international law. Recognition of these territories is generally viewed as a violation of the principle of territorial integrity, as these regions are considered by the United Nations and most of the international community to be parts of Georgia and Moldova, respectively. The United Nations General Assembly has consistently reaffirmed the territorial integrity of Georgia, particularly in resolutions concerning the return of internally displaced persons to Abkhazia and South Ossetia.[512]

In addition, the European Court of Human Rights has held Russia responsible for human rights violations in these regions due to its effective control, further complicating the legal situation for states considering recognition of these territories.[513] Recognising these entities would likely place states in breach of their obligations under the United Nations Charter, which emphasises respect for sovereign borders and non-interference in the internal affairs of other states.[514]

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[509] NATO Parliamentary Assembly Resolution 382 on Georgia's occupied territories of Abkhazia and South Ossetia (2010) calls on NATO member states to support Georgia in its efforts to resolve the conflict through peaceful means, condemns the continued Russian military presence in these regions and urges member states not to recognise the independence of Abkhazia and South Ossetia. The resolution reflects NATO's ongoing commitment to Georgia's sovereignty and territorial integrity within its internationally recognised borders.

[510] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 27.

[511] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 28 – 29.

[512] UNGA Res 76/302 (7 June 2022).

[513] *Georgia v Russia* (II) (Application no 38263/08) (Judgment of 21 January 2021) <https://www.echr.coe.int/w/georgia-v-russia-ii-no-38263/08-just-satisfaction-art-41-> accessed 9 September 2024.

[514] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2(4).

4.14 Conclusion

Chapter four examined the complexities of state formation and international recognition that have characterised the post-Soviet space. With the examples of Transnistria, Abkhazia, South Ossetia, and Kosovo, the break-up of the Soviet Union and the Socialist Federal Republic of Yugoslavia provided a fertile area to examine the relevance of the convention within the context of contemporary international law, geopolitics and the agenda by powerful global players. The chapter, examined the geopolitical and legal frameworks that influenced the development of these territories, providing a doctrinal analysis of the role international law played and the approach of the international community towards self-determination and recognition. The chapter opens by framing the demise of the Soviet Union and the new state formations that resulted.[515]

It demonstrates the inconsistency with which international law, and specifically the principles of self-determination and recognition, were applied, fundamentally buttressed by power politics and geopolitics. The European Union and Russia's influences over these newly emerging claims to statehood are then critiqued with reference to the guidelines issued by the Badinter Commission[516] at a time when it was fundamental in shaping the pattern of recognition of new states in Eastern Europe. The chapter looked into why some states recognised Kosovo declaration of independence and others have not or subsequently rescinded their support. The chapter examined the *Kosovo Advisory Opinion* and used the comments made in questions from countries together with the reasons given by the dissenting judges.[517] The author probed Kosovo's unique status with respect to changing the United Nations administration to a managed independence and the role played by the International Court of Justice. Especially in the light of states that emerged from the former Eastern European socialist republics, the validity of the Montevideo Convention criteria for statehood is thrown into question.[518] The chapter looked at whether the international community based its recognition of these states on the convention or customary international law.

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[515] Mikulas Fabry, 'The Contemporary Practice of State Recognition: Kosovo, South Ossetia, Abkhazia, and Their Aftermath' (2012) 40 Nationalities Papers 661 – 676, 667.
[516] Maurizio Ragazzi, 'Opinion 1' (1992) Conference of Yugoslavia Arbitration Commission: Opinions of Questions Arising from the Dissolution of Yugoslavia' 1488, 1497.
[517] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024.
[518] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 64.

Alexander Wendt's constructivist approach is used to present state identities and interests as socially created.[519] As the chapter demonstrates, legitimacy and recognition are not traits of states like Kosovo, Transnistria, Abkhazia, and South Ossetia, but are rather in continuous movement through diplomatic interaction, regional conflicts, and international interventions. This way of thinking highlights how state formation and recognition are both relational and processual, and for the states under discussion, that means their legitimacy is based on interactions with other states and international bodies.

The chapter also explores the constitutive versus declaratory debate on recognition.[520] It argues that recognition should be viewed as an expression of *opinio juris* in the formation of a new state.[521] While some states are created through international treaties, most achieve statehood through customary international law, which consists of state practice and opinio juris. The entities discussed in this chapter highlight how the international community considers the notion of self-determination, emphasising that it applies to territories through recognition or treaty arrangements.[522]

The principle of self-determination is shown to be both a political and legal construct, influenced by historical contexts and power dynamics. The case of Kosovo serves as a focal point for the discussion on the interplay between self-determination, secession, and international recognition. Kosovo's declaration of independence in 2008, despite significant international backing, remains contested due to its unilateral nature and the lack of unanimous international recognition.[523] The International Court of Justice's advisory opinion in 2010, which stated that Kosovo's declaration of independence did not violate international law, is critically analysed.[524] The chapter points out that the International Court of Justice avoided addressing broader issues of statehood and recognition, focusing solely on the legality of the declaration itself. The influence of external actors, such as North Atlantic Treaty Organisation in Kosovo and Russia in Transnistria, Abkhazia, and South Ossetia, is examined to understand their roles in these regions' quests for

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[519] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 213.
[520] James Crawford, *The Creation of States in International* Law (2nd edn, OUP 2006) 34.
[521] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 97.
[522] Gleider Hernández, International Law (2nd edn, OUP 2022) 34.
[523] Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 Vanderbilt Journal of Transnational Law 779 – 851, 832.
[524] Alexander Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the Foam on the Tide of Time (2011) 15 Max Planck Yearbook of United Nations Law 65 – 104, 67.

recognition. North Atlantic Treaty Organisation's intervention in Kosovo, while stopping immediate conflict, left unresolved questions about the region's final status, leading to Kosovo's unilateral declaration of independence.[525] In contrast, Russia's support for Transnistria, Abkhazia, and South Ossetia has been essential for their ability to remain separate from their parent state and function economically. It could be argued that South Ossetia and Transnistria aspire to be incorporated into the Russian Federation.[526] Finally by emphasising the ongoing negotiation of state legitimacy and recognition in the international system. It highlights that statehood is not a static condition but a dynamic process shaped by historical experiences, regional dynamics, and the broader international community's responses. The application of post-positivist and constructivist perspectives allows for a nuanced understanding of how states like Kosovo and the post-Soviet contested entities navigate the complex terrain of international recognition and legitimacy. The role of international organisations, influential states, and regional politics in these processes is critically reviewed, underscoring the multifaceted nature of state formation in the modern world.[527]

[525] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 <141-20100722-ADV-01-06-EN.pdf (icj-cij.org)> accessed 6 February 2024, paragraph 28.
[526] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP USA 2023) 94 – 95.
[527] Pınar Akgü, 'Non-Western International Relations Theories' in Engin Sune and M. Kürşad Özekin (eds), *Critical Approaches to International Relations: Philosophical Foundations and Current Debates* (Brill 2021) 225.

CHAPTER FIVE THE KURDS

5.1 Introduction

The Kurds are one of the world's largest ethnic groups without a nation-state, residing as significant minorities in Turkey, Iraq, Syria, and Iran. The notion of nationhood has been integral to Kurdish identity, largely due to their position straddling the borders of these parent states, which have aggressively demarcated their territories to solidify control over Kurdish identities.[528] Historically, Kurdish activists and politicians have vacillated between seeking a unified Kurdistan and settling for regional autonomy. In Syria, the Autonomous Administration of North and East Syria, also known as Rojava, exemplifies this struggle, establishing a *de facto* autonomous region shaped by the dynamics of the Syrian Civil War and the broader Kurdish fight for autonomy.[529]

The Kurdish relationship with their official nationalities has been troubled, comparable to that of Palestinians. State violence over decades has crossed borders, effectively colonising the Kurdish people in their lands.[530] The international community has often remained ambivalent, aligning with regional powers for strategic alliances.[531] Kurdish political leader Abdullah Öcalan[532] argues that state structures infused with nationalism, sexism, and religious morality are the main levers of Kurdish oppression, hence rejecting the replication of such oppressive systems.[533] Despite these challenges, Kurdish enclaves in Iraq (Kurdistan Region of Iraq), Syria (Rojava), Turkey, and Iran demonstrate a long-established, continuous population with a distinct ethnic, cultural, and linguistic

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[528] Yvonne Chiu, 'Kurdistan: The Taiwan of the Middle East?' (2018) 55 Global Society 344 – 348, 346.
[529] David McDowall, *A Modern History of the Kurds* (Bloomsbury 2021) 521.
[530] Mehmet Gurses, *Anatomy of a Civil War: Sociopolitical Impacts of the Kurdish Conflict in Turkey* (University of Michigan Press 2018) 30.
[531] Will Todman, 'Settling Kurdish Self-Determination in Northeast Syria' (CSIS, 29 January 2019) <https://www.csis.org/analysis/settling-kurdish-self-determination-northeast-syria> accessed 9 August 2024.
[532] Abdullah Öcalan is a Kurdish political leader and one of the founding members of the Kurdistan Workers' Party, an organisation initially aimed at establishing an independent Kurdish state. Captured in 1999 and imprisoned in Turkey, Öcalan has since reoriented his ideology towards democratic confederalism, advocating for a decentralised, stateless society based on principles of direct democracy, gender equality, and ecological sustainability. His writings and theories have significantly influenced Kurdish movements, particularly in Rojava, where these ideas are being implemented.
[533] Abdullah Öcalan *The Political Thought of Abdullah Öcalan: Kurdistan, Women's Revolution and Democratic Confederalism* (Pluto Press 2017) 8.

identity.[534] The KRI, for instance, meets several criteria for statehood under the Montevideo Convention, including a defined territory, a government, and some capacity for international relations. Rojava, though lacking formal recognition, has also established a form of local government based on democratic confederalism.[535] In addition to these significant populations, smaller Kurdish communities exist in countries like Armenia, Azerbaijan, and Lebanon,[536] resulting from historical migrations and regional conflicts.[537] There is also a considerable Kurdish diaspora in Europe, with significant communities in Germany, Sweden, France, and the Netherlands. This diaspora, arising from political repression and conflict, has played a crucial role in maintaining Kurdish culture and advocating for their rights internationally.[538]

This chapter will explore the Kurdish struggle for nationhood and autonomy through historical and contemporary lenses. It will begin with an examination of the historical context post-World War I, detailing the division of Kurdish lands and the impact of the Treaties of Sèvres[539] and Lausanne.[540] The discussion will then move to the various Kurdish resistance movements and the state violence they have faced across Turkey, Iraq, Syria, and Iran. Chapter five will draw upon Michael Gunter's extensive research on Kurdish autonomy and geopolitical developments, particularly from The Kurdish Spring. His analysis of Kurdish state-building efforts amidst regional instability and his insights into the international responses will be crucial. Gunter's exploration of Kurdish nationalism and the interplay between autonomy movements and state politics will serve as a foundational framework for analysing the potential formation of a Kurdish state, especially considering the role of external powers.[541] The chapter will provide in-

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[534] Richard Falk, 'Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars' (1994) 15 Michigan Journal of International Law 591 – 603, 593 – 594.

[535] Arianne Shahvisi, 'Beyond Orientalism: Exploring the Distinctive Feminism of Democratic Confederalism in Rojava' (2018) 1 *Geopolitics* 1 – 26, 4

[536] Lokman I Meho, 'The Kurds in Lebanon: a social and historical overview' (2002) 16 *International Journal of Kurdish Studies* 59 – 82, 60.

[537] Anon, '*The Kurdish Diaspora'* (Institut Kurde de Paris, 2024) <https://www.institutkurde.org/en/kurdorama/> accessed 28 September 2024.

[538] Naif Bezwan and Janroj Yilmaz Keles, 'Displacement, Diaspora and Statelessness: Framing the Kurdish Case' in Tamar Mayer and Tri Tran (eds), *Displacement, Belonging, and Migrant Agency in the Face of Power* (Routledge 2022) 222.

[539] *Treaty of Peace Between the Allied and Associated Powers and Turkey* (Treaty of Sèvres) (signed 10 August 1920, not ratified).

[540] *Treaty of Peace with Turkey* (Treaty of Lausanne) (signed 24 July 1923, entered into force 6 August 1924).

[541] Michael M. Gunter is a leading scholar in Kurdish studies, particularly known for his extensive contributions to Middle Eastern politics, nationalism, and international law. His notable works include The Kurdish Spring: Geopolitical Changes and the Kurds and The Kurds Ascending, which

depth case studies of Kurdish autonomy in Iraq and Syria. The Kurdistan Regional Government in Iraq will be analysed for its semi-autonomous status, governance structures, and international relations, demonstrating how it aligns with the Montevideo Convention's statehood criteria.[542] The Autonomous Administration of North and East Syria, also known as Rojava's unique governance model and its challenges will also be discussed, highlighting the region's efforts towards autonomy amidst the Syrian Civil War.[543] The Chapter will consider Turkey's approach to the Kurdish issue which has been has been predominantly militaristic.[544] The Kurdish regions, especially the Kurdistan Region of Iraq and Rojava, partially meet these criteria.[545] However, international recognition and the geopolitical interests of surrounding states and the broader international community complicate their quest for statehood.[546]

The Convention was never intended to deal with situations such as the Kurdish patchwork of territories or the complex geopolitical landscape of the 21st century. Jure Vidmar's approach to statehood based on international customary law offers a more flexible understanding of territory and governance. Vidmar argues that the traditional criteria can be interpreted more leniently to accommodate entities that effectively govern and maintain stable populations, even if they lack full international recognition or face territorial disputes.[547] This perspective can be applied to Kurdish regions, acknowledging their *de facto* autonomy and governance structures despite the lack of formal statehood.

A Wendtian approach, based on Alexander Wendt's constructivist theory, would examine how Kurdish identity and statehood aspirations are socially constructed

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offer in-depth analyses of Kurdish autonomy and geopolitics. Gunter's extensive research is crucial for understanding the complex dynamics of the Kurdish struggle across multiple states.

[542] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.

[543] Anon, 'Beyond the Frontlines: The Building of the Democratic System in North and East Syria' (Rojava Information Centre, 19 December 2019) <https://rojavainformationcenter.org/2019/12/report-beyond-the-frontlines/> accessed 9 August 2024.

[544] Michael B Bishku, 'The Geopolitics of the Kurds since World War I: Between Iraq and Other Hard Places' in Michael M Gunter (ed), *Routledge Handbook on the Kurds* (Taylor & Francis 2018) 217.

[545] Anon, Country Policy and Information Note: Opposition to the Government in the Kurdistan Region of Iraq (KRI), Iraq (GOV.UK, July 2023) <https://www.gov.uk/government/publications/iraq-country-policy-and-information-notes/country-policy-and-information-note-opposition-to-the-government-in-the-kurdistan-region-of-iraq-kri-iraq-july-2023-accessible> accessed 28 September 2024.

[546] James Ker-Lindsay and Mikulas Fabry (eds), *Secession and State Creation: What Everyone Needs to Know* (OUP 2022) 100 – 101.

[547] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.

through interactions with other states and international actors.[548] This approach would explore how international norms, state interests, and identity politics shape the Kurdish struggle for recognition and autonomy. The chapter will conclude by summarising the findings and discussing the prospects for Kurdish autonomy and statehood. By analysing these themes, the chapter aims to provide a post-positivist perspective of the Kurdish quest for nationhood and the complex geopolitical realities that surround it.

5.2 Historical context

The original homeland of Kurds is in the mountainous region of Western Asia, which falls greatly within the territories of Southeastern Turkey, Northwestern Iran, Northern Iraq, and Northern Syria. Their history is long, dating back to a point where their ethnicity was related to the famous Muslim medieval ruler, Salahuddin Ayubi. But Chapter Six will focus on the historical discourse that followed the immediate aftermath of World War I, in an era that would cause determination over whether the Kurds and much of the Middle East, would ever be the same again.[549] In this period before and during World War One, the Kurds came together as an ethnic unit and, like other groups within the Ottoman Empire, declared their brand of nationalism. Now it was over, and the Allies faced the question of what to do with the Middle East. In response, the American President, Woodrow Wilson, wrote his famous 14 points as a blueprint for world peace,[550] one of which made a manifesto that the nationalities living under the Ottoman Empire should be able to self-determine their future. Kurds to this day quote Wilson's 14 points in their calls for Irredentism.[551] But Britain and France were already discussing the division of the area for their interest while the war was not yet over. That became the 1916 Sykes–Picot Agreement which attempted to divide the Middle East into spheres of interest.[552] Therefore, at the end of the war, the newly formed League of Nations laid out the mandate power system in which France was handed Syria and Lebanon, and Iraq, Palestine, and Trans-Jordan went to Britain. Imperial Russia had been promised strategic territory; however, with the Bolshevik revolution this

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[548] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218
[549] David McDowall, *A Modern History of the Kurds* (Bloomsbury Academic 2021) 131
[550] Anon, 'President Woodrow Wilson's 14 Points (1918)' (National Archives, 8 February 2022) https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points accessed 9 August 2024.
[551] Anon, 'President Woodrow Wilson's 14 Points (1918)' (National Archives, 8 February 2022) <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points> accessed 9 August 2024.
[552] The Sykes-Picot Agreement (entered into 26 April 1915 and entered into operation 1916).

evaporated as the Bolsheviks wanted no part in the colonialisation of the former Ottoman Empire, and in essence, blew the whistle on the Machiavellian plans of Sykes and Picot.[553]

5.2.1 Turkey

The French and the British would not allow valuable land to be lost from their mandates from the Ottoman lands of Syria and Iraq, so a state for the Kurds in southeast Anatolia was proposed in the Treaty of Sèvres, in 1920.[554] By 1923, Mustafa Kemal Atatürk had rallied the Turkish national movement, seized control over southeast Anatolia, and succeeded in the Turkish War of Independence.[555] That way, the Turks managed to push the Allies to return to the negotiating table and redraw Sèvres.

The new Treaty of Lausanne in 1923 made no mention of the Kurds in any of the four Middle Eastern states.[556] The borders of the brand new Republic of Turkey subsumed the intended state for the Kurds, leaving them stateless. Some relevant and critical points emerged from this period in time. Firstly, British administrators felt that a unified southern Kurdistan was impractical due to the region's underdevelopment, poor communications, and tribal dissension.[557] They considered creating a network of states reflecting tribal and economic divisions, to later consolidate into a Kurdish entity. Secondly, Kurdish society was suspicious of foreign administration, with tribal rivalries and landholders wary of land ownership scrutiny. There was a strong anti-British administration and a fear of what a Christian oversight might look like. Thirdly, their tribal leaders were divided, engaging in hostilities between themselves, and perplexed by potential hostilities with Armenia. The so-called deal breaker came down to whether to gamble on cutting themselves loose from the Muslim, Ottoman heartlands. Most chiefs did not wish to take this gamble.[558]

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[553] Sabir Mirzazada, 'The Russian Revolution, Effects on the Establishment of the Turkey Republic' (2020) 6 International Journal of History and Cultural Studies 14 – 20, 14.
[554] Michael D. Berdine, *Redrawing the Middle East: Sir Mark Sykes, Imperialism and the Sykes-Picot Agreement* (I.B. Tauris 2020) 79.
[555] David McDowall, *A Modern History of the Kurds* (Bloomsbury Academic 2021) 154.
[556] Anon, 'The Treaty of Lausanne' (The Lausanne Project, 2024) <https://thelausanneproject.com/history-lausanne-treaty/> accessed 9 August 2024.
[557] David McDowall, *A Modern History of the Kurds* (Bloomsbury Academic 2021) 154.
[558] David McDowall, *The Kurds* (Minority Rights Group 1996) 14.

By 1925, it was obvious to the Kurdish religious and tribal leaders that Mustafa Kemal Atatürk's secular way of reforms were stringent and did not include the notion of an autonomous Kurdish state. The Sheikh Said Rebellion was an uprising in 1925 led by Sheikh Said, a Kurdish religious leader, The rebellion was effectively quashed, Sheikh Said and other-ranking leaders were executed and the Turks exacted brutal and devastating suppression.[559] That marked one of the most important moments of the Kurdish resistance, which reluctantly resulted in further repression against Kurdish identity and culture in Turkey. In 1930, the Turkish interior minister Mahmud Esad Bozkurt announced:

> Only the Turkish nation has the privilege of demanding national rights in this country. There is no possibility that other ethnic groups' demands for such a right will be recognized. There is no need to hide the truth. The Turks are the sole owners and the sole nobles of this country. Those who are not of Turkish origin have only one right: to serve and be the slaves, without question, of the noble Turkish.[560]

The succession of Turkish leaders dominated the Kurd population operating a strict martial law, that ran until 1952. The leadership opted to social engineer the Kurdish population which they referred to as Turkification. The Kurdish language was banned, students in school who spoke Kurdish were punished, and sanctions were placed on businesses.[561] In a demonstration of perhaps the epitome of this viewpoint, President Evren of Turkey claimed that, in reality, Kurds did not even exist; he preferred the term ‘Mountain Turk’. The south-east of the country was not even open to foreigners until 1965, because the Turks feared international condemnation over the treatment of the Kurdish population.

The 1930s were characterised by rebellions and continued suppression. The younger Kurds adopted a Marxist approach. This created the birth of the Kurdistan Workers' Party, popularly abbreviated as Kurdish Workers Party.[562] The Kurdish Workers Party, led by Abdullah Öcalan, waged a rebellion against the government of Turkey in 1984. The Kurdish Workers Party conducted an irregular war carried

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[559] Robert Olson, 'The Kurdish Rebellions of Sheikh Said (1925), Mt. Ararat (1930), and Dersim (1937-8): Their Impact on the Development of the Turkish Air Force and on Kurdish and Turkish Nationalism' (2000) 40 Die Welt des Islams 67 – 94, 67.
[560] Robert Olson, 'The Kurdish Rebellions of Sheikh Said (1925), Mt. Ararat (1930), and Dersim (1937-8): Their Impact on the Development of the Turkish Air Force and on Kurdish and Turkish Nationalism' (2000) 40 Die Welt des Islams 67 – 94, 69.
[561] Delal Aydin and Rosa Burc, 'Kurdish Movement, Contemporary (Turkey)' in *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (2022) 2.
[562] Delal Aydin and Rosa Burc, 'Kurdish Movement, Contemporary (Turkey)' in *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (2022) 2.

on throughout the 1980s; the Kurds used knowledge of the terrain, along with tactics such as ambushes, sabotage, and hit-and-run attacks. Their approach also encompassed psychological operations and efforts to win the support of the local population. Activists adopted the celebration of Newroz: the Kurdish New Year celebration of spring and the vernal equinox. The mystique and lore surrounding this festival have a strong symbolic value for renewal and resistance.[563] has great cultural and political meaning in Kurdistan. and ran into the 1990s. The Kurdish Workers Party's objective has swung between demands for complete independence and the extension of limited forms of autonomy and representation for the Kurds.[564]

5.2.2 Iraq

The situation in Iraq was similar for the Kurdish population who experienced the aftermath of the Treaty of Lausanne in the same way as their counterparts in Turkey. The region saw several revolts by tribal and political leaders, the most notable early revolt was led by Sheikh Mahmud Barzanji in the 1920s, who declared himself the ruler of an independent Kurdish kingdom. His rebellion was eventually crushed by the British and Iraqi forces.[565] Despite brutal suppression, the Kurdish resistance movement was monopolised by Mustafa Barzani, with revolts spanning five decades. The Barzani family plays a predominant role in Kurdish politics today, since 2005, his son and his grandson officially lead the Kurdistan Regional Government.[566]

Throughout the later part of the 20th century, the Iraqi government and Iraqi Kurds have vacillated between resolving their differences facilitating Kurdish autonomy and engaging in hostilities. There was a series of Iraqi-Kurdish Wars in the later part of the 20th Century which resulted in Kurdish defeat and displacement. During the Iran-Iraq War, Kurdish parties aligned with Iran, leading to Saddam Hussein's genocidal Al-Anfal campaign in 1986,[567] which caused significant Kurdish

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[563] Delal Aydin, *'Mobilizing the Kurds in Turkey: Newroz as a Myth'* (Middle East Technical University 2005) 2.
[564] Jooma Carikci, *Kurdistan: Achievable Reality or Political Mirage* (Afro-Middle East Centre 2013) 24.
[565] Jooma Carikci, *Kurdistan: Achievable Reality or Political Mirage* (Afro-Middle East Centre 2013) 39.
[566] Jooma Carikci, *Kurdistan: Achievable Reality or Political Mirage* (Afro-Middle East Centre 2013) 40.
[567] Anon, 'Anfal Campaign 36th Anniversary: FCDO Minister's Statement' (GOV.UK, 14 April 2024) https://www.gov.uk/government/news/statement-on-36th-anniversary-of-the-anfal-campaign accessed 9 August 2024.

casualties. Post-Gulf War uprisings and the establishment of no-fly zones by the US, UK, and France allowed Kurds to gain *de facto* autonomy. The mid-1990s saw a civil war between the Kurdistan Democratic Party and the Patriotic Union of Kurdistan, ending in 1997.[568] After the first Gulf War in 1991, the United States and United Kingdom operated a no-fly zone to prevent Iraqi forces from perpetuating attacks on the Kurdish population. This allowed Kurds to have a form of regime governing independence bringing out today's Kurdistan Regional Government.[569]

5.2.3 Iran

Following the Treaty of Lausanne in 1923,[570] the Kurdish population in Iran faced a complex and challenging period marked by heightened repression and marginalisation.[571] In Iran, the rise of the Pahlavi dynasty in 1925 marked a significant turning point for the Kurdish population. Reza Shah Pahlavi's regime embarked on a nation-building project to centralise power and promote a homogenised Persian identity.[572] This policy of enforced assimilation included measures to suppress minority cultures and languages, directly impacting the Kurdish people. Kurdish cultural expressions, including language, dress, and festivals, were systematically stifled. Kurdish names were changed to Persian ones, and the use of the Kurdish language in public and educational settings was prohibited.[573]

The Iranian government's repressive policies extended beyond cultural suppression. Political activities and movements advocating for Kurdish autonomy or rights were suppressed.[574] The Kurdish regions of Iran, particularly in areas like Mahabad, experienced military interventions and harsh reprisals against perceived

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[568] Beston Husen Arif and Tunku Mohar Mokhtar, 'The Kurdish Civil War (1994–1998) and its Consequences for the Governing System in the Kurdistan Region of Iraq' (2022) 53 Asian Affairs 671 – 689, 671.
[569] Anon, 'Thirteenth Report: The No-Fly Zones' (Parliament, 2 August 2000) https://publications.parliament.uk/pa/cm199900/cmselect/cmdfence/453/45306.htm accessed 28 September 2024.
[570] Treaty of Lausanne (adopted 24 July 1923, entered into force 6 August 1924).
[571] Mohammad Sabah Kareem, 'Winston Churchill's Middle Eastern Strategy and the Idea of a Kurdish Buffer State, 1921–1922' (2022) 44 The International History Review 1 – 19, 12.
[572] Robert Steele, 'Crowning the "Sun of the Aryans": Mohammad Reza Shah's Coronation and Monarchical Spectacle in Pahlavi Iran' (2021) 53 International Journal of Middle East Studies 175 – 193, 176.
[573] Anon, 'Iran: Human Rights Abuses Against the Kurdish Minority' (Amnesty International, 2008) 7 <https://www.amnesty.org> accessed 28 September 2024.
[574] Michael M Gunter, *Historical Dictionary of the Kurds* (Scarecrow Press 2010) 22.

dissent.[575] The Kurdish resistance, while persistent, was often fragmented and lacked the resources to mount a sustained challenge against the well-equipped Iranian state. The repression of the Kurds in Iran was not solely a product of internal policies but was also influenced by regional dynamics.[576] The geopolitical context of the Middle East, characterised by the decolonisation of British and French colonial interests and emerging nation-states, further complicated the Kurdish struggle. Neighbouring countries with significant Kurdish populations, such as Turkey and Iraq, also pursued policies of assimilation and suppression, which often led to cross-border solidarity among Kurdish groups but also heightened the challenges they faced.[577] Throughout the mid-20th century, the Kurdish population in Iran continued to resist and seek greater autonomy. Notable uprisings, such as the establishment of the short-lived Republic of Mahabad in 1946,[578] demonstrated the enduring aspiration for Kurdish self-rule. However, these efforts were quashed by Iranian military force, and leaders of the Kurdish movement faced imprisonment or execution.[579]

5.2.4 Syria

From the establishment of the French Mandate in Syria until the outbreak of the Syrian civil war in 2011, the relationship between the Syrian state and the Kurdish population was characterised by the now familiar case of repression and resistance.[580] The Kurds' desire for autonomy clashed with the Syrian state's efforts to maintain national unity and suppress ethnic separatism. During the French Mandate period (1920-1946), the Kurds in Syria experienced a degree of cultural freedom. The French colonial administration under the Terrier Plan, in its attempt to control the diverse population of Syria, allowed some ethnic and cultural expression among minority groups, including the Kurds.[581] This period saw the establishment of Kurdish cultural and educational institutions, albeit within the constraints imposed by the colonial rulers. However, the underlying tensions

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[575] Hashem Ahmadzadeh and Gareth Stansfield, 'The Political, Cultural, and Military Re-Awakening of the Kurdish Nationalist Movement in Iran' (2010) 64 Middle East Journal 11 – 27, 15 – 16.
[576] Kerim Yildiz and Tanyel B Taysi, 'Iranian Kurds and Regional Geopolitics' in The Kurds in Iran: The Past, Present and Future (Pluto Press 2007) 69.
[577] Kerim Yildiz and Tanyel B Taysi, 'Kurdish Cross-Border Cooperation' in *The Kurds in Iran: The Past, Present and Future* (Pluto Press 2007) 61.
[578] David McDowall, *A Modern History of the Kurds* (3rd edn, IB Tauris 2004) 264 – 265.
[579] Abbas Vali, *The Forgotten Years of Kurdish Nationalism in Iran* (1st edn, Palgrave Macmillan 2019) 1.
[580] Jordi Tejel, 'The Evolution of Kurdish Struggle in Syria: Between Pan-Kurdism and Syrianization, 1920-2016' in Michael M Gunter (ed), *Routledge Handbook on the Kurds* (Routledge 2018) 366.
[581] Jordi Tejel Gorgas, 'The Terrier Plan and the Emergence of a Kurdish Policy under the French Mandate in Syria, 1926–1936' (2007) 21 International Journal of Kurdish Studies 93 – 108, 93.

between the Kurds' aspirations for greater autonomy and the centralised control of the mandate authorities were evident. The Kurds sought to assert their distinct identity and rights, while the French aimed to maintain order and prevent any separatist movements that could destabilise their rule.[582] Following Syria's independence in 1946, the newly established Syrian state embarked on a nation-building project that emphasised Arab nationalism. The Kurds, as a non-Arab minority, faced increasing marginalisation. Successive Syrian governments implemented policies aimed at Arabising the Kurdish regions. Kurdish language and cultural practices were suppressed, and Kurds were often denied citizenship, rendering them stateless and without basic rights. The 1962 census in the al-Hasakah governorate, a predominantly Kurdish region, resulted in the denationalisation of a significant portion of the Kurdish population.[583] This policy effectively stripped many Kurds of their citizenship, leaving them as "foreigners" in their homeland. The lack of citizenship deprived Kurds of access to education, employment, and property rights, exacerbating their socio-economic marginalisation. The rise of the Ba'ath Party to power in 1963 marked a period of intensified repression for the Kurds in Syria.[584] The Ba'athist regime, motivated by an ideology of Arab socialism and nationalism, viewed Kurdish identity and aspirations with suspicion and hostility. The government implemented a range of measures to suppress Kurdish political and cultural expression. One of the most significant policies was the Arab Belt project initiated in the 1970s. This project aimed to alter the demographic composition of the Kurdish regions by resettling Arab families in Kurdish areas, particularly along the Syrian-Turkish border.[585] The project sought to create an "Arab Belt" to prevent Kurdish territorial continuity and curb Kurdish nationalism. Kurdish political organisations and activities were banned, and Kurdish activists faced imprisonment, torture, and execution.[586] The government sought to erase Kurdish identity through policies of forced assimilation, including banning the Kurdish language in public and educational

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[582] Jordi Tejel Gorgas, 'The Terrier Plan and the Emergence of a Kurdish Policy under the French Mandate in Syria, 1926–1936' (2007) 21 International Journal of Kurdish Studies 93 – 108, 95.
[583] Harriet Allsopp, *The Kurds of Syria: Political Parties and Identity in the Middle East* (Bloomsbury Publishing 2016) 36.
[584] Harriet Allsopp and Wladimir van Wilgenburg, *The Kurds of Northern Syria: Governance, Diversity and Conflicts* (Bloomsbury Academic 2019) 16.
[585] Jordi Tejel, *Syria's Kurds: History, Politics and Society* (1st edn, Routledge 2008) 61.
[586] Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation Without State* (Western Kurdistan Association Publications 2005) 123.

institutions. Kurdish villages were renamed with Arabic names, and Kurdish history and culture were systematically excluded from the national narrative.[587]

5.2.5 Smaller Communities

In addition to the countries with significant Kurdish populations such as Turkey, Iraq, Iran, and Syria, there are smaller Kurdish communities in several other countries. These include Armenia, Azerbaijan, and Lebanon, where historical migrations and regional conflicts have led to the establishment of Kurdish populations over the years.[588] The presence of Kurds in these countries is often a result of the complex historical and political dynamics in the Middle East, which have forced many Kurds to seek refuge and new opportunities in neighbouring regions. Kurdish migration to Armenia began during the 16th and 17th centuries due to Ottoman and Persian conflicts. In the 19th century, Russian expansion into the Caucasus attracted Kurds seeking stability. The Soviet era saw both the promotion and repression of Kurdish culture.[589] Similar factors influenced Kurdish migration to Azerbaijan. Ottoman-Safavid conflicts displaced Kurds, who later migrated during Russian expansion in the 19th century. The Soviet period also shaped Kurdish communities, balancing cultural promotion with periods of repression.[590] Kurdish migration to Lebanon is more recent, primarily occurring in the 20th century. The collapse of the Ottoman Empire and subsequent conflicts drove Kurds to Lebanon. The Syrian civil war in 2011 led to a significant influx of Kurdish refugees. Lebanon's diverse and open society provided opportunities for Kurds to settle, particularly in urban areas like Beirut.[591] Despite challenges, Kurdish communities in these regions have preserved their cultural identity and contributed to the socio-political fabric of their host countries.

5.3 Assessing Potential for Statehood

The prospect of establishing a unified Kurdish state, Kurdistan, presents a complex and contested issue.[592] From a legal perspective, the question of Kurdish

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[587] Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation Without State* (Western Kurdistan Association Publications 2005) 25.
[588] Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation Without State* (Western Kurdistan Association Publications 2005) 17.
[589] George A Bournoutian, *A Concise History of the Armenian People: From Ancient Times to the Present* (Mazda Publishers 2006).
[590] Audrey L Altstadt, *The Azerbaijani Turks: Power and Identity under Russian Rule* (Hoover Press 1992).
[591] Lindsey I Meho and Najib G Kawtharani, 'The Kurdish Question in Lebanon: Socioeconomic and Political Dimensions' (2004) 58 The Middle East Journal 40 – 62, 40.
[592] James Crawford, *The Creation of States in International Law* (Clarendon Press 2006) 404.

statehood must be examined through the lens of international law, particularly focusing on the Convention's requirements for statehood, customary international law, the right to self-determination, and the legality of secession. Additionally, the geopolitical dynamics of the region, internal divisions within Kurdish factions, and the broader position of the international community heavily influence the likelihood of achieving Kurdish independence.[593] The following section of the Chapter explores these elements, drawing upon academic sources and international legal principles to assess the potential for Kurdish statehood. The Kurdish population, which spans four primary countries Turkey, Iraq, and Syria constitutes one of the world's largest stateless nations.[594] The Kurds have long pursued greater autonomy and, in some instances, complete independence. However, the political realities in these countries and the international community's reluctance to support Kurdish independence present significant barriers.[595]

According to the Convention, a state must fulfil four requirements: a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.[596] The Kurdish regions, particularly Iraq and Syria, arguably meet several criteria. The Kurdistan Regional Government in Iraq operates as a semi-autonomous entity with its government, defined territory, and international relations, although it lacks formal recognition as a sovereign state.[597] The Kurdish-led Autonomous Administration of North and East Syria has established a de facto government in Syria. However, its future is precarious due to opposition from both the Assad regime and neighbouring Turkey.[598]

The key obstacle to Kurdish independence lies in the unwillingness of the parent states, Turkey, Iraq, Iran, and Syria, to permit secession. Under international law, the principle of territorial integrity is often prioritised over the right to self-determination, particularly regarding secessionist movements.[599] This is evident in

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[593] Hagit Ariav, *'The Time of the Kurds'* (Council on Foreign Relations, 10 October 2019) <https://www.cfr.org/article/time-kurds> accessed 29 September 2024.
[594] James Ker-Lindsay and Mikulas Fabry (eds), *Secession and State Creation: What Everyone Needs to Know* (OUP 2022) 92.
[595] United Nations Iraq, 'Statement on the Federal Supreme Court Decision Concerning the Kurdistan Referendum' (United Nations Iraq, 6 November 2017) <https://iraq.un.org/en/210626-statement-federal-supreme-court-decision-concerning-kurdistan-referendum> accessed 29 September 2024.
[596] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[597] *Pearl Petroleum Co Ltd v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361.
[598] William Christou, 'The SDF seek international recognition to consolidate rule' (The New Arab, 20 July 2021) <https://www.newarab.com/analysis/sdf-seek-international-recognition-consolidate-rule> accessed 29 September 2024.
[599] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 131.

the reaction of the Iraqi government to the Kurdish Regional Government's 2017 independence referendum, which was overwhelmingly rejected by Baghdad and condemned by neighbouring states like Turkey and Iran.[600] These countries fear that Kurdish independence in one region could inspire similar movements within their borders, potentially leading to a fragmentation of the region.[601] Secession is further complicated by the fact that none of the parent states recognise the Kurds' right to establish an independent state, and they view Kurdish separatism as a threat to national unity.[602] The International Court of Justice's advisory opinion on Kosovo's unilateral declaration of independence may offer some guidance, but it emphasised the importance of state consent and did not establish a clear legal pathway for unilateral secession under international law.[603]

The issue of recognition is essential in this context. Even if the Kurds were to declare independence, they would still need recognition from the international community to solidify their status as a sovereign state. Recognition by other states is largely a political process, influenced by strategic interests, geopolitical alliances, and the existing legal framework.[604] The United Nations has historically emphasised the principle of territorial integrity, as reflected in resolutions such as United Nations General Assembly Resolution 2625, which outlines the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.[605] This resolution reinforces the idea that self-determination should not disrupt the territorial integrity of existing states unless the state fails to represent the whole of its people.[606] In the case of the Kurds, their longstanding marginalisation might provide some grounds for arguing a failure of representation, particularly in countries like Turkey and Iran, where Kurdish rights have been systematically repressed. However, without broad international support and recognition, it is unlikely that a Kurdish state would be viable in the long term.[607]

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[600] James Ker-Lindsay and Mikulas Fabry (eds), *Secession and State Creation: What Everyone Needs to Know* (OUP 2022) 101.
[601] Michael M Gunter, *The Kurds: A Divided Nation in Search of a State* (Markus Wiener Publishers 2019) xv.
[602] Muhammad Khairil Zaki Al-Asyura and M. Hamdan Basyar, 'Turkey and Kurdistan Regional Government (KRG) Relations: A Soft Power Approach towards Kurdish Question' (2022) 11 Andalas Journal of International Studies 86 <https://doi.org/10.25077/ajis.11.1.78-93.2022> accessed 29 September 2024.
[603] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (*Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 6 February 2024.
[604] Martin Dixon and Robert McCorquodale and Sarah Williams, *Cases & Materials on International Law* (6th edn, OUP 2016)
[605] UNGA Res 2625 (XXV) (24 October 1970).
[606] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 4.
[607] Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation Without State* (Western Kurdistan Association Publications 2005) 240.

Natural resources, particularly oil, play a significant role in the Kurdish quest for autonomy. The Kurdish regions in Iraq and Syria are rich in oil reserves, and control over these resources has provided the Kurdish Regional Government with a degree of economic independence. However, the management of these resources has also been a point of contention between the KRG and Baghdad, with disputes over revenue-sharing and control of oil exports.[608] In Syria, the Kurdish regions face similar challenges, compounded by the ongoing conflict and lack of international recognition, which hinders their ability to capitalise on these resources fully.[609] The economic viability of a potential Kurdish state would depend heavily on its ability to manage and export natural resources, particularly in the face of opposition from neighbouring countries like Turkey, which controls key export routes. This highlights the broader geopolitical challenge: even if the Kurds were able to declare independence, the economic sustainability of a Kurdish state would be difficult to achieve without the cooperation of neighbouring states and the international community.[610] The internal divisions within Kurdish factions further complicate the prospect of a unified Kurdistan.[611] The Kurdish political landscape is fragmented, with various factions often competing for power and influence. In Iraq, the rivalry between the Kurdistan Democratic Party and the Patriotic Union of Kurdistan has led to significant internal conflict, weakening the Kurdish position in negotiations with Baghdad and other international actors.[612] In Syria, the Democratic Union Party faces opposition from other Kurdish factions, many of which are aligned with the Kurdish Democratic Party. These divisions undermine the possibility of creating a unified Kurdish state, as internal conflicts could prevent the formation of a cohesive government capable of representing the diverse Kurdish population across multiple countries.[613]

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[608] Wladimir van Wilgenburg, *'Iraqi Federal Court Ruling Deals Another Blow to Kurdistan Regional Government's Oil Autonomy'* (S&P Global Commodity Insights, 22 February 2024) <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/022224-iraqi-federal-court-ruling-deals-another-blow-to-kurdistan-regional-governments-oil-autonomy> accessed 29 September 2024.

[609] Anon, *'Turkey Destroying NE Syria Oil, Power Facilities: Kurds'* (France 24, 11 October 2023) <https://www.france24.com/en/live-news/20231011-turkey-destroying-ne-syria-oil-power-facilities-kurds> accessed 29 September 2024.

[610] Joshua Krasna, *Autonomy Curbed: Kurdish Oil Exports Hit Snags from Turkey and Baghdad* (FPRI, 25 July 2023) <https://www.fpri.org/article/2023/07/autonomy-curbed-kurdish-oil-exports-hit-snags-from-turkey-and-baghdad/> accessed 29 September 2024.

[611] *The Iraqi Kurds' Destructive Infighting: Causes and Consequences* (LSE Middle East Centre Blog, 15 April 2020) https://blogs.lse.ac.uk/mec/2020/04/15/the-iraqi-kurds-destructive-infighting-causes-and-consequences/ accessed 29 September 2024.

[612] Michael M Gunter, 'Thinking Theoretically about the Kurds' (2021) 30 Middle East Critique 1 – 20, 9.

[613] Michael M Gunter, 'Thinking Theoretically about the Kurds' (2021) 30 Middle East Critique 1 – 20, 12.

Geopolitical considerations and strategic alliances shape the international community's position on Kurdish independence.[614] While Kurdish forces have received support from Western powers, particularly in the fight against ISIS, this support has not translated into backing for Kurdish independence.[615] The United States and European countries have generally prioritised the territorial integrity of Iraq and Syria, viewing the fragmentation of these states as destabilising for the broader region.[616] Regional powers like Turkey and Iran strongly oppose Kurdish independence, and their geopolitical influence plays a significant role in shaping the international community's stance.[617]

According to Crawford assessments of self-determination, the international community is often reluctant to support secessionist movements unless there is a clear violation of human rights or an overwhelming consensus that the parent state has failed its population.[618] In the case of the Kurds, while there have been significant human rights violations, particularly in Turkey and Iran, the geopolitical risks associated with Kurdish independence have deterred the international community from offering full support.[619]

5.4 United Nations and International Opinion

The United Nations' involvement with the Kurds has been limited due to geopolitical concerns and the interests of member states like Turkey, Iran, Iraq, and Syria. Significant United Nations actions include condemning Iraq's use of chemical weapons against Kurds and recognising the repression of Kurds post-Gulf War.[620] Despite occasional supportive measures, such as the oil-for-food program,[621] the UN generally maintains the territorial integrity of existing states, complicating Kurdish aspirations for independence.

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[614] David McDowall, *A Modern History of the Kurds* (4th edn, I.B. Tauris 2021) 577.
[615] Hagit Ariav, *'The Time of the Kurds'* (Council on Foreign Relations, 10 October 2019) <https://www.cfr.org/article/time-kurds> accessed 29 September 2024
[616] Jonathan Honigman, 'Never Mind Betrayal: America's Indifference to the Kurds is a Strategic Blunder' (2022) 15 Journal of Strategic Security 54 – 74, 56.
[617] Fahrettin Sumer and Jay Joseph, 'The Paradox of the Iraqi Kurdish Referendum on Independence: Contradictions and Hopes for Economic Prosperity' (2018) 45 British Journal of Middle Eastern Studies 574 – 588, 587.
[618] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 109.
[619] Yaniv Voller, *Second-Generation Liberation Wars: Rethinking Colonialism in Iraqi Kurdistan and Southern Sudan* (CUP 2022) 208.
[620] UNSC Resolution 688 (5 April 1991).
[621] UNSC Resolution 986 (14 April 1995).

The Kurdish Workers Party is widely recognised as a terrorist organisation by numerous countries, including the European Union, the United States, Canada, and Australia.[622] Since its foundation in 1984, the Kurdish Workers Party has been held responsible for the deaths of over 40,000 people, primarily through its attacks on Turkish military, police, and civilian targets.[623] The group's ideology combines revolutionary Marxism-Leninism with separatist ethno-nationalism, aiming to establish an autonomous Kurdish region while opposing integration efforts within Turkey. Kurdish Workers Party members have been involved in various criminal activities, including extortion, arms smuggling, and drug trafficking, with significant funding from illicit activities in Europe.[624] The group's operations extend beyond Turkey, with training camps in northern Iraq and affiliations with Kurdish groups in Syria and Iran. The Kurdish Workers Party's Syrian offshoots, the Patriotic Union of Kurdistan, share leadership and strategic frameworks with the Kurdish Workers Party, further complicating the regional security landscape. The Kurdish Workers Party's violent tactics and designation as a terrorist organisation significantly undermine legitimate Kurdish aspirations for autonomy.[625] The group's association with terrorism provides a pretext for countries like Turkey to crack down on broader Kurdish political movements, conflating peaceful advocacy with militancy. This association complicates international support for Kurdish autonomy, as states are wary of endorsing movements linked to a recognised terrorist organisation.[626]

The Kurdish Workers Party's actions have led to significant military and political repercussions in the region. Turkish military operations against Kurdish Workers Party bases in northern Iraq and Syria disrupt not only Kurdish Workers Party activities but also affect Kurdish civilian populations and other Kurdish political entities striving for legitimate self-governance. The group's criminal activities and international financing issues further tarnish the image of Kurdish political

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[622] Anon, 'Kurdistan Workers' Party (PKK)' (National Counterterrorism Center, 2022) https://www.dni.gov/nctc/ftos/pkk_fto.html accessed 13 August 2024.
[623] Anon, 'Report of a Home Office Fact-Finding Mission: Turkey: Kurds, the HDP and the PKK' (UK Home Office, October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843123/TURKEY_FFM_REPORT_2019.odt> accessed 13 August 2024.
[624] Anon, 'European Union Terrorism Situation and Trend Report 2023' (European Union Agency for Law Enforcement Cooperation, 2023) <https://www.europol.europa.eu/cms/sites/default/files/documents/European%20Union%20Terrorism%20Situation%20and%20Trend%20report%202023.pdf> accessed 13 August 2024.
[625] Daniel DeFraia, 'The PKK: Who are they and what do they want?' *GlobalPost* (Agence France-Presse, 30 July 2016) <https://theworld.org/stories/2016/07/31/pkk-who-are-they-and-what-do-they-want> accessed 13 August 2024.
[626] Anon, *'Deadly Attack on Civilians at Tourist Site in Iraq Shows "Shocking" Disregard for International Humanitarian Law, Senior Official Tells Security Council'* (United Nations, 26 July 2022) <https://press.un.org/en/2022/sc14982.doc.htm> accessed 13 August 2024.

movements, making it challenging for them to gain international sympathy and support. While the Kurdish Workers Party claims to fight for Kurdish rights and autonomy, its terrorist designation and violent methods hinder broader Kurdish efforts to achieve legitimate political and cultural independence.[627] The international community's concern over terrorism often overshadows the legitimate grievances and aspirations of the Kurdish people.

No direct International Court of Justice rulings have addressed Kurdish independence. However, International Court of Justice decisions on self-determination, such as the advisory opinion on Kosovo's declaration of independence[628], indirectly impacting the Kurdish case. These decisions highlight that while the right to self-determination is recognised, it does not necessarily entail a right to unilateral secession, especially in non-colonial contexts. The international community did not take a similar approach to the Kurdish Regional Government's aspirations as Kosovo.

Moreover, the United States went to great lengths to discourage the Iraqi Kurds from pursuing secession.[629] The International Court of Arbitration has been involved in cases concerning Kurdish oil exports. A significant ruling occurred in March 2023, when Baghdad won a case alleging that Kurdish oil exports via Turkey were illegal. This decision halted a lucrative trade of 450,000 barrels of oil daily, significantly impacting the Kurdish Regional Government's economy.[630] The ruling reinforced the central government's authority over oil resources and highlighted the legal and economic constraints faced by the Kurdish Regional Government in pursuing greater autonomy or independence.[631] Kurdish regions have made significant strides towards self-governance, but legal and geopolitical

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[627] Anon, 'Report of a Home Office Fact-Finding Mission: Turkey: Kurds, the HDP and the PKK' (UK Home Office, October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843123/TURKEY_FFM_REPORT_2019.odt> accessed 13 August 2024.

[628] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) 2010 <https://www.icj-cij.org/case/141> accessed 6 February 2024.

[629] Marina Ottaway, 'United States Policy and the Kurdistan Referendum: Compounding the Problem' (Middle East Program, Wilson Center, September 2017) <https://www.wilsoncenter.org/publication/united-states-policy-and-the-kurdistan-referendum-compounding-the-problem> accessed 13 August 2024.

[630] Anon, 'KRG Oil Exports Suspended following Arbitration Ruling' (Iraq Business News, 27 March 2023) <https://www.iraq-businessnews.com/2023/03/27/krg-oil-exports-suspended-following-arbitration-ruling/> accessed 13 August 2024.

[631] Emir Gurbuz, 'Turkey's Halt on Iraqi Oil Exports Is Shaking Up Global Markets: A Diplomatic Deadlock over a 50-Year-Old Pipeline Agreement is Wreaking Havoc in the Region—and Beyond' (Foreign Policy, 25 August 2023) <https://foreignpolicy.com/2023/08/25/turkey-iraq-krg-oil-pipeline-ceyhan-export-erdogan-embargo/> accessed 13 August 2024.

challenges continue to hinder their aspirations for statehood. The international community's emphasis on maintaining existing state boundaries and legal rulings against unilateral secession and disputed resource control present formidable obstacles to Kurdish independence.[632]

5.8 Kurdish Diaspora

There is a considerable Kurdish diaspora spread across the globe. Countries like Germany, Sweden, France, and the Netherlands host significant Kurdish communities in Europe.[633] This diaspora primarily resulted from political repression, economic hardships, and armed conflicts in the Kurdish regions of the Middle East.[634] Many Kurds emigrated in search of safety, stability, and better living conditions, particularly during periods of intense conflict such as the Iran-Iraq War, the Gulf Wars, and the Syrian Civil War. The Kurdish diaspora has played an important role in maintaining and promoting Kurdish culture and identity abroad.[635] Kurdish communities in Europe and elsewhere have established cultural associations, political organisations, and media outlets to keep their heritage alive and advocate for Kurds' rights and recognition in their home countries. This global presence of Kurds has developed an international awareness and support for Kurdish issues, contributing to the broader discourse on self-determination and minority rights.[636]

5.9 Conclusion

Chapter Five and the exploration of the Kurds analyses their historical and contemporary struggles for nationhood and autonomy. It details the significant challenges Kurds face across Turkey, Iraq, Iran, and Syria and the impact of geopolitical dynamics on their quest for self-governance. The Convention's requirements for statehood are applied to assess the Kurdish regions' capacity for statehood, revealing partial compliance but significant obstacles due to lack of international recognition and geopolitical complexities.[637] Jure Vidmar's arguments on statehood, based on international customary law, offer a more flexible

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[632] Hagit Ariav, *'The Time of the Kurds'* (Council on Foreign Relations, 10 October 2019) <https://www.cfr.org/article/time-kurds> accessed 29 September 2024.
[633] David McDowall, *A Modern History of the Kurds* (4th edn, I.B. Tauris 2021) 646.
[634] Mari Toivanen, 'How the Kurdish Diaspora(s) Came to Be' in *The Kobane Generation: Kurdish Diaspora Mobilising in France* (Helsinki University Press, 2021) 81 – 85.
[635] Mari Toivanen, 'How the Kurdish Diaspora(s) Came to Be' in *The Kobane Generation: Kurdish Diaspora Mobilising in France* (Helsinki University Press 2021) 85.
[636] Mari Toivanen, 'How the Kurdish Diaspora(s) Came to Be' in *The Kobane Generation: Kurdish Diaspora Mobilising in France* (Helsinki University Press 2021) 92.
[637] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 109.

understanding that acknowledges the territorial autonomy and governance structures in Kurdish regions despite the lack of formal statehood.[638] The key themes to emerge from this chapter are the historical context of Kurdish struggles, the geopolitical dynamics affecting Kurdish autonomy, the application of the Montevideo Convention's requirements to Kurdish regions, the impact of the Kurdish Workers Party's designation as a terrorist organisation, and the role of the Kurdish diaspora in maintaining Kurdish identity and advocating for rights.[639]

Geopolitical dynamics play a significant role in shaping Kurdish autonomy. The interests of surrounding nations, Turkey, Iran, Iraq, and Syria profoundly impact Kurdish aspirations. These countries view Kurdish independence movements as threats to their territorial integrity and have taken measures to suppress Kurdish autonomy.[640] For instance, Turkey's military operations against Kurdish groups in Syria and Iraq aim to prevent the emergence of a unified Kurdish entity that could inspire similar movements within its borders. Iran's repression of Kurdish political parties and its influence in Iraqi Kurdish politics also reflect its strategic interests in curbing Kurdish autonomy.[641] Furthermore, the international community, including major powers like the United States, often prioritises regional stability over Kurdish aspirations. This geopolitical landscape complicates the Kurdish quest for self-governance, as regional and global powers weigh their strategic interests against supporting Kurdish autonomy.

The application of the Montevideo Convention's requirements for statehood reveals that Kurdish regions partially meet these criteria but face significant obstacles to achieving full statehood.[642] The Kurdistan Regional Government in Iraq has a defined territory, a functioning government, and some capacity for international relations. However, it lacks formal international recognition, which is crucial for statehood. The Autonomous Administration of North and East Syria, known as Rojava, has established a self-governing administration but faces

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[638] Anon, 'Statement on the Federal Supreme Court Decision Concerning the Kurdistan Referendum' (United Nations Iraq, 6 November 2017) <https://iraq.un.org/en/210626-statement-federal-supreme-court-decision-concerning-kurdistan-referendum> accessed 29 September 2024.
[639] Zeynep Kaya, *Mapping Kurdistan: Territory, Self-Determination and Nationalism* (CUP 2020) 3.
[640] Fahrettin Sumer and Jay Joseph, 'The Paradox of the Iraqi Kurdish Referendum on Independence: Contradictions and Hopes for Economic Prosperity' (2018) 45 British Journal of Middle Eastern Studies 574 – 588, 587.
[641] Michael M Gunter, *The Kurds: A Divided Nation in Search of a State* (Markus Wiener Publishers 2019) 212.
[642] Rhona KM Smith, *International Human Rights Law* (10th edn, OUP 2021) 350.

territorial threats and lacks recognition.[643] Kurdish regions in Turkey and Iran do not have defined autonomous territories or independent governments.

The Montevideo Convention was not designed to address complex situations like the Kurdish regions, where de facto autonomy exists without *de jure* statehood.[644] Jure Vidmar's approach, which considers the effectiveness of governance and stable populations, offers a more nuanced understanding that could better accommodate the Kurdish situation. Nonetheless, the lack of international recognition remains a significant hurdle.[645] The designation of the Kurdish Workers Party as a terrorist organisation by numerous countries, including the European Union, the United States, Canada, and Australia, significantly impacts Kurdish aspirations for autonomy.[646] This designation allows countries like Turkey to justify military operations and crackdowns on broader Kurdish political movements, conflating peaceful advocacy with terrorism. The Kurdish Workers Party's violent tactics and involvement in criminal activities further complicate international support for Kurdish autonomy.[647] The association with terrorism undermines legitimate Kurdish efforts to achieve political and cultural rights, as the international community remains wary of endorsing movements linked to a recognised terrorist organisation. This situation creates a significant barrier to Kurdish aspirations for autonomy and self-governance.[648]

While Kurdish regions meet some of the Convention requirements, they face significant obstacles, particularly in gaining international recognition.[649] Jure Vidmar's approach, based on international customary law, offers a more flexible understanding that considers effective governance and stable populations.[650] This

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[643] Michael M Gunter, *The Kurds: A Divided Nation in Search of a State* (Markus Wiener Publishers 2019) 90.
[644] Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), International Law (6th edn, OUP 2024) 208.
[645] Christine Chinkin and Freya Baetens, *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 212.
[646] Anon, 'Proscribed Terrorist Groups or Organisations: Accessible Version' (GOV.UK, March 2001) <https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version> accessed 1 October 2024
[647] Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024) 473
[648] Eric W. Schoon, 'The Paradox of Legitimacy: Resilience, Successes, and the Multiple Identities of the Kurdistan Workers' Party in Turkey' (2015) 62 *Social Problems* 267 – 268, 266.
[649] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[650] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 186.

perspective acknowledges the *de facto* autonomy of Kurdish regions, even if they lack formal recognition.

The pros of the Montevideo Convention lie in its clear requirements for statehood, but its limitations are evident in complex geopolitical contexts like that of the Kurds. Vidmar's approach provides a more pragmatic framework, accommodating entities that effectively govern despite lacking full international recognition or facing territorial disputes. However, the lack of international recognition remains a formidable barrier to achieving Kurdish aspirations for statehood. The Kurdish quest for autonomy and statehood is deeply intertwined with regional and international political considerations, making the journey towards recognition a complex and challenging process. Chapter Six explores how the international community interacts with territories functioning as de facto states without formal recognition. Using Somaliland and Taiwan as case studies, the chapter examines legal theories on state recognition and the relevance of the Montevideo Convention today. Somaliland declared independence in 1991, establishing stability but lacking recognition. Taiwan, while often considered a *de facto* state, has not declared independence, with its status tied to historical disputes over governance. This chapter will analyse these cases to highlight the challenges of state recognition in the modern world.

CHAPTER SIX STATE RECOGNITION

6.1 Introduction

Approaching the subject of *de facto* states requires a broad consideration of territories that openly or tacitly aspire to independence and have a degree of control, however small, over spatial territory.[651] Others take a far more restrictive view, arguing that it should only be applied to territories that have formally declared independence, can meet the terms of the Montevideo Convention, including the existence of truly independent statehood, and are going through the required legal process.[652] The term *de facto* state is highly subjective; there is no universal agreement on what to call these territories or a legal definition of which territories qualify.[653] Caspersen suggested a set of criteria for consideration but this is academic and not *de jure*.[654] McGibbon has developed the concept of a Non-State Effective Territorial Entity, a territory that, while legally part of a recognised state, functions independently or under the control of another entity, without formal recognition as a sovereign state.[655] While some territories that have been labelled *de facto,* like Somaliland, Nagorno-Karabakh, Transnistria, Northern Cyprus, Taiwan, Abkhazia, and Kosovo are more well known some territories like *Republika Srpska* are less conspicuous.[656]

Chapter Six examines how the international community and states interact with territories that operate effectively as what some authors refer to as *de facto* states and others describe as effective but unrecognised territories. The Chapter uses the case of Somaliland and Taiwan to explore legal theories about state recognition and consider the relevance of the Convention in a complex 21st

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[651] Scott Pegg, *International Society and the De Facto State* (Ashgate 1999) 10.
[652] James Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (OUP 2012) 39.
[653] Nina Caspersen and Gareth Stansfield, *Unrecognized States in the International System* (Taylor & Francis 2012) 8. An unrecognised state is one that has achieved *de facto* independence, controlling at least two-thirds of the territory it claims, including its main city and key regions. Its leadership is actively working to build further state institutions and demonstrate its own legitimacy. The entity has declared formal independence or shown clear aspirations for independence, for instance, through an independence referendum or the adoption of a separate currency, or similar actions that unmistakably signal separate statehood. Despite these efforts, the entity has not gained international recognition or, at most, has been recognized only by its patron state and a few other states of no significant importance. Additionally, it has existed in this state for at least two years.
[654] Nina Caspersen, *Unrecognized States: The Struggle for Sovereignty in the Modern International System* (Polity, 2012).
[655] Sarah McGibbon, 'Seceding from Failed States: Reconsidering the Case of Somaliland' in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 293-310.
[656] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 13.

century. Somaliland declared independence from Somalia in 1991 and, since then, has managed to establish itself as a relatively stable and democratic entity in the tumultuous Horn of Africa. But formal recognition efforts remain largely unfulfilled despite the rising tide of successes chalked under its belt.[657] The situation with Taiwan is completely different, although Taiwan is often included in a list of *de facto* states, it has never declared independence - nor does it officially aspire to independent statehood. Instead, the historical circumstances of this dispute are based on competing claims to the government, rather than a case of secession.[658] However, despite this, Taiwan is nevertheless often counted as a *de facto* state - not because it claims to want statehood, but simply because it effectively seems to exist as one.[659]

Chapter Six applies some of the key theories operating in international law and international relations to compare how the Convention has or has not been applied or even need to be applied to these territories. Chapter Six deals specifically with the legal dimensions of the Somaliland secession and the extent to which Somaliland acted in compliance with international norms. The chapter will examine whether Somaliland has violated any peremptory norms of international law and whether any states breached the law by dealing with Somaliland as if it was a state, and not part of Somalia. The Chapter considers the broader geopolitical context within which Somaliland and Taiwan operate. Before considering how their recognition is impacting regional stability, the interests of neighbouring countries especially Somaliland with the recent developments with Ethiopia and Puntland.[660]

6.1 An Introduction to Somaliland

Somaliland could be viewed as a territory with a legitimate claim to statehood based on its effective operation of state-like functions, which highlights the problematic implications of the constitutive doctrine of recognition.[661] The constitutive doctrine assumes that for a state to be considered as such, it must be recognised by other established states, even if its claim to independence violates

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[657] James Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (OUP 2012) 37.
[658] Mahir Al Banna, 'Taiwan's International Legal Standing: Navigating the Fragile Status Quo' (2024) 10 Journal of Liberty and International Affairs 149 – 172, 149.
[659] Jure Vidmar, *'Territorial Status in International Law'* (1st edn, Hart Publishing 2024) 19.
[660] Stanislav Šturdík, 'Ethiopia-Somaliland Memorandum of Understanding: Impact on Regional Security' (Security Outlines, 29 April 2024) <https://www.securityoutlines.cz/ethiopia-somaliland-memorandum-of-understanding-impact-on-regional-security/> accessed 28 July 2024.
[661] Jure Vidmar, Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice (Hart Publishing 2013) 35.

international law. Article 2(4) of the United Nations Charter obliges member states to respect the territorial integrity and political independence of other states.[662] Peaceful secession, even in the absence of conflict, challenges this principle by altering the territorial boundaries of the parent state, as seen in the collapse of Somalia.[663] Somaliland's effective administration and its ability to govern and protect its people make it a desirable candidate for statehood under the requirements outlined by the Montevideo Convention.[664] Somaliland declared its independence from Somalia in 1991 following the collapse of the central government in Mogadishu. Since then, it has developed a functioning government, maintained relative stability, and held regular elections.[665] However, despite these achievements, Somaliland remains unrecognised by any United Nations member state.[666] The constitutive doctrine's requirement for recognition by other states presents almost insurmountable barriers to Somaliland's quest for international legitimacy.

James Crawford argues that, in theory, a state's status does not depend on recognition. Yet, from a practical perspective, recognition is an essential part of being a state. Crawford notably opposes Somaliland's bid for statehood, despite its ability to fulfil the criteria of governance since 1993, because it operates within Somalia's internationally recognised borders.[667] The United Nations, aligning with the broader international community, does not recognise Somaliland as an independent state but rather considers it part of Somalia, emphasising the

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[662] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2(4).

[663] Daniel Thürer, 'The Failed State and International Law' (1999) 81 International Review of the Red Cross 731 – 761, 744.

The phenomenon of a "failed state" can be characterised by three main elements from a political and legal perspective.

Firstly, there is a geographical and territorial aspect, where failed states are primarily affected by internal problems leading to an implosion rather than an explosion of power structures, resulting in the disintegration and de-structuring of the state rather than its dismemberment.

Secondly, from a political standpoint, failed states experience an internal collapse of law and order, marked by a near-total breakdown of structures that guarantee law and order, distinct from the fragmentation seen in civil wars where rebels are identifiable and fighting for specific objectives.

Thirdly, on a functional level, failed states lack reliable institutions capable of representing the state internationally or being influenced by the international community. If such institutions exist, they are often unreliable, acting inconsistently or untrustworthily, described metaphorically as "statesman by day and bandit by night".

[664] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1(d).

[665] Pablo Moscoso, 'The statehood of 'collapsed' states in Public International Law' (2011) 18 *Agenda Internacional* 121 – 174, 133.

[666] James Crawford, The Creation of States in International Law (2nd edn, Clarendon Press 2006) 415.

[667] James Crawford, 'Kosovo and the Requirements for Statehood in International Law' in Marko Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015).

principle of territorial integrity.[668] This lack of recognition also prevents Somaliland from accessing loans from international financial institutions such as the World Bank and the International Monetary Fund. No United Nations member state or international organisation has recognised Somaliland, which reinforces the application of the constitutive doctrine by the rest of the international community. As Crawford warns, without a concrete and clear set of requirements for statehood, or where such requirements are vague and lacking practical utility, the constitutive approach dominates once again.[669]

Somaliland remains unrecognised as a state on the international stage, despite its proven track record of relative stability in the Horn of Africa, a region fraught with conflict. Without United Nations membership and the associated legal protections available to recognised states, Somaliland finds itself in a precarious position.[670] The lack of recognition has had serious economic and diplomatic consequences for Somaliland.[671] The case of Somaliland illustrates a significant dilemma faced by self-regulated territories: the tension between the declarative theory and the constitutive theory of statehood. The declarative theory focuses on the factual requirements necessary for statehood, while the constitutive theory emphasises the importance of recognition by other states. Despite meeting the declarative requirements for statehood, the lack of recognition under the constitutive theory remains a substantial obstacle to Somaliland's international acceptance.[672] This situation aligns with McGibbon's broader arguments about Non-State Effective Territorial Entities, which are often capable of functioning like states but are caught in the legal limbo created by the state/non-state binary in international law.[673]

6.2 Historical Context and Clan Dynamics

Somaliland's history and clan dynamics are inseparable from the story of this area's quest for statehood. The birth of Somaliland and its declaration of

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[668] Anon, 'UN Assistance Mission in Somalia' (Department of Political and Peacebuilding Affairs, 2022) <https://unsom.unmissions.org> accessed 2 October 2024; Adam Abdelmoula, 'Somalia is on the path of recovery, but real challenges remain' (United Nations Somalia, 23 December 2021) <https://somalia.un.org/en/166087-somalia-path-recovery-real-challenges-remain> accessed 2 October 2024.
[669] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 45 – 46.
[670] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945).
[671] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (Oxford University Press 2010) 222.
[672] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 137.
[673] Sarah McGibbon, 'Seceding from Failed States: Reconsidering the Case of Somaliland' in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds), Research Handbook on Secession (Edward Elgar Publishing 2022) 294.

independence is interwoven within the region's colonial history and the complex clan structures that define political life.[674] The modern history of Somaliland can be traced back to European imperial expansion in Africa in the late 19th century. In this period Britain, France, and Italy claimed colonial authority in the regions lived in by the Somali people of Eastern Africa.[675] The British Somaliland Protectorate was declared in 1884 making it a distinct identity from the neighbouring Italian Somaliland. The British took advantage of the ports and meat supplies for its garrison in Aden. The unification of British Somaliland and Italian Somaliland, which took place in 1960 to form the Somali Republic, was welcomed at first as a step toward union among all the Somali peoples in the region.[676] The Union was fraught with problems. The two territories, with totally different histories and divided along clan lines, had difficulties integrating. The northern part of the country what was to become Somaliland soon found itself increasingly being relegated to an inferior status by the southern-dominated government in Mogadishu.

Gérard Prunier, a historian of contemporary Africa, undertook a thorough investigation in the proceedings that surrounded the union between Somaliland and Somalia, which was executed with remarkable haste, neglecting even basic legal formalities. On 27 June 1960, just a day after Somaliland gained independence, its legislature passed a hastily drafted text proposing a union with the South. Notably, the representative from Mogadishu, present in Hargeisa, abstained from signing the document. On 1 July, the day of southern Somalia's independence, the local authorities in Mogadishu presented an Act of Unification, written in Italian, mirroring the 27 June Hargeisa declaration.[677] However, this document also lacked signatures from representatives of the North. Thus, despite no outright refusal, no formal unification documents were signed, rendering the union of the two territories a *de facto* arrangement without a solid international or constitutional foundation.[678] Some researchers have argued that the procedure violated the principles outlined in the Vienna Convention on the Law of Treaties,[679] which emphasises the necessity of free and genuine consent in treaty formation.

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[674] Zakariye Abdi Bade, 'From Clans to Colonials to Contemporary Times: The Shifting Dynamics of Somali Social, Economic, and Cultural Life' (2023) 6 International Journal of Social Sciences and Management Review 136 – 155, 140.
[675] Gerard Prunier, *The Country That Does Not Exist: A History of Somaliland* (C Hurst & Co Publishers Ltd 2021) 5.
[676] Union of Somaliland and Somalia Law 1960.
[677] Union of Somaliland and Somalia Law 1960.
[678] The Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).
[679] Temesgen S Beyene, 'Declaration of Statehood by Somaliland and the Effects of Non-Recognition under International Law' (2019) 10 Beijing Law Review 196 – 211, 202.

By failing to secure proper agreement and signatures from all involved parties, the union of British Somaliland and Italian Somaliland contravened these international legal standards. Nonetheless, they proceeded as a united entity, though dysfunctions became evident within a year. On 20 June 1961, a draft constitution was put to a referendum, resulting in 91 per cent approval and 9 per cent rejection. These figures were misleading due to the South's significantly larger population compared to the former British colony. In the North, only about 100,000 registered voters participated, with 63 per cent voting against the draft constitution.[680] The early optimism, as noted by 'Africa Confidential' quickly gave way to internal strife. The collapse of parliamentary democracy in 1969 and the onset of military and dictatorship ignited a prolonged and devastating civil war. The regime of Siad Barre, which lasted from 1969 to 1991, was a significant period in Somali history, marked by authoritarian rule, widespread human rights abuses, and eventually the collapse of the Somali state.[681] The conflict was particularly intense in the 'British' North, now Somaliland, and continues in varying degrees in the 'Italian' South.

The declaration was a response to the widespread violence and chaos that engulfed Somalia after Barre's fall. Somaliland sought to distance itself from the turmoil and establish a separate, peaceful, and democratic state.[682] Despite not receiving international recognition, Somaliland has since built its government institutions, held regular elections, and maintained relative stability and peace compared to the rest of Somalia. Somaliland's decision to declare independence was rooted in historical, cultural, and political factors. It reflects the region's distinct colonial past, separate from southern Somalia, and the desire of its people for self-determination in the face of neglect and atrocities committed by Barre's regime. The declaration of independence remains a central issue in Somaliland's quest for international recognition and its relationship with Somalia and the broader international community.[683]

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[680] Gerard Prunier, *The Country That Does Not Exist: A History of Somaliland* (C Hurst & Co Publishers Ltd 2021) 5.
[681] Mohamed Haji Ingiriis, 'State and Clan Violence in Somalia' (2018) 8 African Conflict and Peacebuilding Review 73 – 96, 81.
[682] Gerard Prunier, *The Country That Does Not Exist: A History of Somaliland* (C Hurst & Co Publishers Ltd 2021) 150.
[683] Anon, 'Overcoming Somaliland's Worsening Political Crisis' (Crisis Group, 10 November 2022) <https://www.crisisgroup.org/africa/horn-africa/somalia/overcoming-somalilands-worsening-political-crisis> accessed 18 November 2023.

The political dynamics of clans have a significant impact on the ability to effectively govern Somaliland. The Somali people are united through major clans, with varying numbers of sub-clans and sub-sub-clans.[684] The Isaaq is the most influential clan in Somaliland and has a dominant role in the political and economic spheres. The Isaaq clan played a significant role in the formation of Somaliland and continues to hold substantial power in the government and civil society. The Harti confederation of Darod clans has considerable influence, particularly in the eastern regions of Somaliland. This affects political differences, making them at times the major source of friction and a trigger for conflict. The issue was made more complicated as conflict arose due to the Puntland region of Somalia established in 1998. It mainly comprised the Majeerteen, a sub-clan of Harti-Darod who sought self-rule. However, in 2024, Puntland announced it would operate as a functionally independent territory 'amid a dispute over Somali constitutional changes'.[685]

6.3 Non-State Effective Territorial Entity

Somaliland declared its independence from Somalia in 1991, following the collapse of the central government in Mogadishu. It embarked on a journey of self-reconstruction, establishing peace and building functioning state institutions within its former colonial borders.[686] Despite these achievements, Somaliland's quest for international recognition has remained largely unfulfilled. Today, Somaliland stands as a unique case of a relatively stable and democratic non-state effective territorial entity in a region plagued by conflict and instability. It continues to seek international recognition and support to solidify its status as a viable nation-state.[687]

Somaliland's quest for recognition as a sovereign state, when viewed through the prism of the Convention, presents a compelling but challenging case. The region has defined its territorial borders based on the former British Somaliland, which ostensibly meets the Convention's requirement for a defined territory. However, the

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[684] Mohamed Haji Ingiriis, 'State and Clan Violence in Somalia' (2018) 8 *African Conflict and Peacebuilding Review* 73 – 96, 81.
[685] Anon, 'Somaliland Profile' (BBC News, 5 July 2011) <https://www.bbc.co.uk/news/world-africa-14114727> accessed 31 July 2024.
[686] Gerard Prunier, The Country That Does Not Exist: A History of Somaliland (C Hurst & Co Publishers Ltd 2021) 5.
[687] Anon, 'Somaliland: WS on the Case of Somaliland' (International Federation for the Protection of the Rights of Ethnic, Religious, Linguistic and Other Minorities (IFPRERLOM, 12 March 2006) <https://unpo.org/article/3973> accessed 23 November 2023.

reality is more complex, particularly along its border with Puntland, where the boundary remains contested and, in parts, undefined.[688] This situation poses a significant challenge to fulfilling the Convention's emphasis on clearly defined territorial boundaries, a fundamental aspect of traditional statehood under international law. In terms of population, Somaliland boasts a significant number of around 3.5 million inhabitants, primarily composed of Somali clans distinct from those in southern Somalia.[689]

This demographic composition aligns with the Convention's requirement of a permanent population. However, the population requirement is not without its intricacies, as some clans in the region have contested allegiances, particularly with Puntland, thereby introducing a layer of complexity to the demographic aspect of statehood.[690]

On the governance front, Somaliland has established an operational government with distinct executive, legislative, and judicial branches. This governance structure operates independently from the southern part of Somalia, fulfilling the Convention's mandate for an effective government.[691] Nevertheless, the international community's recognition remains an essential factor, particularly in the context of Somaliland's capacity to engage in formal relations with other states.

Despite efforts to establish diplomatic ties and engage in informal international relations, Somaliland's sovereignty is yet to be universally acknowledged, limiting its ability to fully actualise the criterion of the capacity to enter into relations with other states.[692] The Somali Compact of 2013 marked a significant shift in the political landscape of Somaliland and Somalia. It granted Somaliland federal autonomy, effectively allowing it to exercise a form of self-determination within the Somali State.[693]

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[688] Martha C Johnson and Meg Smaker, 'State Building in De Facto States: Somaliland and Puntland Compared' (2014) 60 Africa Today 3 – 23, 13.
[689] Zakariye A Bade, 'From Clans to Colonials to Contemporary Times: The Shifting Dynamics of Somali Social, Economic, and Cultural Life' (2023) 6 International Journal of Social Sciences and Management Review 136 – 155, 140.
[690] Martha C Johnson and Meg Smaker, 'State Building in De Facto States: Somaliland and Puntland Compared' (2014) 60 Africa Today 3 – 23, 13.
[691] Anon, 'Country Profile' (Republic of Somaliland, undated) <https://somalilandgov.com/country-profile/> accessed 23 November 2023.
[692] Sarah G Phillips, 'When Less Was More: External Assistance and the Political Settlement in Somaliland' (2016) 92 International Affairs 629 – 645, 629.
[693] Anon, 'Somali Compact' (ReliefWeb, 17 September 2013) <https://reliefweb.int/report/somalia/somali-compact> accessed 18 November 2023, Anon, 'The Somali Compact - Building a New Somalia' (European External Action Service, 17 September

This development led to a redefinition of sovereignty in the region: Somaliland could embody its people's sovereignty, while the unbounded sovereignty of Somalia was simultaneously curtailed.[694] This situation created a paradox in the political order, highlighting that sovereignty is not absolute but is subject to limitations and is highly political. The recognition of Somaliland as a self-governing entity was relatively uncontroversial, and it raised complex questions about the handling of conflicting sovereignty claims. This scenario is not merely a case of statehood recognition; it also contributes to broader discussions in international relations about how political order is established and interpreted through the lens of sovereignty.[695]

The United Nations's approach to Somaliland is primarily driven by its policy of supporting the sovereignty and territorial integrity of existing member states. In this context, the United Nations recognises the Federal Government of Somalia as the legitimate authority over the entire territory of Somalia, including Somaliland.[696] Despite the lack of formal recognition, the UN and its agencies are actively involved in humanitarian and development projects in Somaliland. These efforts are aimed at improving the living conditions of the people in the region, addressing issues such as health, education, and infrastructure, and supporting governance and stability.

The United Nations's stance on Somaliland reflects a cautious approach to issues of secession and statehood, especially in regions with complex histories and delicate geopolitical contexts. The organisation often prioritises stability and diplomatic dialogue within the framework of existing national borders.[697]

2013) <https://www.eeas.europa.eu/top_stories/2013/170913_post_somalia_conference_en.htm> accessed 18 November 2023.
On 16 September a landmark Conference on A New Deal for Somalia was held in Brussels, co-hosted by the Somali Federal Government and the European Union (EU), with participation from Somali regions, Members of Parliament and civil society, as well as international friends and partners. To support this progress, the conference endorsed a New Deal Compact and committed to support its implementation. This Compact is a testament to the new partnership, based on mutual accountability and risk management that is being initiated between the Federal Government, Parliament, regions and people of Somalia, and the international community. It includes Special Arrangements for Somaliland.

[694] Mohamed Haji Ingiriis, 'Being and Becoming a State: The Statebuilding and Peacebuilding Conversations in Southern Somalia and Somaliland' (2021) 39 Journal of Contemporary African Studies 1 – 33, 13.

[695] Pål Kolstø, 'The Sustainability and Future of Unrecognized Quasi-States' (2006) 43 Journal of Peace Research 723 – 740, 723.

[696] Anon, United Nations, 'About the UN in Somalia' (UN Somalia, 2024) <https://somalia.un.org/en/about/about-the-un> accessed 3 October 2024.

[697] Anon, 'Consultations on the Situation between Ethiopia and Somalia under the "Peace and Security in Africa" Agenda Item' (Security Council Report, 28 January 2024)

Determining which currently unrecognised group has the strongest case for statehood recognition under the Convention is challenging due to the complexity of international law and politics. Based on the Convention's requirements, the case of Somaliland often emerges as a notable example. Somaliland's unique status as an unrecognised entity has surprisingly yielded positive outcomes.[698] Without formal statehood, Somaliland has avoided the burdens of international debt and over-reliance on foreign aid, a self-reliant state-society relationship.[699] This situation has also compelled Somaliland to mimic state-like behaviours, in anticipation of potential future recognition, leading to more democratic and efficient governance. This stands in contrast to neighbouring Somalia, where international legitimacy has often resulted in governance challenges. Indicators of Somaliland's quasi-state status include its ability to issue its currency and passports, as well as the nationalisation of its armed forces and bureaucratic functions.[700] This scenario suggests that Somaliland's unconventional position might offer a unique and effective approach to state-building and governance in challenging regional contexts.[701]

In 2005, the African Union sent a fact-finding mission to Somaliland. The final report from the mission recommended recognition based on the steps that the country had taken toward becoming a modern state and further being unique and self-justified in African political history.[702] This recommendation was key because it handed Somaliland the apparent route to eventual full international recognition. This steer from the African Union's fact-finding mission, however, could not change international opinion. Somaliland remained unrecognised and the African Union were cautious not to set a precedent for other regions in the area: 'Objectively viewed, the case should not be linked to the notion of 'opening a Pandora's

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https://www.securitycouncilreport.org/whatsinblue/2024/01/consultations-on-the-situation-between-ethiopia-and-somalia-under-the-peace-and-security-in-africa-agenda-item.php accessed 3 October 2024.

[698] Rebecca Richards and Robert Smith, 'Statebuilding and the Politics of Non-Recognition' in Christopher Daase et al (eds), *Recognition in International Relations* (Palgrave Macmillan 2015) 170.

[699] Mariel Ferragamo and Claire Klobucista, *'Somaliland: The Horn of Africa's Breakaway State'* (Council on Foreign Relations, 25 January 2024) <https://www.cfr.org/backgrounder/somaliland-horn-africas-breakaway-state> accessed 3 October 2024.

[700] Alex de Waal, *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (1st edn, Polity 2015) 133.

[701] Mariel Ferragamo and Claire Klobucista, *'Somaliland: The Horn of Africa's Breakaway State'* (Council on Foreign Relations, 25 January 2024) <https://www.cfr.org/backgrounder/somaliland-horn-africas-breakaway-state> accessed 3 October 2024.

[702] Anon, 'AU Fact-Finding Mission to Somaliland' (30 April to 4 May 2005) <https://www.files.ethz.ch/isn/18043/110_somaliland___time_for_african_union_leadership.pdf> accessed 31 July 2024.

box'.[703] As such, the African Union should find a special method of dealing with this outstanding case.

The international community's i.e. the United Nations and the African Union's reluctance to recognise Somaliland can be attributed to concerns about setting a precedent for other secessionist movements.[704] Western countries, most particularly the United Kingdom, are mindful of the implications of Somaliland's independence in its effort to re-stabilise and rebuild Somalia.[705] There are fears that if Somaliland secedes without Mogadishu's legal consent other portions of the country will follow a similar route and continue to balkanise Somalia into small ineffective territories, preparing the ground for long-standing problems: warlords, terrorist gangs, and piracy.[706] While making a strong case for statehood due to Somaliland's compliance with international law and effective government, the presence of these challenges cannot be denied.[707]

McGibbon's argument on Non-State Effective Territorial Entities resonates deeply with the case of Somaliland.[708] Somaliland, despite operating with *de facto* independence for over thirty years, still is not recognised as a sovereign state, reflecting the key issues McGibbon addresses about the tension between legal capacity and recognition. McGibbon critiques the international legal system's reliance on the state/non-state binary, which marginalises entities like Somaliland, preventing them from fully engaging in international legal processes despite fulfilling many of the practical functions of a state.[709]

6.4 Internal Stability and Governance

One of the keys to Somaliland's success was that it had established a government with a distinct executive, legislative, and judicial branch.[710] This government

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[703] Anon, 'AU Fact-Finding Mission to Somaliland' (30 April to 4 May 2005) <https://www.files.ethz.ch/isn/18043/110_somaliland___time_for_african_union_leadership.pdf> accessed 31 July 2024.

[704] Batseba Seifu, 'Somalia and Somaliland: A Complex Relationship in the Horn of Africa' (*Modern Diplomacy,* 27 June 2024) <https://moderndiplomacy.eu/2024/06/27/somalia-and-somaliland-a-complex-relationship-in-the-horn-of-africa/> accessed 7 August 2024

[705] HC 18 January 2022 707.

[706] Mary Harper, 'How do you solve a problem like Somalia?' (BBC News, 11 May 2017) <https://www.bbc.co.uk/news/world-africa-39855735>accessed 31 July 2024.

[707] Marleen Renders, *Consider Somaliland: State-building with Traditional Leaders and Institutions* (Brill 2012) 16.

[708] Sarah J McGibbon, '*Non-state effective territorial entities: A critical appraisal of international legal capacity and responsibility*' (PhD Thesis, Maastricht University 2023).

[709] Sarah J McGibbon, '*Non-state effective territorial entities: A critical appraisal of international legal capacity and responsibility*' (PhD Thesis, Maastricht University 2023).

[710] Anon, Unrepresented Nations and Peoples Workshop, *A Shadow on Tomorrow's Dreams: Somaliland's Struggle for Statehood* (Lewis & Clark Law School, 2016)

operates independently of the rest of Somalia or any other entity and has frequently been cited as one of the significant reasons for the African Union and United Nations to start the process for Somaliland's journey to nationhood.[711] While southern Somalia has suffered through protracted periods of political chaos and violence, Somaliland avoided the intense upheaval of other parts of the area. Somaliland's Government has held regular elections, exhibiting a dedication to democratic principles. These elections have, without exception, been termed free and fair by international observers.[712] One of the greatest threats to its stability is the war raging with Puntland over the eastern regions of Sool, Sanaag, and Cayn. The population there is divided between clans with disputed allegiances and the looming threat of terrorist antagonism by groups such as Al-Shabaab.[713] Moreover, along with internal conflicts, Somaliland has to interact with the broader geopolitical landscape of the Horn of Africa. Ethiopia and Somaliland signed a memorandum of understanding on 1 January 2024. Somaliland's agreement comprises a naval and commercial lease on territory on their Red Sea coast for fifty years in return for shares in Ethiopian Airlines and negotiations toward Ethiopia's recognition of Somaliland as a sovereign state. The arrangement was criticised by neighbouring states such as Egypt and Djibouti, These tensions are exacerbated by geopolitical struggles over infrastructure and political alliances that further complicate Somaliland's pursuit of international recognition.[714]

Although the Memorandum of Understanding signed nine months ago has not been formalised, Somaliland recently announced that Ethiopia appointed an ambassador, elevating its consulate in Hargeisa to an embassy.[715] Ambassador Shunde's presentation of credentials to President Muse Bihi marks a significant diplomatic development. This development could be seen as advancing Ethiopia's recognition of Somaliland's independence. According to the Vienna Convention on

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<https://law.lclark.edu/live/files/24272-a-shadow-on-tomorrows-dreams--somalilands-struggle> accessed 31 July 2024.

[711] Sascha-Dominik Oliver, Vladimir Bachmann and Martinas Prazauskas, 'The Status of Unrecognised Quasi-States and Their Responsibilities Under the Montevideo Convention' (2019) 52 *The International Lawyer* 393 – 437, 417.

[712] Louisa Brooke-Holland, *Political Developments in Somaliland Research Briefing*, (The House of Commons Library, 7 March 2023) <https://researchbriefings.files.parliament.uk/documents/CBP-9733/CBP-9733.pdf> accessed 4 October 2024.

[713] Abdulkadir Khalif, 'Disaster as fighting rages in Somaliland's Las Anod (The East African, 14 February 2023) <https://www.theeastafrican.co.ke/tea/news/rest-of-africa/disaster-as-somali-enclave-fight-rages-4122976> accessed 1 August 2024.

[714] Moustafa Ahmad, 'Ethiopia eying the Red Sea may exacerbate regional extremism' (LSE Africa Blog, 11 December 2023) <https://blogs.lse.ac.uk/africaatlse/2023/12/11/ethiopia-eying-the-red-sea-may-exacerbate-regional-extremism/> accessed 1 August 2024.

[715] Hagos Gebereamlak, 'Ethiopia's Recognition of Somaliland and the Repercussions for African Borders' (*The Reporter Magazine*, 2 October 2024) <https://thereportermagazines.com/3214/> accessed 3 October 2024.

Diplomatic Relations (1961), establishing embassies and exchanging ambassadors typically signify full diplomatic recognition.[716] However, Ethiopia has not explicitly recognized Somaliland, carefully avoiding the term 'Republic of Somaliland' in official statements. While this does not amount to formal recognition, it lays the foundation for potential future acknowledgement. The fact that it highlights Somaliland's independence before the union with Italian Somaliland is an important signal - even though prior independence is not seen as justification for a territory to reclaim independence later under international law.[717]

6.5 Constructivism and the Case of Somaliland

Applying Alexander Wendt's theory of constructivism to the case of Somaliland involves examining how identity, norms, and interests shape the territory's quest for statehood. Wendt argues that the international system is socially constructed through interactions among states.[718] Somaliland's efforts to achieve recognition are influenced by its constructed identity as a distinct entity separate from Somalia, shaped by historical, cultural, and political factors. This identity is reinforced through its governance structures, stability, and democratic practices, which differentiate it from the rest of Somalia.[719] Despite its lack of formal recognition, Somaliland has engaged in diplomatic efforts and informal relations with other states, demonstrating its capacity for international interaction.

The United Kingdom, Somaliland, and Denmark signed an agreement to support Phase II of the Somaliland Development Fund programme, with £25 million funding from 2018 to 2022.[720] This initiative aims to enhance local public services through critical infrastructure projects and institutional capacity building, aligned with Somaliland's National Development Plan II. Additionally, the United Kingdom and Somaliland renewed their commitment to the ESRES programme to boost renewable energy. The agreements were signed by President Bihi and Damon

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[716] *Vienna Convention on Diplomatic Relations* (adopted 18 April 1961, entered into force 24 April 1964).
[717] Kalkidan Yibeltal, 'Ethiopia signs agreement with Somaliland paving way to sea access' (BBC News, 1 August 2024) <https://www.bbc.co.uk/news/world-africa-67858566> accessed 1 August 2024.
[718] Alexander Wendt, *Social Theory of International Politics* (CUP 1999).
[719] Carolina Mañoso Gimeno, 'A Constructivist Approach to Analysing Somalia's State Failure' (E-International Relations, 17 August 2017) <https://www.e-ir.info/2017/08/17/a-constructivist-approach-to-analysing-somalias-state-failure/> accessed 1 August 2024.
[720] Anon, 'Somaliland Development Fund Phase 2' (Ministry of Planning and National Development, Republic of Somaliland, 2024) https://mopnd.govsomaliland.org/article/somaliland-development-fund-phase-2 accessed 3 October 2024.

Bristow of DFID, with other United Kingdom officials present at the ceremony.[721] Genel Energy, the United Kingdom oil exploration firm, estimated that the Somali basin as a whole likely holds offshore reserves of about 30 billion barrels, with additional onshore reserves Genel holds the rights to explore in Somaliland.[722] It will be useful to observe how the pursuance by international companies to access Somaliland's natural resources will affect any future recognition of statehood. Wendt's theory also highlights the role of international norms in shaping state behaviour.

The principles of territorial integrity and sovereignty, enshrined in international law, create challenges for Somaliland's recognition. These norms influence the responses of other states and international organisations, which are cautious about setting precedents that might encourage other secessionist movements.[723] However, the evolving norms of self-determination and democratic governance provide a basis for Somaliland's claim to statehood. Its democratic credentials and relative stability are used to argue for recognition, despite the normative commitment to maintaining Somalia's territorial integrity. From a post-positivist perspective, the application of the Montevideo Convention's requirements to Somaliland's case reveals the limitations of a purely legalistic approach. Post-positivists argue that the criteria for statehood – a defined territory, permanent population, effective government, and capacity to enter into relations with other states – are not merely objective legal standards but are interpreted through political lenses.[724] The case of Somaliland demonstrates how these criteria are subject to political considerations and power dynamics within the international community.

6.6 Concluding the Somaliland Case Study

Somaliland meets the Montevideo requirements through its stable governance, defined territory, and ability to engage in international relations.[725] However, its

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[721] Anon, 'British government signs agreements worth £31 million to support development in Somaliland' (GOV.UK, 11 September 2019) <https://www.gov.uk/government/news/british-government-signs-agreements-worth-31m-to-support-development-in-somaliland> accessed 1 August 2024.

[722] Anon, '*Somaliland'* (Genel Energy, date unknown) <https://genelenergy.com/operations/pre-production/somaliland/> accessed 1 August 2024.

[723] Alexander Wendt, 'Anarchy is What States Make of it: The Social Construction of Power Politics' (1992) 46 International Organization 391 – 425, 401.

[724] Jure Vidmar, *'Territorial Status in International Law'* (1st edn, Hart Publishing 2024) 19.

[725] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.

lack of recognition highlights the political nature of statehood. The reluctance of the international community to recognise Somaliland is influenced by concerns about regional stability, the potential for encouraging other secessionist movements, and the interests of powerful states.[726] This political dimension emphasises the argument that statehood is not solely determined by legal criteria but by the broader context of international politics and the interests of existing states. Moreover, post-positivists emphasise the role of discourse in shaping international norms and state behaviour.[727]

The narrative surrounding Somaliland's quest for recognition involves framing it as a successful, democratic entity deserving of statehood, in contrast to the failed state of Somalia. This discourse seeks to legitimise Somaliland's claims and gather international support. However, the competing narrative of maintaining Somalia's territorial integrity and the geopolitical interests of regional powers complicate this process. The situation with Somaliland illustrates the complex relationship between legal requirements, political considerations, and normative discourses in the recognition of states.[728]

Alexander Wendt's constructivist theory and post-positivist perspectives provide a potential alternative paradigm to explain how identity, norms, and political dynamics shape Somaliland's pursuit of recognition and the challenges it faces within the international system.[729]

6.7 An Introduction to Taiwan

Taiwan is a case that provides a fascinating opportunity to examine the Convention, customary international law and the post-positive notion of statehood. The issue in this section of the Chapter is one of recognition of a government rather than state recognition.[730] The Republic of China governed mainland China until it was overthrown by Communist forces at the end of the 1940s - at which

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[726] Abdulkadir Khalif, 'Disaster as fighting rages in Somaliland's Las Anod (The East African, 14 February 2023) <https://www.theeastafrican.co.ke/tea/news/rest-of-africa/disaster-as-somali-enclave-fight-rages-4122976> accessed 1 August 2024.

[727] Patrick Thaddeus Jackson and Joshua S Jones, 'Constructivism' in Richard Devetak, Jim George and Sarah Percy (eds), *An Introduction to International Relations* (CUP 2017) 107.

[728] Friedrich Kratochwil, 'Is the Ship of Culture at Sea or Returning?' in Yosef Lapid and Friedrich Kratochwil (eds), *The Return of Culture and Identity in IR Theory* (Lynne Rienner Publishers 1996) 201.

[729] Alexander Wendt, 'Identity and Structural Change in International Politics' in Yosef Lapid and Friedrich Kratochwil (eds), *The Return of Culture and Identity in IR Theory* (Lynne Rienner Publishers 1996) 57.

[730] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP USA 2023) 103.

point, it relocated to the island of Taiwan.[731] In the years that followed, countries began to switch their support to the People's Republic of China and in 1971 Taiwan lost its place as the Chinese representative at the United Nations.[732] Today, just fourteen of the UN's 193 members continue to recognise Taiwan as the legitimate government of China. However, many countries - including the United States, Britain, Japan, and many European Union members - still maintain extensive economic and political links with Taiwan and have diplomatic offices in Taipei, the capital of Taiwan.[733] The United Kingdom's policy on the Taiwan-PRC dispute has maintained that the situation be resolved by dialogue, reflecting the views of both sides of the Taiwan Strait Officially the United Kingdom has stated that it has no intention to recognise Taiwan as a state. Nevertheless, it supports Taiwan's participation in international organisations as an observer.[734] The United Kingdom is represented in Taiwan by the British Office Taipei. The relations have intensified in recent times, with the United Kingdom supporting a strategic tilt to the Indo-Pacific region in its 2021 Integrated Review of Security, Defence, Development, and Foreign Policy.[735]

6.8 Historical Background

The division between China and Taiwan traces back to 1949, when the People's Republic of China was established, and the defeated Kuomintang fled to Taiwan, setting up an exile government.[736] Taiwan, although maintaining its autonomy, has

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[731] Chien-Huei Wu, 'Introduction: Studying the Diplomatic Competition of Taipei and Beijing in New Geopolitics and its Contribution' in Chien-Huei Wu (ed), *Switching Diplomatic Recognition Between Taiwan and China: Economic and Social Impact* (1st edn, Routledge 2024) 1.

[732] UNGA Res 2758 (XXVI) (25 October 1971).

The General Assembly, Recalling the principles of the Charter of the United Nations, Considering that the restoration of the lawful rights of the People's Republic of China is essential both for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter, Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council,

Decides to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.

[733] Jinji Chen and Ling-Yu Chen, 'The Promise of Growth: A "Difference-in-Differences" Analysis of the Economic Impact of Switching Diplomatic Relations between Taiwan and China' in Chien-Huei Wu (ed), *Switching Diplomatic Recognition Between Taiwan and China: Economic and Social Impact* (1st edn, Routledge 2024) 93.

[734] Stuart Lau, 'UK Parliament Calls Taiwan "Independent Country" as Cleverly Visits China' (Politico, 30 August 2023) <https://www.politico.eu/article/uk-parliament-calls-taiwan-independent-country-report-says-james-cleverly-visit-china/> accessed 1 August 2024.

[735] Anon, 'Taiwan: History, Politics and UK Relations' (House of Commons Library Research Briefing, 28 March 2024) <https://commonslibrary.parliament.uk/research-briefings/cbp-9254/> accessed 1 August 2024.

[736] Seanon S Wong, 'Economic Statecraft Across the Strait: Business Influence in Taiwan's Mainland Policy' (2005) 29 Asian Perspective 41 – 72, 42.

faced continuous pressure from the Peoples Republic of China, which insists that Taiwan is a part of China, rejecting any assertion of Taiwanese independence as secession.[737] While Taiwan has gradually embraced its distinct identity, particularly under leadership like the Democratic Progressive Party, China remains resolute on reunification, using both diplomatic and military deterrence.[738] However, China's threat of force, while strong, is tempered by the potential backlash, both within Taiwan and internationally, particularly from the United States.[739] Despite economic integration and various diplomatic overtures by China, Taiwan's identity continues to lean toward independence. Cross-Strait relations remain a delicate balance, with Beijing increasingly relying on economic incentives and diplomatic isolation to box Taiwan into a reunification scenario. The issue is not merely geopolitical but deeply tied to national identity, both in Taiwan, where many citizens see themselves as distinct, and in China, where reunification is seen as an issue of sovereignty. This unresolved tension keeps the Taiwan Strait a geopolitical flashpoint.[740]

6.9 One China

China's aspirations are seen in a commitment to eventual reunification with Taiwan, preferably through peaceful means, yet with a willingness to employ force if necessary.[741] Legal apparatuses such as the Anti-secession Law of 2005[742] exemplify this, positing the potential for 'non-peaceful means' should Taiwan pursue formal independence or if the prospect of peaceful reunification diminishes.[743] The military dimension is further accentuated by the continual enhancement of the People's Liberation Army's capabilities around the Taiwan Strait, including advanced missile systems, naval deployments, and military exercises.[744] Holmes and Yoshihara expound that Taiwan's strategic position

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[737] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 155.
[738] Yi-huah Jiang, 'Taiwan's National Identity and Cross-Strait Relations' in Lowell Dittmer, *Taiwan and China: Fitful Embrace* (University of California Press 2017) 36.
[739] Anders Henriksen, International Law (4th edn, OUP 2023)
[740] Gang Lin and Weixu Wu, 'Chinese National Identity under Reconstruction' in Lowell Dittmer, *Taiwan and China: Fitful Embrace* (University of California Press 2017) 77 – 78.
[741] Catherine L Chou and Mark Harrison, *Revolutionary Taiwan: Making Nationhood in a Changing World Order* (Cambria Press 2024) 137.
[742] The Anti-Secession Law of 2005 is a key piece of legislation enacted by the People's Republic of China, addressing the contentious issue of Taiwan's status and the potential for its secession. This law, ratified on 14 March 2005 by the National People's Congress of the Peoples Republic of China, constitutes a formal articulation of China's policy towards Taiwan, particularly within the intricate and longstanding context of cross-strait relations.
[743] Dean P Chen, 'The Strategic Implications of Ma Ying-jeou's "One ROC, Two Areas" Policy on Cross-Strait Relations' (2013) 20 American Journal of Chinese Studies 23 – 41, 36.
[744] Ian Easton, *The Chinese Invasion Threat: Taiwan's Defense and American Strategy in Asia* (2nd edn, Eastbridge Books 2019) 113.

would grant the Peoples Liberation Army Navy vital access to the Pacific, emphasising the importance of the region in China's broader geopolitical strategy.[745]

Despite comfortably satisfying the Convention's requirements, Taiwan's global statehood recognition finds itself ensnared in a dilemma of international geopolitical entanglements.[746] Beijing's unyielding commitment to the 'One China' doctrine has meant that numerous countries, in their pursuit of fostering ties with China, have abstained from entering into official diplomatic overtures with Taiwan.[747] These diplomatic movements also permeate international forums, where Taiwan's endeavours for representation have often been met with resistance.[748]

The complex landscape of international legal considerations versus Taiwan is exemplified in precedents like the *Case Concerning East Timor (Portugal v. Australia)*.[749] Although not a direct analogue, the International Court of Justice in the case highlighted the pre-eminence of territorial integrity and the sanctity of non-intervention in a country's internal affairs. This ruling, albeit in a different context, resonates with the geopolitical challenges faced by nations when comparing the principles of self-determination and the imperatives of territorial sovereignty. Furthermore, the maritime geopolitics of the South China Sea, with countries such as Vietnam and the Philippines, make Taiwan's position more unstable. The landmark judgement in the *South China Sea Arbitration (Philippines*

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[745] James R Holmes and Toshi Yoshihara, *Red Star over the Pacific: China's Rise and the Challenge to U.S. Maritime Strategy* (2nd edn, Naval Institute Press 2018) 156.

[746] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.

1. Defined Territory Taiwan's territorial integrity is irrefutable, encompassing the main island and various adjunctive islands.
2. Permanent Population With its inhabitants numbering over 23 million, Taiwan unequivocally satisfies this criterion.
3. Effective Government The government of Taiwan, operating with manifest efficacy, exercises unencumbered sovereignty over its domain. It prides itself on its democratic machinery, robust legal frameworks, and periodic electoral exercises.
4. Capacity to Enter into Relations with Other States. This remains the most contentious pillar. While Taiwan has burgeoned into a significant global trade player and nurtures unofficial diplomatic ties, formal recognitions remain elusive, largely due to the PRC's inexorable 'One China' stance.

[747] Lindsay Maizland, 'Why China-Taiwan Relations Are So Tense' (Council on Foreign Relations, 8 February 2024) https://www.cfr.org/backgrounder/china-taiwan-relations-tension-us-policy-biden accessed 4 October 2024.

[748] Scott AW Brown, 'Fraying at the Edges: A Subsystems/Normative Power Analysis of the EU's "One China Policy/Policies"' (2022) 252 China Quarterly 1014.

[749] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024 par 90.

v. China)[750] is a testament to this, as it entailed territorial claims that interwove with Taiwan's maritime aspirations. Taiwan epitomises the tug-of-war between strict legal requirements and the mutable, often unpredictable, terrain of global geopolitics. Its alignment with the Convention's requirements contrasts the broader dynamics of international diplomacy and strategic interests.[751] While Taiwan meets the formal criteria for statehood under the Convention, China considers it a Chinese province and hence part of China under its 'One China' policy. Taiwan never declared independence, and China vetoed its participation in United Nations organisations. However, Taiwan has a separate legal personality in specific areas, such as the Law of Sea, and participates in many non-UN organisations. Many countries maintain bilateral relations with Taiwan, cautiously navigating the 'One China' policy.[752]

The General Assembly can pass resolutions that are capable of creating UN-specific obligations, they do not necessarily create specific binding obligations for UN's members. This is the reason why China describes Resolution 2758 as a 'political document.'[753] Resolution 2758 represented the text through which the Republic of China was expelled from the United Nations. It is true that the text 'decides' hence, suggesting bindingness of the Resolution within the United Nations, independent of its members to 'expel forth with the representative of Chiang Kai-Shek from the place which they unlawfully'.*[754]*

In this regard, however, this kind of expulsion does not directly relate to a state but rather the representatives of its organisation implicitly recognise the competence to control legitimacy. Resolution 2758 thus did not address the membership of Taiwan to the United Nations, but rather a representation to the UN of a state considered to be the same since 1945 – China. In essence, it was not a matter of having one seat replace another but changing the occupants of only one seat. This indeed was a view shared by the two rival governments then.

Further analysis of the text shows that it cannot carry the broader meaning that China now asserts. The Resolution goes no further than to state that: '*the restoration of the lawful rights of the People's Republic of China'* is essential both

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[750] The South China Sea Arbitration (*The Republic of Philippines v. The People's Republic of China*) 2013 <https://pca-cpa.org/en/cases/7/> accessed 27 February 2024 page 45.
[751] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 432.
[752] Mahir Al Banna, 'Taiwan's International Legal Standing: Navigating the Fragile Status Quo' (2024) 10 Journal of Liberty and International Affairs 149 – 172.
[753] UNGA Res 2758 (25 October 1971).
[754] Mahir Al Banna, 'Taiwan's International Legal Standing: Navigating the Fragile Status Quo' (2024) 10 Journal of Liberty and International 149 – 172, 156.

for the protection of the Charter of the United Nations and for the cause that the United Nations must serve under the Charter. It acknowledges that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations and that the People's Republic of China is one of the five permanent members of the Security Council.[755]

6.10 Somaliland and Taiwan

On 1 July 2020, Somaliland and Taiwan gained international attention when it was agreed to set up representative offices in their respective capitals. No doubt, their action has led to speculations as to what their relationship can encompass, but the actual advantages they can bring might be of more significance than the exact nature of their relations.[756]

Somaliland and Taiwanese dynamics appeared to develop a relationship for enhancing cooperation between their countries in maritime security, education, and healthcare matters.[757] This latest deal has provoked speculation over mutual recognition between Somaliland and Taiwan. However, the word 'recognition' does not appear in their official statements, but it is country, not state.[758] Arguably, such ambiguity suggests that while recognition may be implied, this is at best tacit, and not made explicit. Similarly, the establishment of representative offices rather than embassies suggests cautious incrementalism so as not to provoke mainland China.[759] This represents a potential economic benefit to both territories

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[755] Jessica Drun and Bonnie S. Glaser, 'The Distortion of UN Resolution 2758 to Limit Taiwan's Access to the United Nations' (German Marshall Fund of the United States, 24 March 2022) <https://www.gmfus.org/news/distortion-un-resolution-2758-and-limits-taiwans-access-united-nations> accessed 1 August 2024.

[756] Mohamed Hagi, 'A Future Outlook: Prospects for Somaliland-Taiwan Relations' (Global Taiwan Institute, 1 May 2024) <https://globaltaiwan.org/2024/05/a-future-outlook-prospects-for-somaliland-taiwan-relations/> accessed 9 August 2024.

[757] Richard Atimniraye Nyelade, 'Strategic Diplomacy Beyond Recognition: Taiwan and Somaliland's People-Centered Relations in the Global Arena' (Saxafi Media, 27 June 2024) <https://saxafimedia.com/strategic-diplomacy-recognition-taiwan-somaliland/> accessed 4 October 2024.

[758] Molly Hunt, 'Why an Acknowledgement of Country is important (and advice on how to give one)' (ABC News, 23 January 2020) <https://www.abc.net.au/news/2020-01-23/why-acknowledgement-of-country-is-important-and-how-to-give-one/11881902> accessed 9 August 2024.

[759] Marshall Reid, 'The Taiwan-Somaliland Partnership: A Model for an Unofficial Approach to Diplomatic Relations?' (Global Taiwan Institute, 1 December 2021) <https://globaltaiwan.org/2021/12/the-taiwan-somaliland-partnership-a-model-for-an-unofficial-approach-to-diplomatic-relations/> accessed 9 August 2024.

considering Taiwan's booming industrial sector and Somaliland's strategic location, ports and oil reserves.[760]

The Taiwan-Somaliland relationship goes more than a decade back. While it is not formal recognition, the partnership is rather strategic and tries to bring benefit to both territories in light of complex international politics. After all, this agreement symbolises the down-to-earth attitude each side shares concerning international visibility and economic development. Secondly, this strategy follows the precedent Taiwan has set in the international community in its ability to maintain unofficial international and corporate connections.[761]

6.11 Taiwan Conclusion

Taiwan, similar to Somaliland is located in a grey and ambiguous area of international law and statehood. Crawford articulated that although meeting all the requirements of statehood: having its currency, a growing economy, strong democratic system, substantial military force a genuine case of Montevideo Plus, it lacks international recognition. The incoming President is not seeking formal unification; William Lai is not seeking formal independence and is focused on what is the best way to maintain the current situation in Taiwan, which is to be separate, democratic, and self-governing but also not challenging the Peoples Republic of China in a way that could lead to military conflict.[762] Taiwan may use constitutional reforms in an attempt to find legal instruments to appeal to international legal requirements. The United States, being its ally, can change the policy of being strategically ambiguous at present to that of active support for Taiwan's bid for international recognition. A third option could involve bringing the matter before the International Court of Justice through an advisory opinion. That would not be legally binding but may be persuasive to the international community.[763]

At the time of writing the Chinese sword of Damocles seems to hang over Taipei, China's use of force to reunite with Taiwan is evident not only in the political

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[760] Mohamed Hagi, 'A Future Outlook: Prospects for Somaliland-Taiwan Relations' (Global Taiwan Institute, 1 May 2024) <https://globaltaiwan.org/2024/05/a-future-outlook-prospects-for-somaliland-taiwan-relations/> accessed 9 August 2024.

[761] Mohamed Hagi, 'A Future Outlook: Prospects for Somaliland-Taiwan Relations' (Global Taiwan Institute, 1 May 2024) <https://globaltaiwan.org/2024/05/a-future-outlook-prospects-for-somaliland-taiwan-relations/> accessed 9 August 2024.

[762] Rupert Wingfield-Hayes, 'William Lai: Taiwan just chose a president China loathes. What now?' (BBC News, 13 January 2024) <https://www.bbc.co.uk/news/world-asia-67920530> accessed 1 August 2024.

[763] Trang Pham, 'A Legal Perspective on the Future of Cross-Strait Relations under William Lai's Taiwan' (Perry World House, 3 May 2024) <https://global.upenn.edu/perryworldhouse/news/legal-perspective-future-cross-strait-relations-william-lais-taiwan-0> accessed 1 August 2024.

statements of its leaders but also within its domestic legal framework.[764] Article 8 of China's 2005 Anti-Secession Law states that

> [i]n the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity.[765]

In practice, China has frequently demonstrated its military presence around the island but has refrained from attacking Taiwan. There are two legal reasons for this restraint.[766]

Firstly, international law limits China's use of force against Taiwan. As a member state of the UN, China is bound by the United Nations Charter,[767] particularly Article 2(4), which prohibits the threat or use of force inconsistent with the purposes of the United Nations. Article 1 of the Charter emphasises maintaining international peace and security, which includes not just the absence of war but also the reduction of conditions likely to cause conflict. Therefore, an armed attack on Taiwan would flagrantly violate the United Nations Charter, which is binding on China. Such an attack could escalate tensions between China and the United States, both nuclear powers, threatening international peace and security. The Taiwan Relations Act[768] obliges the United States to provide Taiwan with arms necessary for self-defence against coercion, including force. Following the 2024 Taiwan election, the US demonstrated its support by sending a warship through the Taiwan Strait, which China condemned as provocative. Moreover, a war over

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[764] Helen Davidson, 'Xi Jinping Tells China's Army to Focus on Preparation for War' (The Guardian, 9 November 2022) <https://www.theguardian.com/world/2022/nov/09/xi-jinping-tells-chinas-army-to-focus-on-preparation-for-war> accessed 1 August 2024.

[765] Anon, 'General Policy Archives (1994-2008): The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law' (Mainland Affairs Council: Republic of China: TAIWAN, 29 March 2005) <https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE#:~:text=In%20response%20to%20China%E2%80%99s%20contempt%20for%20Taiwan%E2%80%99s%20sovereignty%2C,China%20solemnly%20proclaims%20its%20opposition%20to%20this%20Law> accessed 9 August 2024.

[766] Gregor Stuart Hunter, 'China Preparing Armada of Ferries to Invade Taiwan: Roll-on Roll-off Passenger Vessels Being Earmarked to Carry Armoured Vehicles, Security Experts Say' (The Telegraph, 26 May 2024) <https://www.telegraph.co.uk/world-news/2024/05/26/china-preparing-armada-of-civilian-ferries-to-invade-taiwan/> accessed 1 August 2024.

[767] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[768] Taiwan Relations Act 1979.

Taiwan could spell economic disaster and be a potential humanitarian catastrophe for 23.5 million people.[769]

China's domestic laws stipulate explicit conditions for the use of force: firstly, that all channels for peaceful reunification have to be exhausted; and secondly, there must either be an attempt at secession or incidents involving Taiwan of a magnitude tantamount to secession.[770] President-elect Lai emphasised peaceful coexistence in the Taiwan Strait and opened a path for possible dialogue with the People's Republic of China, the stipulated conditions of when force could be used under China's *Anti-Secession Law* have not yet been satisfied. China may be discouraged from an armed attack on Taiwan, because of the additional issues of illegitimacy both in international and domestic law and risks significant reputational damage.[771]

6.12 Conclusion

Chapter Six examined the complex nature of non-state territorial entities or self-determined units, using Somaliland and Taiwan as primary case studies. The chapter considers the contest term and varying definitions of *de facto* states, noting the absence of a universal agreement or legal definition, and highlights the criteria suggested by academics, which are not legally binding.[772]

Somaliland's pursuit of international recognition is discussed, emphasising its effective governance and adherence to the Montevideo Convention requirements despite lacking formal recognition. Taiwan's unique status is also explored, noting its lack of a formal declaration of independence, its significant economic and political links with many countries, and its precarious position under the 'One China' policy.[773] The chapter also analyses the international legal constraints on

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[769] Trang Pham, 'A Legal Perspective on the Future of Cross-Strait Relations under William Lai's Taiwan' (Perry World House, 3 May 2024) <https://global.upenn.edu/perryworldhouse/news/legal-perspective-future-cross-strait-relations-william-lais-taiwan-0> accessed 1 August 2024.

[770] Anon, 'General Policy Archives (1994-2008): The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law' (Mainland Affairs Council: Republic of China: TAIWAN, 29 March 2005) <https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE#:~:text=In%20response%20to%20China%E2%80%99s%20contempt%20for%20Taiwan%E2%80%99s%20sovereignty%2C,China%20solemnly%20proclaims%20its%20opposition%20to%20this%20Law> accessed 9 August 2024.

[771] Trang Pham, 'A Legal Perspective on the Future of Cross-Strait Relations under William Lai's Taiwan' (Perry World House, 3 May 2024) <https://global.upenn.edu/perryworldhouse/news/legal-perspective-future-cross-strait-relations-william-lais-taiwan-0> accessed 1 August 2024.

[772] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 4.

[773] James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 218.

China's use of force against Taiwan, including the implications of the United Nations Charter[774] and the Taiwan Relations Act.[775]

Furthermore, it considers the broader geopolitical context, including the impact of regional stability, the interests of neighbouring countries, and the strategic actions taken by the United States and other nations.[776] The chapter concludes by reflecting on the challenges and implications of state recognition, the back-and-forth of legal and political factors, and the potential paths forward for entities like Somaliland and Taiwan.

The chapter presents a detailed examination of the definition and recognition of *de facto* states, highlighting the subjective nature of the term and the absence of a universal legal definition. It explores the academic requirements suggested for identifying *de facto states* and contrasts these with the legal standards, emphasising the complexity and variability in recognizing such territories. This theme sets the stage for understanding the challenges faced by territories like Somaliland and Taiwan, which function effectively as self-determined units but lack formal international recognition. Somaliland's pursuit of recognition is a significant focus, reflecting on its effective governance, adherence to the Montevideo Convention requirements, and the obstacles it faces in gaining international acceptance.

The chapter discusses Somaliland's historical context, its efforts to establish a stable and democratic government, and the political and economic ramifications of its lack of recognition. It highlights the tension between the declarative and constitutive theories of statehood and the implications for Somaliland's quest for international legitimacy. Taiwan's status is examined in detail, noting its lack of a formal declaration of independence and its complex relationship with China under the 'One China' policy. The chapter explores Taiwan's significant economic and political connections with other countries, its participation in international organisations as an observer, and the legal and political challenges it faces. The discussion includes Taiwan's strategic importance, the impact of regional stability, and the influence of major powers like the United States on its international standing.

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[774] *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[775] Taiwan Relations Act 1979.
[776] Timothy R Heath, *Is China Prepared for War? Indications and Warning of a Potential Chinese Conflict with the United States* (RAND Corporation 2024) 2 – 8.

Finally, exploring post-positivist solutions for the recognition of non-state territorial entities like Somaliland and Taiwan involves moving away from rigid legalistic frameworks towards more flexible, socially constructed paradigms suggested by Vidmar and McGibbon. Alexander Wendt's constructivist theory suggests that the international system is shaped by social interactions and the identities, norms, and interests that arise from them.[777] Applying Wendt's ideas, the recognition of these entities could be influenced by how they are perceived and interacted with by other states, rather than strictly adhering to traditional criteria of statehood. This shift towards constructivism emphasises the importance of diplomatic engagement, international norms, and the evolving political contexts that influence recognition.[778] By prioritising these aspects, Somaliland and Taiwan could achieve a form of *de facto* recognition and integration into the international community, even in the absence of formal statehood. This approach highlights the dynamic and negotiated nature of international relations, where legitimacy and recognition can be constructed through continuous interaction and mutual acknowledgement among global actors.

As Chapter Six concludes its analysis of state recognition and sovereignty under traditional international law frameworks, Chapter Seven continues to critique the deficiencies of the Montevideo Convention, particularly concerning the unique conditions of indigenous peoples. This chapter will examine how rigid statehood criteria overlook the cultural, historical, and political complexities faced by Indigenous groups, advocating for alternative legal frameworks grounded in international human rights law to better protect their rights to self-determination, autonomy, and cultural survival

[777] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 10.
[778] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 9 – 10.

CHAPTER SEVEN MINORITY AND INDIGENOUS PEOPLES' RIGHTS

7.1 Introduction

This chapter seeks to analyse the deficiencies of the requirements for statehood laid down under the Montevideo Convention concerning the peculiar conditions that indigenous peoples present, wherein the rights for self-determination, autonomy, and cultural survival run opposite to the interest of a politically and economically strong state. The chapter argues that the inability of the traditional Westphalian conception of statehood, as codified in the Convention, concerning the question of indigenous peoples, is because the requirements it uses defined territory, a permanent population, a government, and the capacity to enter into relations with other states-are rigid and not flexible, hence incapable of considering in their peculiar historical, cultural, and political contexts the case of the indigenous peoples.[779] The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, adopted in 1992, establishes minimum standards for the protection and rights of minorities.[780] The Declaration includes rights related to cultural, religious, and linguistic identity, participation in public life, and the establishment of associations. It also obliges states to ensure the full and effective exercise of these rights. While not legally binding, the Declaration represents a significant political commitment by states.[781] This chapter demonstrates how much more effective protection of indigenous peoples' rights might be under alternative legal frameworks, particularly those emanating from international human rights law. The chapter uses the case studies of *East Timor,*[782] *the Chagos Archipelago,*[783] *Awas Tingni,*[784] and others to examine the weaknesses of the Convention. In the case of *East Timor*, the International Court of Justice could not rule on the nature of the case in the absence of Indonesia. *East Timor* showed how geopolitical considerations can override even the principle of self-determination; indigenous groups are more often left vulnerable when the interests of the indigenous population clash with the overriding concerns of powerful states.[785] The Chagos Archipelago case

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[779] Stephen James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 26.
[780] UNGA Res 47/135 (18 December 1992).
[781] UNGA Res 47/135 (18 December 1992).
[782] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024.
[783] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024.
[784] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) 2001 <http://hrlibrary.umn.edu/iachr/AwasTingnicase.html> accessed 2 September 2024.
[785] Jan Klabbers, *International Law* (CUP 2024) 95.

demonstrates how ineffective the Convention is in tackling decolonisation, coupled with indigenous claims of rights. The 2019 Advisory Opinion of the International Court of Justice, found against the United Kingdom for continuing its administration over the islands and pronouncing self-determination as rightfully belonging to the Chagossians. This ruling provides a flavour of the potential of international law in support of indigenous claims.

The United Kingdom has agreed to return the Chagos Islands to Mauritius, but Diego Garcia will remain under United Kingdom-United States control for 99 years. Chagossians, displaced decades ago, feel excluded from the arrangement and continue to seek the right to return. The treaty has been welcomed by Mauritius and the African Union.[786] This case indicates how ill-matched the state-centric approach of the Convention was vis-à-vis solving the complex claim for Indigenous rights in a post-colonial framework. Another issue taken up as a deciding factor in the rights of indigenous peoples in this chapter is the availability of other legal mechanisms, if not perhaps more viable, such as those represented through the Inter-American Court of Human Rights. The case of *Awas Tingni*, where the Court recognised collective land rights owned by the Mayagna (Sumo) community, provided a precedent for approaches that are more fully grounded in human rights principles. These remedies can provide more meaningful protection for indigenous peoples.[787] By recognising the cultural, spiritual, and social dimensions of Indigenous peoples' land rights, the Inter-American Court reflected an understanding of the needs and aspirations of Indigenous peoples that was more effective than the formalistic requirements of statehood codified by the Convention. The chapter concludes that the Convention, although foundational in defining statehood, falls short of attending to the peculiar challenges faced by Indigenous people. The rigid requirements of the Convention do not consider the peculiar legal and cultural identities of indigenous peoples, making it fall short of an instrument in protecting the rights of such groups.[788]

The case studies presented in the chapter expose the insufficiencies of the Convention and raise awareness of the need for other forms of legal frameworks that would consider the special status of indigenous peoples within the international order. This growing realisation is important to ensure the self-

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[786] Jutalla Coulibaly-Willis, Why the Return of the Chagos Islands has Left Chagossians Feeling Excluded (Euronews, 10 October 2024) <https://www.euronews.com/2024/10/10/why-the-return-of-the-chagos-islands-has-left-chagossians-feeling-excluded> accessed 10 October 2024.
[787] Stephen James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004).
[788] UNGA Res 47/135 (18 December 1992).

determination of Indigenous peoples, and the preservation of their culture, and autonomy are exercised in a manner respected and upheld with humanity through international law.[789]

7.2 The Rights of Indigenous Peoples

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples after more than two decades of drafting, in which Indigenous groups and their Non-Government Organisations participated extensively.[790] It further led to key structural changes within the United Nations: the establishment of the United Nations Permanent Forum on Indigenous Issues; expanding the mandate of the Special Rapporteur on Indigenous Peoples; and the establishment of the Expert Mechanism on the Rights of Indigenous Peoples.[791]

Customarily international recognition of Indigenous rights had been confined to two International Labour Organisation Conventions that were limited in scope and participation and arguably catered to state interests.[792] The Declaration marked a departure from a state-centred approach, being far more inclusive of and consultative with indigenous communities. Significantly, the Declaration's Article 3[793] created a statement of the right to self-determination of Indigenous peoples; states long resisted this provision which was similar in tone to the wording of Article 1 of the International Covenant of Civil and Political Rights[794] and International Covenant of Economic, Social, and Cultural Rights.[795] Traditionally, the Human Rights Committee was disinclined to address claims under Article 1; instead, it placed indigenous issues under the minority rights protection under Article 27.[796] It affirms an array of rights critical to the concern of Indigenous

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[789] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 1 – 2.
[790] UNGA Res 61/295 (13 September 2007).
[791] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 624.
[792] International Labour Organisation Convention No. 107: *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (1957). This convention focused on the protection and integration of indigenous populations but was criticised for its assimilationist approach. ILO Convention No. 169: *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (1989). This convention replaced Convention No. 107 and is more progressive, focusing on the rights of Indigenous peoples to maintain their cultures, identities, and self-determination, while still encouraging their participation in national development
[793] UNGA Res 61/295 (13 September 2007) article 3.
[794] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI), Article 1.
[795] The International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966, and came into force 3 January 1976) 993 UNTS 14531 UNGA Resolution 2200A (XXI).
[796] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI), Article 27.

peoples, including rights to equality, freedom from discrimination, cultural identity, and participation in decision-making, beyond self-determination, self-government, and control over traditional lands and resources. Although the term ‘indigenous peoples’ is not defined with precision in the Declaration, its adoption by the General Assembly even though not legally binding carries considerable symbolic weight in the international community. Summers explored the potential for individuals to claim the right to self-determination, typically a collective right, through mechanisms such as the International Covenant of Economic, Social, and Cultural Rights.[797] Summers acknowledged that while many human rights treaties focus on individual rights, self-determination remains a collective right, creating challenges for individual claims under human rights law.[798] He explored how mechanisms in treaties like the African Charter on Human and Peoples' Rights have allowed individuals to represent groups in claiming violations of collective rights, providing a framework that may be applied under International Covenant on Economic, Social and Cultural Rights.[799]

Will Kymlicka’s work on statehood and Indigenous rights, particularly as presented in multicultural citizenship, challenges traditional concepts of statehood and sovereignty, especially within the Westphalian framework.[800] Kymlicka argues that Indigenous peoples often do not seek statehood in the Westphalian sense, defined by territorial sovereignty, but rather aim to protect their cultural and political rights through forms of non-territorial autonomy.[801] This is because nationalist doctrines are founded on the belief that the identity and sovereignty of the nation should be expressed in an independent state. The reality, however, is never that straightforward, and states at least those with a developed sense of sovereignty are likely to resist this claim fiercely. Such resistance would more often than not be framed around reasons relating to territorial integrity, national security, and political stability. By contrast, the rights of groups within a ‘minority or Indigenous peoples' rights framework may offer an approach that is conceptually more feasible and

[797] James Summers, ‘The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right’ (2019) 31 *New England Journal of Public Policy* 1 – 12, 1 – 2.
[798] James Summers, ‘The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right’ (2019) 31 *New England Journal of Public Policy* 1 – 12, 6 – 8.
[799] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[800] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 2000) 3.
[801] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 2000) 109.

less contentious in terms of protecting and advancing the cultural and political interests of stateless nations.[802]

The recognition of these group rights within an existing state, rather than forming a new state, is more pragmatic conceptually. International legal frameworks, such as United Nations Declaration on the Rights of Indigenous Peoples and multiple European human rights conventions, give another way through which the rights of minorities and indigenous people can be claimed.[803] Most of these instruments include rights to self-determination, cultural preservation, and participation in decision-making processes that may affect their communities. The entrenching of such rights within the structure of an existing state would minimise any potential conflict over statehood and sovereignty while allowing for the expression of national identity and autonomy in a protected legal context. The case of the Sami in Norway, Sweden, and Finland is a clear example of ongoing negotiations based on the recognition and protection of indigenous rights and how this need not inherently threaten state sovereignty.[804]

In all three countries, the Sami have gained varying degrees of cultural and political rights albeit there are trenchant criticisms levelled at the host countries about the status of the Sami: their parliament is legally recognised in Norway, for example, and they enjoy some partial self-government.[805] It illustrates how the rights of stateless nations could be accommodated within existing states and avoid the political and legal conflicts resulting from the pursuit of statehood.[806] This is, nevertheless, a potentially influential doctrine; a more appropriate way of considering the rights of stateless nations lies through the framework for minority rights or indigenous peoples' rights. Both these frameworks allow for the protection and promotion of group rights in a manner that does not challenge the sovereignty and territorial integrity of existing states in keeping with a more stable and peaceful international order.

Several notable cases in the International Court of Justice and other international bodies have arisen concerning the rights of indigenous peoples and minorities,

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[802] Aaron Spitzer and Per Selle, ‘Is Nonterritorial Autonomy Wrong for Indigenous Rights? Examining the ‘Territorialisation’ of Sami Power in Norway’ (2020) 28 International Journal on Minority and Group Rights 1 – 24, 6 – 7.
[803] UNGA Res 61/295 (13 September 2007).
[804] Aaron Spitzer and Per Selle, ‘Is Nonterritorial Autonomy Wrong for Indigenous Rights? Examining the ‘Territorialisation’ of Sami Power in Norway’ (2020) 28 International Journal on Minority and Group Rights 1 – 24, 14.
[805] Rauna Kuokkanen, 'The problem of culturalizing indigenous self-determination: Sámi cultural autonomy in Finland' (2024) 14 Polar Journal 148 – 166, 149.
[806] UN Doc A/HRC/45/34 2023.

and more particularly their claims to self-determination and autonomy.[807] Such legal rulings are reinforced by the antagonism between, on the one hand, the principles of state sovereignty, reflected in the Convention, and the right of Indigenous peoples to self-determination, protecting their way of living and cultural heritage and the right to their land.[808] The Convention does include a model for determining a state's legal status under the system although this does not in any way cater for centuries-old peculiarities of Indigenous people's rights. This approach has often been rigid and remains so, not giving regard to the application of non-state entities within member states, those non-state entities that do meet the Montevideo requirements, and have a distinct cultural identity, history of continuity, and rightful claim for self-determination.[809]

In cases such as *East Timor (Portugal v. Australia)*[810] or the *Chagos Archipelago Advisory Opinion* (2019)[811], for example, the Convention's requirements[812] are seriously deficient in resolving disputes involving indigenous peoples and claims for autonomy. These cases illustrate the complexities that arise when the international legal system prioritising state sovereignty intersects with the evolving recognition of indigenous rights under international law. In the case of *East Timor*, the International Court of Justice eventually refused to make a final judgment on the merits of the case, arguing that it had no legal authority to conduct jurisdiction over Indonesia, thus affirming that there are, indeed, limitations within the Montevideo Convention principles framework in issues relating to indigenous self-determination.

There is a similar provision in the Chagos case, where the court found that the United Kingdom had an illegal detachment of the Chagos Archipelago from the Republic of Mauritius and removed the indigenous population.[813] The *Awas Tingni* case, although before the Inter-American Court of Human Rights and not the International Court of Justice, reiterated the inadequacy that some traditional mechanisms of international law have for the protection of indigenous rights. In

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[807] Rhona KM Smith, *International Human Rights Law* (10th edn, OUP 2021) 367.
[808] Martti Koskenniemi, 'What is International Law For?' in *International Law* (OUP 2018) 32.
[809] Ulrike Barten, *Minorities, Minority Rights and Internal Self-Determination* (Springer International Publishing 2014) 184.
[810] *Case Concerning East Timor* (*Portugal v Australia*) 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024.
[811] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024.
[812] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[813] Przemysław Tacik, *Deconstructing Self-Determination in International Law: Sovereignty, Exception, and Biopolitics* (Brill 2023) 237.

this case. The recognition of Mayagna's (Sumo) community's right to collective land was not derived from adherence to the Montevideo requirements but from the Court's interpretation of human rights, particularly property rights. With these difficulties, there is a clear argument that alternative legal mechanisms have appeared to be more effective for catering to the needs of the two groups in these cases.[814]

The Inter-American Court,[815] for example, to human rights has made it possible for indigenous land rights to get a more detailed focus, recognising their cultural, spiritual, and social dimensions.[816] Furthermore, other international human rights instruments, including the *UN Declaration on the Rights of Indigenous Peoples and the International Labor Organization's Convention 169*, provide the wider framework for the promotion of Indigenous rights beyond the strict limits of statehood defined by the Convention.[817]

7.3 East Timour Case Study

The *East Timor* case may be viewed as a landmark case in international legal recognition of the right to self-determination, particularly as regards Indigenous peoples. The Portuguese took the Southeast Asian territory in the 16th century, the territory was decolonised briefly and then invaded, and held under Indonesian occupation until the late 20th century. Australia and Indonesia were exploiting the oil and gas resources in the Timor Sea. Portugal, acting as the administering power on behalf of the East Timorese People, brought the case to the International Court of Justice, arguing that the *Timor Gap Treaty* 1989 violated the right to self-determination of the East Timorese People.[818] The International Court of Justice, in its ruling, reaffirmed the primacy of the principle of self-determination, which had earlier been implored in international practice by the United Nations Charter and the series of human rights covenants.[819] The Court, however, eventually dismissed

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[814] James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 57).
[815] The Inter-American Court of Human Rights is a judicial body established by the Organization of American States (OAS) to enforce and interpret the American Convention on Human Rights. It addresses cases of human rights violations in member states, issuing binding rulings to protect individuals and groups. The Court plays a crucial role in promoting justice and human rights across the Americas, ensuring that states uphold their international obligations. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 17955.
[816] Anon, *Inter-American Court of Human Rights* (Inter-American Court of Human Rights, 2024) <https://corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 28 August 2024.
[817] UNGA Res 61/295 (13 September 2007).
[818] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024, paragraphs 102 – 105.
[819] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024, paragraphs 102 – 105.

the case under the justification for its incompetence to sit in the matter under the laws governing it, for the reason that Indonesia was not a party to the hearing. The Court concluded that it could not rule on the legality of the agreement without Indonesia's consent to do so, as it would indirectly be adjudicating rights and obligations within Indonesia, violating the tenet of state sovereignty.[820] This decision highlighted one of the shortcomings of the international legal mechanisms when it comes to self-determination issues that involve powerful states.[821] The judgment in the East Timor case demonstrated the conflict of existing state sovereignty and the rights of the indigenous populations to self-determination although the International Court of Justice was a bit unwilling to delve into the substantive issues of the case.

The East Timor case exposed the general geopolitics often at play in the application of international law. Australia, a key ally of Indonesia, had vested interests in upholding the 1989 Timor Gap Treaty, which granted it access to Timor's oil and gas resources.[822] This case exemplifies how strategic and economic interests of states can override the rights of Indigenous peoples under international law. Although the International Court of Justice's ruling did not directly liberate East Timor, it played a critical role in raising international awareness and underscoring the need for stronger legal protections for Indigenous rights.[823] Interest in East Timor's self-determination reignited in the late 1990s, leading to a United Nations-organized referendum in 1999, where the East Timorese voted to break from Indonesia.[824] East Timor became an independent republic in 2002 and this case remains emblematic of the challenges Indigenous populations face within geopolitical and legal processes, especially when global corporations have significant interests in the resources of these territories.[825]

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[820] *Monetary Gold Removed from Rome (Italy v. France, United Kingdom, and United States)* 1954 https://www.icj-cij.org/case/19 accessed 12 September 2024.
[821] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024, paragraphs 23 – 37.
[822] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024, paragraphs 102 – 105.
[823] Ian Martin, *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Lynne Rienner Publishers 2001) 128.
[824] Anon, 'The United Nations and Self-Determination in the Case of East Timor' (E-IR.info, 2023) <https://www.e-ir.info> accessed 28 August 2024.
[825] Clinton Fernandes, *The Independence of East Timor: Multi-Dimensional Perspectives — Occupation, Resistance, and International Political Activism* (Liverpool University Press 2021) 146 – 147.

7.4 The Chagos Archipelago Case Study

The case of the Chagos Archipelago and the International Court of Justice 2019 Advisory Opinion is considered a landmark case in international law providing persuasive case law on the rights of Indigenous people and self-determination.[826] The case concerns the Chagossians, who as an indigenous population were forcefully displaced from their habitat in the Indian Ocean over the 1960s and 1970s.[827] The United States and United Kingdom established a strategic military base on Diego Garcia, which is one of the most effective military locations in the world granting access to the Middle East, Asia and Africa. The Chagos Archipelago formed part of the constitutive estate of the British colony of Mauritius but was detached in 1965 by the British Government, three years before Mauritian independence. The creation of The British Indian Ocean Territory[828] and later the expulsion of the Chagossians have been sources of international contention and legal battles for years. Approximately 1,500 Chagossians were resettled in Mauritius and the Seychelles, where they had to face enormous hardship, including poverty, social exclusion, and loss of cultural identity.[829]

In 2017, the United Nations General Assembly asked for an advisory opinion of the International Court of Justice over the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. The request made to the Court concerned for the better part the question of whether or not the decolonisation of Mauritius had been lawfully completed, and, in terms of legal consequences, whether Great Britain still held the same legal obligations given continued administration vis-à-vis the adoption of a national policy that might adversely affect the Chagossians concerning the exercise of their right to self-determination.[830] In this regard, International Court of Justice affirmed the principle of self-determination. It held that the decolonisation of Mauritius was not accomplished when it attained independence because it was separated without free and well-informed consent given by the Mauritian people, including the Chagossians. It held that the continuous administration of the Chagos Archipelago by the United

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[826] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 95.
[827] Brendan Plant, 'Territory' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 189.
[828] Anon, *British Indian Ocean Territory* (British Indian Ocean Territory, 2024) <https://www.biot.gov.io/> accessed 28 August 2024.
[829] Caecilia Alexandre and Konstantia Koutouki, 'No Way Home for the Chagossians: Law and Power Politics' (2018) 25 International Journal on Minority and Group Rights 369 – 400, 371.
[830] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 174.

Kingdom under international law was done illegally and the archipelago should be returned to Mauritius as soon as possible.[831]

In that opinion, the holding of the Court was based upon several major legal premises: First, it reaffirmed the right to self-determination as constituting one of the fundamental principles of international law, being *erga omnes*[832] in the sense of being about the international community as a whole. The International Court of Justice explained that detachment of the Chagos Archipelago and expulsion of the population were not possible under the right to self-determination, under which 'the integrity of a non-self-governing territory is to be respected pending free and genuine expression of the will of the entire population of that territory regarding its future political status'.[833] The right of self-determination, as explained by the International Court of Justice, is relevant in the context of decolonisation. The question before the International Court of Justice's Advisory Opinion, therefore, involved wider implications under international law and the rights of indigenous people *vis-a-vis* the Chagos Archipelago. In particular, the Court held that the right to self-determination is now one of the norms under international law known as peremptory, one of treaty obligations with the quality of overriding other incompatible treaty stipulations. Although this strengthened the legal position of self-determination, it underlined all illegality associated with any action that was running counter to it, including forced removals such as those that happened to the Chagos Islanders from their homeland.[834]

The Advisory Opinion immediately became a landmark affirmation of the rights of indigenous peoples, which was widely welcomed by human rights advocates and legal scholars throughout the world. It drew attention to the injustices suffered by the Chagossians and substantiated their claims for return to their ancestral

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[831] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 183.

[832] The term *erga omnes* is a Latin phrase meaning "towards all" or "against all." In international law, it refers to obligations or rights that a state has towards the international community as a whole, rather than just between two states. This concept is significant in areas such as human rights, where violations are seen as matters of concern for all states, not just the parties directly involved. An example of *erga omnes* obligations includes prohibitions against genocide, slavery, or racial discrimination.

[833] Anon, *The Chagos Advisory Opinion and the Decolonization of Mauritius* (ASIL, 15 April 2019) <https://www.asil.org/insights/volume/23/issue/6/chagos-advisory-opinion-and-decolonization-mauritius> accessed 10 October 2024.

[834] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 172.

lands.[835] However, the opinion also highlighted the difficulties in implementing international legal standards, because the United Kingdom at the time of writing, has rejected the International Court of Justice opinion and has set aside strategic and security considerations.[836] The International Court of Justice Opinion on the Chagos Archipelago has also highlighted broader conclusions for international law and claims of title over Indigenous people in their lands. The stating of self-determination as a norm of *jus cogens* by the Court, itself a peremptory norm of international law that overrides any conflicting treaty obligations, was remarkable.[837] Such a finding has not only strengthened the legal status of self-determination but also that any act in violation of this will be illegal.[838]

7.5 Awas Tingni Case Study

The Awas Tingni community belongs to the indigenous group known as the Mayagna (Sumo) people, who are inhabitants of the North Atlantic Autonomous Region of Nicaragua. Kulps established that they make extensive use of their territories, which have been used from time immemorial and for generations according to their customs and traditions. But in the early 1990s, the Awas Tingni government had granted a commercial logging concession on the Awas Tingni's traditional lands to a foreign company, throwing the community's livelihood, culture, and spiritual attachment to the land into a tailspin and setting into motion a lawsuit with groundbreaking reach. The *Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, in international human rights law, in particular concerning the rights of the indigenous people.[839] This case was taken up by the Inter-American Court of Human Rights, and in 2001 the Adjudication was pronounced, reinforcing the international precedent that the states follow and acknowledge the land rights of the indigenous community. The case began in Nicaraguan courts, where the community sought to challenge the legality of the

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[835] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 174.
[836] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 177.
[837] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 179.
[838] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 181.
[839] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) 2001 <https://repository.arizona.edu/handle/10150/659193

logging concession. The Awas Tingni, through the Centre for Justice and International Law and the Indian Law Resource Centre, brought several cases against the government at the national level.[840]

Subsequently, the Commission submitted the case to the Inter-American Court of Human Rights, which was the first case it considered about the land rights of indigenous peoples. The Awas Tingni community's legal arguments stressed that the Nicaraguan government had not honoured or protected the customary land rights of the community, which are protected both by the American Convention on Human Rights and several other international human rights instruments.[841] The community argued that its right to property, as protected under Article 21 of the American Convention, lay in the community's collective right to the lands it has traditionally occupied and used.[842] In addition, they submitted that the actions by the state violated their right to judicial protection under Article 25 of the Convention because the concessions were insurmountable by any effective challenges that could be made in Nicaragua's judicial system.[843] To the Awas Tingni community, this was a landmark judgment, which settled several legal principles that continued to be the standing platform for the recognition and respect for the rights of indigenous communities throughout the world. The Court recognised that under Article 21 of the American Convention on Human Rights, the definition of property includes collective land rights of indigenous communities.

The judgment recognised that in the case of Indigenous peoples, the relationships they have with their land are not only economic but also cultural, spiritual, and social.[844] These collective rights were ruled as integral, going to the very essence of survival and well-being of indigenous communities, and thus to be protected under international human rights law. Furthermore, the Court held that Nicaragua had violated the Awas Tingni right by failing to establish and legally demarcate their traditional lands and carry this forward in their Free and Prior Informed Consent. In short, the principle of Free and Prior Informed Consent, already strong

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> accessed 7 August 2024.

[840] James S Anaya and Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples* (2002) 19 Arizona Journal of International and Comparative Law 1 – 15, 16.

[841] Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law* (Brill 2020).

[842] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 17955, Article 21.

[843] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 17955, Article 25.

[844] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) 2001 <https://repository.arizona.edu/handle/10150/659193
> accessed 7 August 2024, paragraph 149.

at the time of the Awas Tingni ruling, was solidified as a cornerstone of international indigenous rights law.[845] This calls upon states to seek the consent of the indigenous communities before developing programs that would affect their lands, territories, and resources. The Court has ordered several measures upon Nicaragua as a result of the violations committed against it. Among them were boundary demarcation and titling over the ancestral lands of Awas Tingni, compensation for the damages caused by the logging concession, and the institution of legal procedures so that the land rights of other Indigenous communities in Nicaragua may be protected.[846]

The Awas Tingni case is significant; it was one of the leading cases in the Inter-American human rights system. It sets a very important precedent and is hugely influential in other international and regional courts in the development of jurisprudence on the rights of indigenous peoples.[847] The ruling has also contributed in a formative way to the national policy and legislation concerning indigenous land rights in many countries in Latin America and beyond. For example, on the realisation of the ruling, at least some of the countries in the region began reform processes to recognise and secure land rights for their indigenous peoples, with the Awas Tingni case considered a legal or moral signpost in the process in many nations, for example in efforts towards the end to establish legislation in Panama, Nicaragua, Costa Rica, and Colombia.[848]

7.6 Namibia Advisory Opinion

In July 1970, the United Nations made a formal request for the International Court of Justice to provide an advisory opinion on the legal consequences of South Africa's continued presence in Namibia, notwithstanding Security Council Resolution 276 (1970).[849] The request reflected the United Nations's ongoing efforts to address the situation in Namibia and the legal implications for member

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[845] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) 2001 <https://repository.arizona.edu/handle/10150/659193> accessed 7 August 2024, paragraph 153.

[846] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Judgment) 2001 <https://repository.arizona.edu/handle/10150/659193> accessed 7 August 2024, paragraph 173.

[847] Jonas Bens, *The Indigenous Paradox: Rights, Sovereignty, and Culture in the Americas* (University of Pennsylvania Press 2020) 141 – 144.

[848] James S Anaya and Claudio Grossman, The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples (2002) 19 *Arizona Journal of International and Comparative Law* 1 - 16, 15.

[849] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)* notwithstanding Security Council Resolution 276 *(Request for Advisory Opinion)* 1970 <https://www.icj-cij.org/case/53> accessed 29 August 2024.

states in light of South Africa's actions. Namibia was, at first a German colony that was mandated to South Africa by the League of Nations following World War 1. During the time that South Africa was in power in Namibia, their administration subjected the citizens to apartheid and oppressed the Indigenous people.[850]

Throughout the administration the situation in the region then called South Western Africa deteriorated and led to armed resistance.[851] It was the question of Namibia's independence and open conflict, that brought the situation to the attention of the United Nations and within the framework of international law. The United Nations took full responsibility for managing the issue for over two decades, involving both the General Assembly and the Security Council.[852] Namibia became a focus of the United Nations, which established the United Nations Council for Namibia and the United Nations Institute for Namibia as part of its resolution of the matter.[853] During the 1950s, the liberation movement began to solidify; the high point of these efforts was the formation of the South West Africa People's Organisation in 1960.[854] South West Africa People's Organisation enjoyed diplomatic success when it gained recognition from the General Assembly as the only authentic representative of the Namibian people and received observer status within the United Nations.[855]

The opinion addressed the legality of South Africa's continued presence in Namibia following the termination of its mandate by the United Nations General Assembly. The International Court of Justice concluded that South Africa's presence in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately.[856] The opinion also highlighted the responsibilities of other states to not recognise South Africa's authority in Namibia or provide any support that would perpetuate its illegal administration. This finding had wide implications for international law and how legal approaches would be taken in future proceedings concerning basic rights for Indigenous peoples and the approach to decolonisation. The case highlighted the principle of self-

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[850] Andries M Fokkens, 'The Suppression of Internal Unrest in South-West Africa (Namibia) 1921–1933' (2013) 40 Scientia Militaria: South African Journal of Military Studies 109 – 146, 140.
[851] Marion Wallace, *A History of Namibia: From the Beginning to 1990* (Reprint edn, OUP 2014) 275.
[852] UNGA Res 3112 (XXVIII) (12 December 1973).
[853] Henning Melber, *Understanding Namibia: The Trials of Independence* (OUP 2015) 8.
[854] Christian A Williams, *National Liberation in Postcolonial Southern Africa: A Historical Ethnography of SWAPO's Exile Camps* (CUP 2015).
[855] UNGA 31/152 (20 December 1976).
[856] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (Request for Advisory Opinion) 1970 <https://www.icj-cij.org/case/53> accessed 29 August 2024.

determination, one of the most making a significant contribution to judicial debates about decolonisation in the 20th century. The opinion reiterated how the international community had a role through the United Nations to ensure that the colonised people could exercise their right to self-determination without illegal foreign domination.

The case of Namibia was a test case in international law on decolonisation and on self-determination.[857] The result, however, was certainly 'of its time' and was influenced by its context of decolonisation, that is to say, not all such cases have yielded the same result for other indigenous or occupied peoples of the world. Ironically in *Diergaardt v. Namibia*[858] it was the newly formed Namibian government who found themselves breaching the rights of Indigenous peoples. This case was brought by the members of the Rehoboth Baster Community who sought justice over the violation of their rights under the International Covenant on Civil and Political Rights.[859] The *Rehoboth Basters* are a community uniquely identified by their mixed-blood lineage of Dutch and indigenous Khoi, through the colonial era, and were granted a degree of self-governance under South African rule.[860]

On gaining independence in 1990, the new Namibian Government violated the previous agreements with South Africa, took over their local governance structure, and seized their lands and assets. The Basters claimed that this act on the part of the Namibian Government violated several Articles of the International Covenant Civil and Political Rights, including Article 27 (rights of minorities to enjoy their own culture),[861] Article 26 (equality before the law),[862] and Article 1 (right to self-determination).[863] However, The Committee did not find that the most significant alleged violations, such as those concerning the termination of self-government or the use of communal land, amounted to violations of the International Covenant Civil and Political Rights. The Committee concluded that these issues were more related to the historical and political context rather than to individual rights as

[857] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 234.
[858] UNHRC CCPR/C/69/D/760/1997 (2000), paragraph 10.3.
[859] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI).
[860] Kristin Kjæret and Kristian Stokke, 'Rehoboth Baster, Namibian or Namibian Baster? An Analysis of National Discourses in Rehoboth, Namibia' (2003) 9 Nations and Nationalism 579 – 600, 584.
[861] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI) Article 27.
[862] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI) Article 26.
[863] The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Resolution 2200A (XXI) Article 1.

outlined in the Covenant. Additionally, the Committee could not establish that the alleged expropriation of land or the restrictions on language use in court proceedings constituted violations under the specific articles cited by the petitioners.[864]The Human Rights Committee called on Namibia to implement non-discriminatory language policies and to allow Afrikaans in dealings with public authorities.[865] However, the broader claims relating to self-determination and land rights were not upheld,[866] highlighting the complexities of international human rights law in cases involving historical grievances and cultural identity. The paradox lies in Namibia, after suffering apartheid under South Africa, replicating similar discriminatory practices against the Rehoboth Baster community. This reflects post-colonial governance challenges, where newly independent states, often led by formerly oppressed groups, marginalise minorities in their quest for national unity.[867]

7.7 The Montevideo Convention and Indigenous Peoples

The traditional approach to sovereignty and self-determination, developed through the Convention, was centred on a rigid State-centric model, which does not fit the unconventional status and rights of Indigenous peoples.[868] This model-inextricably linked to a Eurocentric and positivist approach to statehood according to the presence of a permanent population, defined territory, government, and capacity to engage in international relations, impervious to the particular forms of governance, territoriality, and community that define Indigenous peoples.[869] Reconceptualising sovereignty and self-determination for Indigenous Peoples involves a shift away from the strict Westphalia notion of statehood towards a more elastic and inclusive notion, one that recognises the original right of Indigenous communities to self-determination. S. James Anaya was appointed as the United Nations Special Rapporteur on the rights of Indigenous peoples in March 2008. His tenure lasted until May 2014, during which time he worked on various issues related to Indigenous rights, including land ownership, cultural preservation, and the impacts of development projects on Indigenous communities. He led a call to redefine

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[864] Kristin Kjæret and Kristian Stokke, ‘Rehoboth Baster, Namibian or Namibian Baster? An Analysis of National Discourses in Rehoboth, Namibia’ (2003) 9 Nations and Nationalism 579 – 600, 587.
[865] UN Human Rights Committee, CCPR/C/69/D/760/1997 (2000), paragraph 11.
[866] UN Human Rights Committee, CCPR/C/69/D/760/1997 (2000), paragraph 10.6.
[867] UN Human Rights Committee, CCPR/C/69/D/760/1997 (2000), paragraph 10.3.
[868] Rhona K. M. Smith, *International Human Rights Law* (10th edn, OUP 2021) 360.
[869] Robert McCorquodale, 'Group Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022) 374.

sovereignty in a way congruent with the aspirations and legal traditions of indigenous peoples. Anaya explains that, in the context of Indigenous peoples, self-determination does not imply independent statehood or secession but means autonomous exercise of powers over their lands, resources, and internal affairs while preserving their cultural identity and traditions within respective states.[870]

Another important shift in the reconceptualisation of sovereignty is the realisation that Indigenous Peoples have always retained a form of original sovereignty that existed before state borders and mechanisms of governance within the colonial era. This inherent sovereignty flows from their historical and cultural connections to their lands and communities, entailing at the same time the right to self-government in ways appropriate for them, given their laws, customs, and practices.[871] As aptly mentioned by James Summers, claims of the sovereignty of indigenous people are necessarily a product of recognition of a basic human right, one in conformity with the principles of the United Nations Declaration on the Rights of Indigenous Peoples. The need to reimagine sovereignty concurrently with the historical injustices and continued marginalisation Indigenous peoples have suffered at the hands of the traditional state system. This is demonstrated by the way the state-centric model of sovereignty has been used time and again to deny rights to Indigenous peoples and dispossess their lands.[872]

A postpositive approach to sovereignty would therefore require not only legal recognition of Indigenous governance systems but also restitution of lands and resources taken in a manner that is unjust to them. This would force states into serious dialogue and negotiation with Indigenous communities in a respectful manner regarding their autonomy and rights in their traditional territories.[873] This reconceptualisation rhymes with the shifting standards of international law, which often consider rights relating to Indigenous peoples in terms of self-determination and governance. Therefore, according to Jure Vidmar, customary international law is developing incrementally to include in its ambit the rights of Indigenous peoples within the broader legal framework of statehood and sovereignty. This shift reflects a growing consensus that the traditional requirements of statehood must give way to accommodate other entities that, not conforming to the mould of a traditional

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[870] UN Doc A/HRC/12/34, paragraph 10, 2.
[871] James S Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishing 2009) 44.
[872] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 1.
[873] Corinne Lennox and Damien Short, *Handbook of Indigenous Peoples' Rights* (Taylor & Francis 2016) 20.

state, nonetheless have a distinctive identity and structure of governance worthy of recognition and respect.[874]

This reimagined concept of sovereignty, in its practice, would transfer more powers to the Indigenous peoples regarding self-determination of their internal affairs: self-government over lands and resources, preservation of cultural heritage, and the maintenance of legal and political institutions. Such a development would further enable Indigenous communities to relate more effectively with the international legal order as an independent sovereign power, relating with other states and international organisations on their terms.[875] That is to say, the reconceptualisation of sovereignty and self-determination for Indigenous peoples requires movement away from the outdated state-centric model of the Montevideo Convention toward one more inclusive, facilitating respect for human rights, recognises Indigenous peoples' inherent sovereignty and right to self-determination following emerging international law norms in the interest of an increasingly just and equitable world order.

7.8 Embedding Human Rights

Embedding human rights into state recognition criteria marks a shift from the traditional positivist approach outlined by the Convention.[876] This transition is not a mere legal formality but a substantive reorientation of international norms,[877] reflecting the growing recognition of Indigenous peoples' rights, as articulated in international instruments like the United Nations Declaration on the Rights of Indigenous Peoples.[878] Integrating human rights into state recognition processes moves beyond redefining legal boundaries of statehood; it represents a broader commitment to justice and equity for vulnerable populations. Historically, the Convention set clear, tangible requirements for statehood,[879] but these lacked considerations for the treatment of marginalised groups, particularly Indigenous

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[874] Jure Vidmar and Lea Raible, 'State Creation and the Concept of Statehood in International Law' in Jure Vidmar, Lea Raible, and Sarah McGibbon (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 27.
[875] Bradford W Morse and Gordon R Woodman, 'Introductory Essay' in Bradford W Morse and Gordon R Woodman (eds), *Indigenous Law and the State* (De Gruyter 2019) 17.
[876] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[877] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 5.
[878] UNGA Res 61/295 (13 September 2007).
[879] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.

peoples. By embedding human rights into the requirements for state recognition, the international community ensures that recognition of a state depends not only on fulfilling formal requirements but also on adhering to fundamental human rights standards.[880] United Nations Declaration on the Rights of Indigenous Peoples, is a key document that articulates the rights of Indigenous peoples, including their rights to self-determination, land, and cultural preservation.[881] Anaya argues that these rights should serve as the foundation for any process of state recognition, especially in contexts involving Indigenous communities. Anaya stresses that the protection of human rights must be a central consideration in determining whether an entity deserves recognition as a state. This approach shifts the focus from merely assessing whether an entity meets the formal requirements of statehood to evaluating whether it respects and upholds the rights of its inhabitants. Moreover, embedding human rights into state recognition criteria aligns with broader trends in international law, which increasingly prioritise the protection of human rights over strict adherence to sovereignty. As Robert McCorquodale highlights, international law has evolved to recognise that the legitimacy of a state is not derived solely from its ability to govern but also from its commitment to safeguarding the rights and dignity of all individuals within its borders.[882] This evolution is evident in the practices of international organisations and courts, which have increasingly taken into account human rights records when assessing the legitimacy of governments and the recognition of new states.[883] This shift in approach demonstrates how international law is moving beyond mere territorial sovereignty, incorporating principles of justice and human rights as fundamental criteria for state legitimacy. Moreover, it acknowledged the growing recognition that a state's ability to protect the rights of its population is essential to its legitimacy within the international community.[884]

The case of *Kaliña and Lokono Peoples v. Suriname* demonstrates how Anaya's argument could operate.[885] The central issues in the case revolved around Suriname's failure to recognise the collective ownership of the traditional lands and

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[880] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 3.
[881] UNGA Res 61/295 (13 September 2007).
[882] Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 The International and Comparative Law Quarterly 857 – 885, 875.
[883] Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 The International and Comparative Law Quarterly 857 – 885, 865.
[884] Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 The International and Comparative Law Quarterly 857 – 885, 875.
[885] *Kaliña and Lokono Peoples v. Suriname*, IACtHR Ser C No 309, (25 November 2015) <https://corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf> accessed 1 September 2024.

natural resources of the Kaliña and Lokono peoples. The Indigenous groups argued that Suriname had not established a legal and regulatory framework recognising their rights to these lands, as required under international law. The Inter-American Court of Human Rights found that Suriname had violated these rights, emphasizing the importance of collective legal personality and the sociocultural dimensions of environmental protection.[886] The integration of human rights into state recognition criteria offers Indigenous peoples greater autonomy and protection, recognising them as rights-bearing entities capable of self-governance.[887] This approach holds states accountable for their treatment of Indigenous populations, with non-compliance impacting a state's international standing. It would require new frameworks for assessing and enforcing human rights compliance, consistently applied across regions.[888] However, implementing the principle of self-determination remains complex due to its collective nature and the ambiguity surrounding the definition of 'peoples' entitled to such rights.[889]

7.9 Customary International Law as a Foundation for Indigenous Rights

Klabbers points out that customary international law has increasingly become a vital tool in advancing the rights of Indigenous peoples, particularly in the context of their self-determination and governance over their lands and resources.[890] Unlike treaty law, which requires explicit consent from states, customary international law evolves from consistent state practice accompanied by a belief in legal obligation *opinio juris*.[891] This flexibility makes customary law particularly well-suited to address the evolving nature of Indigenous rights, which often surpass the rigid frameworks of traditional international law. One of the key developments in customary international law concerning Indigenous peoples is the recognition of their collective rights, especially about their lands and natural resources.[892] Historically, international law focused primarily on the rights of states and their sovereignty over territory. However, as scholars have argued, there has been a significant shift towards recognising the rights of peoples, including

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[886] Gleider Hernández, *International Law* (2nd edn, OUP 2022) 452.
[887] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 124.
[888] Thomas Kleinlein and Dominik Steiger, 'The State of the International Human Rights System—Normativity and Compliance: Introduction' (2022) 14 Journal of Human Rights Practice 1 – 16, 3.
[889] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 8, 4.
[890] Jan Klabbers, *International Law* (CUP 2024) 95 – 96.
[891] Anthea Roberts and Sandesh Sivakumaran, The Theory and Reality of the Sources of International Law in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 96 – 97.
[892] Robert McCorquodale, 'Group Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022) 362.

Indigenous communities, as subjects of international law.[893] This shift is reflected in the growing body of legal instruments and judicial decisions that affirm the rights of Indigenous peoples to manage their traditional lands, protect their cultural heritage, and participate in decision-making processes that affect them.[894]

The concept of self-determination, traditionally reserved for state entities, has also been expanded through customary international law to include Indigenous peoples.[895] This expansion recognises that Indigenous communities have a unique status and rights that are distinct from the general population of the states in which they reside.[896] As Jure Vidmar points out, this evolving norm challenges the conventional understanding of sovereignty and statehood by acknowledging that Indigenous peoples have inherent rights that must be respected, even within the framework of existing states.[897] This recognition is critical for advancing Indigenous self-determination, as it provides a legal basis for Indigenous communities to claim greater control over their internal affairs without necessarily seeking full independence or secession. Furthermore, the jurisprudence of international courts has played a crucial role in solidifying these customary norms. For example, the Inter-American Court of Human Rights has issued several landmark rulings that recognise the rights of Indigenous peoples to their ancestral lands and the importance of Free and Prior Informed Consent in any development projects affecting their territories.[898] These decisions have contributed to the emergence of a customary international law norm that requires states to respect the land rights of Indigenous peoples and to engage in meaningful consultations before undertaking activities that could impact their communities.[899] Another

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[893] Willem van Genugten and Federico Lenzerini, 'Legal Implementation and International Cooperation and Assistance: Articles 37-42' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 570.

[894] Megan Davis, 'The Land and Environment Court of New South Wales and the Recognition of Indigenous Peoples' Environmental Rights' in Brian Preston and Elizabeth Fisher (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Bloomsbury Academic 2022) 177.

[895] Başak Çali, 'Regional Protection' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022) 435.

[896] International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989, Art. 7: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use."

[897] Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 186.

[898] Anon, 'Free, Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities (UN DESA, 2016) <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/> accessed 11 October 2024.

[899] *Kaliña and Lokono Peoples v. Suriname,* IACtHR Ser C No 309, (25 November 2015) <https://corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf> paragraph 129. This case established that Indigenous and tribal peoples have the right to be consulted in advance regarding

significant aspect of customary international law in the context of Indigenous rights is its role in environmental protection. Indigenous peoples have long been recognised as stewards of the environment, with deep spiritual and cultural connections to their lands.[900] Customary law has increasingly acknowledged these connections, leading to the recognition of Indigenous rights to participate in environmental governance and to protect their lands from environmental degradation. This recognition is crucial in the context of global challenges such as climate change, where the knowledge and practices of Indigenous peoples can contribute significantly to sustainable environmental management.[901]

The concept of inclusive and pluralistic governance models is essential for ensuring that Indigenous peoples are fully integrated into the political and legal frameworks of the states in which they live.[902] This approach not only recognises the unique legal traditions and governance structures of Indigenous communities but also ensures their participation in decision-making processes at both the national and international levels. Scholars such as James Anaya and Megan Davis have emphasised the importance of developing governance models that respect and incorporate Indigenous legal systems, thereby moving away from the assimilationist policies of the past and towards a more inclusive and just legal order.[903] [904] Inclusive governance models acknowledge that the sovereignty and self-determination of Indigenous peoples do not necessarily require the creation of new states. Instead, these models promote the idea that Indigenous communities can coexist within existing states, exercising autonomy over their internal affairs while contributing to the broader governance of the state.[905] This approach aligns with the principles of federalism, where different levels of government coexist and share powers.[906] In a pluralistic governance model, Indigenous legal systems are

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any development, investment, or extractive projects that might affect their lands and natural resources, solidifying the principle of Free, Prior, and Informed Consent (FPIC).

[900] UNGA Res 61/295 (13 September 2007) Article 32(2).

[901] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 150 – 152.

[902] Mauro Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 266.

[903] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 105 – 107.

[904] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne Journal of International Law 439 – 471, 448.

[905] James S Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples Have in Lands and Resources' (2005) 22 Arizona Journal of International and Comparative Law 1 – 11, 7.

[906] Megan Davis, *The Land and Environment Court of New South Wales and the Recognition of Indigenous Peoples' Environmental Rights* in *An Environmental Court in Action: Function, Doctrine and Process* (Hart 2022) 177.

recognised and integrated into the national legal framework, allowing for a harmonious coexistence of multiple legal traditions.[907]

One of the key aspects of inclusive governance is the recognition of Indigenous peoples' rights to land and natural resources. As Summers has pointed out, land is not only a source of economic sustenance for Indigenous peoples but also a fundamental aspect of their cultural identity and spiritual well-being.[908] Inclusive governance models must therefore ensure that Indigenous communities have control over their lands and resources and that their rights are protected against external exploitation.[909] This can be achieved through legal mechanisms such as land title recognition, resource-sharing agreements, and the inclusion of Indigenous representatives in environmental decision-making processes.[910] Moreover, pluralistic governance models emphasise the importance of participatory democracy, where Indigenous peoples are not only subjects of law but active participants in the creation and implementation of laws that affect them.[911] This requires the establishment of institutional frameworks that facilitate Indigenous participation at all levels of government.[912] For example, some countries have established Indigenous advisory councils or reserved seats for Indigenous representatives in national parliaments. These mechanisms ensure that Indigenous voices are heard and that their perspectives are incorporated into policy-making processes.[913]

In the international arena, inclusive governance also means ensuring that Indigenous peoples have a seat at the table in global decision-making bodies.[914] The participation of Indigenous representatives in international organisations, such as the United Nations Permanent Forum on Indigenous Issues,[915] is crucial for

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[907] Mark Weller, 'Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, 46(1)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 115-116.
[908] James Summers, *The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right* (2019) 31 New England Journal of Public Policy 1 – 12, 3.
[909] James Summers, The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right (2019) 31 New England Journal of Public Policy 1 – 12, 6.
[910] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 150-152.
[911] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 130.
[912] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 Melbourne Journal of International Law 439 – 471, 448.
[913] Megan Davis, The Land and Environment Court of New South Wales and the Recognition of Indigenous Peoples' Environmental Rights in *An Environmental Court in Action: Function, Doctrine and Process* (Hart 2022) 178.
[914] Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015) 132.
[915] Anon, 'United Nations Permanent Forum on Indigenous Issues' (UNPFII, date unknown) <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html> accessed 11 October 2024.

advancing Indigenous rights on the global stage.[916] Additionally, international treaties and agreements should include provisions that recognize and protect Indigenous rights, and Indigenous peoples should be involved in the negotiation and implementation of these agreements.[917] Another essential element of inclusive governance is the protection and promotion of Indigenous languages and cultural practices. Language is a vital component of identity, and the loss of Indigenous languages is often linked to the erosion of cultural heritage.[918] Inclusive governance models should therefore support the revitalization and preservation of Indigenous languages, including through education policies that incorporate Indigenous languages and knowledge systems into the curriculum.[919]

7.11 Conclusion

Chapter Seven critically examined the limitations of the Montevideo Convention in the context of indigenous peoples and their unique rights to self-determination, autonomy, and cultural survival.[920] The Convention is rooted in a Westphalian conception of statehood that does not adequately address the needs and rights of indigenous populations.[921] This chapter argues that the rigid and state-centric model of the Convention is fundamentally inadequate for recognizing the complex realities of Indigenous communities, who often possess distinct historical, cultural, and political identities that do not align with conventional notions of statehood.[922] The chapter begins by outlining the deficiencies of the Convention in dealing with the specific conditions of indigenous peoples. The requirements established by the Convention are inflexible and fail to consider the historical and cultural contexts of indigenous communities. The chapter highlights that the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, adopted in 1992, sets minimum standards for the

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[916] Luis Enrique Chávez, 'The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground' in Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers 2009) 98.

[917] Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016) 75.

[918] Hanne Veber, *The Creation of Tribalism in Southern Africa* (University of California Press 1989) 210.

[919] Janet Wilson, *Revitalising Indigenous Language in the Context of Education: A Case Study from Aotearoa/New Zealand* (Springer 2017) 59.

[920] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 1 – 8.

[921] James S Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009) 55.

[922] Jure Vidmar and Lea Raible, 'State Creation and the Concept of Statehood in International Law' in Jure Vidmar, Lea Raible, and Sarah McGibbon (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 27.

protection of minority rights, including the rights to cultural, religious, and linguistic identity, participation in public life, and the establishment of associations.[923] Although this declaration is not legally binding, it represents a significant political commitment by states to protect minority rights.[924]

The chapter then examines several case studies, including East Timor, the Chagos Archipelago, and Awas Tingni, to illustrate the weaknesses of the Convention in addressing the rights of indigenous peoples. In the case of East Timor, the International Court of Justice was unable to rule on the nature of the case in the absence of Indonesia, highlighting how geopolitical considerations can override the principle of self-determination.[925] The chapter argues that Indigenous groups are often left vulnerable when their interests clash with the overriding concerns of powerful states. The Chagos Archipelago case is another example of the limitations of the Convention in addressing decolonisation and indigenous claims to rights. The 2019 Advisory Opinion of the International Court of Justice found against the United Kingdom for continuing its administration over the islands and pronounced that the right to self-determination rightfully belonged to the Chagossians.[926] However, the refusal of the United Kingdom to abide by the International Court of Justice ruling on grounds of strategic interests emphasizes the challenges of implementing legal decisions in practice. This case demonstrates how the state-centric approach of the Convention is ill-suited to resolving complex claims for indigenous rights in a post-colonial framework.

The chapter reviewed the availability of alternative legal mechanisms, such as those represented by the Inter-American Court of Human Rights, which may be more effective in protecting the rights of indigenous peoples.[927] The case of *Awas Tingni*, in which the Court recognised collective land rights owned by the *Mayagna (Sumo)* community, is presented as a precedent for approaches grounded in human rights principles.[928] The chapter argues that these remedies can provide more meaningful protection for Indigenous peoples by recognising the cultural, spiritual, and social dimensions of their land rights. The Inter-American Court's understanding of the needs and aspirations of indigenous peoples is shown to be

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[923] UNGA Res 47/135 (18 December 1992).
[924] UNGA Res 47/135 (18 December 1992).
[925] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024.
[926] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) 2019 <https://www.icj-cij.org/case/169> accessed 12 September 2024.
[927] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 102.
[928] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* 2001 <http://hrlibrary.umn.edu/iachr/AwasTingnicase.html> accessed 30 August 2024.

more nuanced than the formalistic requirements of statehood codified by the Convention. The chapter concludes that while the Convention has played a foundational role in defining statehood within the international legal system, it falls short in addressing the peculiar challenges faced by indigenous peoples. The rigid requirements of the Convention do not take into account the legal and cultural identities of indigenous peoples, making it an inadequate instrument for protecting their rights. The case studies presented in the chapter highlight the insufficiencies of the Convention and raise awareness of the need for other legal frameworks that would consider the special status of indigenous peoples within the international order.

In response to these challenges, the chapter advocates for a reconceptualisation of sovereignty and self-determination that aligns with the evolving norms of international law. This reconceptualisation involves moving away from the outdated state-centric model of the Convention and towards a more flexible and inclusive understanding of sovereignty that recognises the inherent rights of indigenous peoples. The chapter draws on the work of scholars such as Anaya, who argues that self-determination for indigenous peoples does not necessarily imply independent statehood or secession, but rather the autonomous exercise of powers over their lands, resources, and internal affairs while preserving their cultural identity and traditions within their respective states. [929] The chapter highlighted the importance of recognising that Indigenous peoples have always retained a form of original sovereignty that predates state borders and colonial governance mechanisms.[930] This inherent sovereignty, rooted in historical and cultural connections to their lands and communities, includes the right to self-government in appropriate ways, given their laws, customs, and practices.[931] The chapter emphasised that claims of indigenous sovereignty are necessarily a product of recognising a basic human right, in conformity with the principles of the United Nations Declaration on the Rights of Indigenous Peoples.[932]

The chapter concludes by asserting that the shifting standards of international law, which increasingly recognise the rights of Indigenous peoples in terms of self-determination and governance, reflect a growing consensus that the traditional requirements of statehood must give way to accommodate other entities with

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[929] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 104
[930] Rhona KM Smith, *International Human Rights Law* (10th edn, OUP 2021) 359.
[931] James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2nd edn, Nijhoff Publishers 2013) 130.
[932] UNGA Res 61/295 (13 September 2007).

distinctive identities and structures of governance worthy of recognition and respect.[933] Overall, Chapter Seven provides a comprehensive critique of the Montevideo Convention's inadequacies in addressing the rights of Indigenous peoples and calls for a more inclusive and flexible approach to statehood and sovereignty. The chapter points to the importance of embedding human rights within the criteria for state recognition, recognising the inherent sovereignty of Indigenous peoples, and developing legal frameworks that better reflect the complex realities of Indigenous communities. By doing so, the international community can work towards a more just and equitable global order that respects the rights and dignity of all peoples. These discussions on landmark cases of Indigenous peoples' rights illustrate how the Convention-influenced approach cannot capture the rich tapestry of complex realities set off by these peoples. A constructivist paradigm, rooted in the ideas of Alexander Wendt, provides an alternative approach to the social construction of international relations, where the identities and interests of states and non-state actors are shaped by shared ideas, norms, and interactions rather than merely material factors.[934] Applying this paradigm to the cases and arguments discussed in the chapter offers a more sophisticated understanding of the complex relationship between indigenous peoples, statehood, and international law, particularly within the context of the Montevideo Convention.

By viewing statehood and sovereignty as social constructs, a Wendtian approach encourages a rethinking of these concepts in a way that recognizes the legitimacy of Indigenous peoples' claims to self-determination and autonomy. Rather than seeing state sovereignty as a fixed and exclusive domain, constructivism allows for the possibility of multiple forms of sovereignty, where indigenous governance systems can coexist alongside state structures. This reconceptualisation aligns with the evolving norms of international law, which increasingly recognise the rights of indigenous peoples, as seen in the United Nations Declaration on the Rights of Indigenous Peoples and the jurisprudence of international courts like the Inter-American Court of Human Rights. The recent agreement between Mauritius and the UK regarding sovereignty over the Chagos Archipelago is seen as a positive step towards decolonisation.[935] However, United Nations experts stress

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[933] Julie Ringelheim, 'Cultural Rights' in Daniel Moeckli and others (eds), *International Human Rights Law* (4th edn, OUP 2022) 287.
[934] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 121.
[935] Anon, 'UK-Mauritius Joint Statement' (GOV.UK, 3 October 2024) <https://www.gov.uk/government/news/uk-and-mauritius-joint-statement-3-october-2024> accessed 11 October 2024.

that the rights of the Chagossians, including their right to return to Diego Garcia, must be prioritised in the final treaty. The agreement should include reparations and ensure that Chagossians are meaningfully involved in decision-making processes concerning their homeland. The experts emphasise that Chagossians' participation is crucial to addressing past injustices.[936] Military commentators have criticised the UK's decision to cede sovereignty over the Chagos Archipelago, arguing that it weakens the United Kingdom's strategic position and sets a dangerous precedent for future territorial disputes. While the agreement allows the UK to retain rights over the military base at Diego Garcia, there is an argument that this does little to mitigate long-term security risks.[937] Conversely, others support the move, suggesting that by voluntarily ceding control, the United Kingdom avoided a binding ruling and preserved its soft power, while resolving diplomatic friction, especially with countries from the Global South.[938]

As we conclude Chapter Seven and transition to the final chapter, it becomes clear that the evolution of statehood and recognition in international law demands a more contemporary approach than that provided by traditional frameworks like the Montevideo Convention even with additional criteria bolted on. The case studies of Palestine, Taiwan, Kosovo, and Western Sahara have illustrated the limitations of rigid legal criteria in the face of geopolitical complexities and international power dynamics. The concluding chapter will synthesise these findings, critically reflecting on how constructivist theories, human rights concerns, and self-determination movements are reshaping the discourse on statehood. This final chapter will offer insights into the future of international law, suggesting possible reforms that can better address the changing realities of global governance, recognition, and the legitimacy of emerging political entities.

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[936] Anon, 'Chagossians Should Be Centre Stage in Negotiations between Mauritius and the UK: UN Experts' (*OHCHR*, 10 October 2024) <https://www.ohchr.org/en/press-releases/2024/10/chagossians-should-be-centre-stage-negotiations-between-mauritius-and-uk-un> accessed 11 October 2024.

[937] Jack Watling, 'The UK's Surrender of Chagos is a Symptom of Strategic Ineptitude' (RUSI, 11 October 2024) <https://www.rusi.org/explore-our-research/publications/commentary/uks-surrender-chagos-symptom-strategic-ineptitude> accessed 11 October 2024.

[938] Antony J Blinken, 'Secretary of State US Department of State, 'Agreement between the Republic of Mauritius and the United Kingdom on the Status of the Chagos Archipelago' (US Department of State, 3 October 2024) <https://www.state.gov/agreement-between-the-republic-of-mauritius-and-the-united-kingdom-on-the-status-of-the-chagos-archipelago/> accessed 11 October 2024.

CHAPTER EIGHT CONCLUSION

8.1 Introduction

This final chapter synthesises the key findings of this thesis, reflecting on the relevance and limitations of the Montevideo Convention in contemporary international law,[939] the implications of constructivist theories for understanding statehood,[940] the challenges posed by self-determination movements, Jure Vidmar's critique of statehood,[941] and the rising significance of human rights and Indigenous sovereignty in shaping state recognition.[942] The aim is to offer a current perspective on the evolution of statehood criteria and propose directions for international law in addressing the effectiveness of criteria and approaches to state formation and the emergence of non-state territorial entities.[943]

The Convention, adopted in 1933, established a foundational legal framework for statehood in international law. Its four requirements - permanent population, defined territory, effective government, and the capacity for foreign relations, have long been regarded as the gold standard for determining state recognition.[944] However, as demonstrated throughout this thesis, the contemporary geopolitical landscape has significantly evolved, rendering the Convention's requirements increasingly inadequate in addressing the complexities of modern statehood.[945] Entities like Palestine and Taiwan illustrate the limits of the Convention's framework.[946] Palestine, despite meeting many of the Montevideo requirements, remains in limbo due to political fragmentation and lack of full international recognition.[947] The situation is further complicated by the Israeli occupation and the fragmented governance between the Palestinian Authority and Hamas.[948] Similarly, Taiwan functions as a non-state territorial entity with an effective

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[939] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934.
[940] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.
[941] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.
[942] James S Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 104.
[943] Sarah McGibbon, 'Seceding from Failed States: Reconsidering the Case of Somaliland' in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar Publishing 2022) 293 – 310.
[944] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 *Columbia Journal of Transnational Law* 404 – 457, 411.
[945] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21
[946] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023)13.
[947] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 239.
[948] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 European Journal of International Law 307 – 313, 308.

government and defined territory, yet its statehood is contested by powerful actors like China, preventing it from achieving widespread diplomatic recognition.[949] In both cases, the legal framework of the Convention does not provide a clear solution, as it fails to address the geopolitical complexities that hinder these entities from gaining full recognition.[950] The rise of new political entities and the increasing importance of human rights, self-determination, and globalisation challenge the traditional criteria of statehood.[951] The Montevideo Convention's rigid requirements cannot fully account for the legitimacy of political movements and regions that fulfil the socio-political realities of statehood but lack international recognition due to external political interests.[952] This thesis has shown, through various case studies, that the Convention's reliance on territorial control and effective governance is often undermined by international politics, suggesting that a more flexible and comprehensive framework is needed to account for the realities of 21st-century statehood. In addition to Palestine and Taiwan, the cases of Kosovo and Western Sahara further illustrate the Convention's limitations.[953] Kosovo, which declared independence from Serbia in 2008, meets many of the Montevideo requirements. However, due to the political opposition of countries like Russia and China, its statehood remains contested despite recognition by over 100 states.[954] The case of Western Sahara, where the Sahrawi Arab Democratic Republic has claimed independence but faces occupation by Morocco, presents similar complexities.[955] These examples highlight that while the Convention provides a legal framework, its application is frequently overridden by geopolitical realities and the strategic interests of powerful states.

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[949] Lindsay Maizland, 'Why China-Taiwan Relations Are So Tense' (Council on Foreign Relations, 8 February 2024) <https://www.cfr.org/backgrounder/china-taiwan-relations-tension-us-policy-biden> accessed 4 October 2024.

[950] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.

[951] Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 International and Comparative Law Quarterly 361 – 387.

[952] Jan Klabbers, *International Law* (CUP 2020) 76.

[953] James Ker-Lindsay, Kosovo: *The Path to Contested Statehood in the Balkans* (I.B.Tauris 2009) 3.

[954] Colin Warbrick, 'Kosovo: The Declaration of Independence' (2008) 57 International and Comparative Law Quarterly 675 – 690, 679.

[955] Anon, *'What is Western Sahara and why does Morocco claim sovereignty over it?'* (Middle East Eye, 10 December 2020) <https://www.middleeasteye.net/news/western-sahara-why-morocco-claim-sovereignty-over-it> accessed 20 September 2024.

8.2 Wendt's Constructivist Theories

One of the critical theoretical contributions of this thesis is the application of Alexander Wendt's constructivist theories to the concept of statehood.[956] Constructivism, in contrast to positivist legal approaches, emphasises that statehood is not a purely objective or legal phenomenon but is constructed through social interactions, norms, and political negotiations.[957] According to Wendt, states are not simply recognised based on legal requirements; they are socially constructed through the acceptance and recognition of other states and international actors. This thesis argues that constructivism offers a more nuanced understanding of statehood's fluid and dynamic nature. For example, the case of Palestine demonstrates that statehood is as much a product of diplomatic interactions and international recognition as it is of fulfilling legal criteria.[958] Despite fulfilling many of the Montevideo requirements, Palestine's fragmented governance and lack of widespread international recognition reflect the importance of political and social factors in determining statehood.[959] Constructivism also provides a framework for understanding how non-traditional political entities, like Somaliland and Western Sahara, function as non-state territorial entities despite lacking full international recognition.[960] Both entities exercise governance, maintain defined territories, and interact with international actors, yet they are not widely recognised as sovereign states. Somaliland, for example, declared independence from Somalia in 1991 and has since maintained peace, stability, and a functioning government.[961] Still, it remains unrecognised due to the African Union's policy on preserving colonial borders.[962] This thesis argues that these cases show the limitations of a strictly positivist approach to state recognition and that a constructivist framework provides a more accurate reflection of the realities of modern statehood. Moreover, constructivism sheds light on the role of power dynamics in recognising states.[963] Entities like Taiwan and Palestine fulfil many of

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[956] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 213.
[957] Nicholas Onuf, *Making Sense, Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 22.
[958] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 European Journal of International Law 307 – 313, 313.
[959] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 259.
[960] Sarah McGibbon, *Non-State Effective Territorial Entities: A Critical Appraisal of International Legal Capacity and Responsibility* (Maastricht University 2023).
[961] Gerard Prunier, The Country That Does Not Exist: A History of Somaliland (C Hurst & Co Publishers Ltd 2021) 5.
[962] Anon, 'AU Fact-Finding Mission to Somaliland' (African Union, 4 May 2005).
[963] Anton Peez, 'Contributions and Blind Spots of Constructivist Norms Research in International Relations, 1980–2018: A Systematic Evidence and Gap Analysis' (2022) International Studies Review 2 – 3.

the traditional criteria for statehood, but their lack of widespread recognition results from political opposition from influential states.[964] Constructivism helps explain why some entities are recognised while others are not, suggesting that recognition is not merely a matter of meeting legal requirements but is influenced by the broader social, political, and strategic interests of the international community.[965]

8.3 Territorial Status

Throughout the 20th and 21st centuries, self-determination movements have challenged the international legal framework on statehood.[966] As discussed in this thesis, movements in Palestine, Western Sahara, and the Kurdish regions illustrate the difficulties in reconciling the principle of self-determination with the rigid legal framework provided by the Convention.[967] In each case, significant portions of the population support the quest for independence, and these entities often fulfil several of the criteria for statehood. However, they lack international recognition due to political interests and the complexities of territorial disputes.[968] The Kurdish struggle for nationhood, for instance, spans multiple states (Turkey, Iraq, Syria, and Iran), complicating any straightforward application of the Montevideo criteria.[969] The Kurdish referendum for independence in 2017 in Iraqi Kurdistan, while supported by a majority of Kurds, was not recognised internationally and was met with strong opposition from Iraq and neighbouring states.[970] This thesis demonstrates that the Convention is ill-equipped to handle these situations, where the legal criteria are met but international recognition is withheld due to geopolitical concerns. In the case of Western Sahara, the Sahrawi Arab Democratic Republic controls parts of the territory, has a defined population, and maintains governance structures, yet Morocco's occupation and the strategic interests of other states prevent widespread recognition. The conclusion calls for a

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[964] John B Quigley, *The Case for Palestine: An International Law Perspective* (Duke University Press 2005) 227.
[965] Jutta Brunnée and Stephen J Toope, 'Constructivist Approaches to International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012) 2 – 3.
[966] James Summers, 'The Right of Peoples to Self-Determination in Article 1 of the Human Rights Covenants as a Claimable Right' (2019) 31 New England Journal of Public Policy 1 – 12, 1.
[967] James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (2nd edn, Nijhoff Publishers 2013) 130.
[968] Joost Jongerden, 'Governing Kurdistan: Self-Administration in the Kurdistan Regional Government in Iraq and the Democratic Federation of Northern Syria' (2019) 18 Ethnopolitics 61 – 75, 62.
[969] Michael M Gunter, *The Kurds: A Divided Nation in Search of a State* (Markus Wiener Publishers 2019) 212.
[970] Anon, 'Statement on the Federal Supreme Court Decision Concerning the Kurdistan Referendum' (United Nations Iraq, 6 November 2017) <https://iraq.un.org/en/210626-statement-federal-supreme-court-decision-concerning-kurdistan-referendum> accessed 29 September 2024.

re-evaluation of the requirements for statehood, particularly about self-determination movements, advocating for a more inclusive and context-specific framework that recognises the socio-political realities of these movements.[971]

Jure Vidmar's critique of the Montevideo Convention offers valuable insights into the evolving nature of statehood in contemporary international law. According to Vidmar, territorial status is not automatically generated by meeting fixed criteria, like those set out in the Montevideo Convention. Instead, it is a result of political decisions that are formalised under international law, through treaties or customary practices.[972] Vidmar's position challenges the traditional view that states are pre-existing entities that naturally occupy a territory. Instead, he argues that a specific spatial area becomes recognised as a 'territory' because a state or political entity occupies it and that this territorial status is created and recognised under international law.[973] Vidmar's arguments are particularly relevant to the case studies explored in this thesis, such as Kosovo, Palestine, and Western Sahara; he claims that the Montevideo requirements more accurately reflect a territories capacity to exercise jurisdiction rather than statehood.[974]

8.4 Indigenous Sovereignty as Emerging Criteria

Finally, this thesis addresses the growing importance of human rights and indigenous sovereignty in shaping modern conceptions of statehood. The Convention, with its emphasis on territorial control and effective governance, does not adequately account for the rights of indigenous peoples and minority groups, whose claims to autonomy and self-determination often conflict with the traditional Westphalian model of statehood.[975] The case studies of the *Chagos Archipelago*[976] and *East Timor*[977] illustrate the challenges faced by indigenous groups in asserting their rights to self-determination within the existing legal framework. The International Court of Justice and the United Nations have increasingly recognised the importance of human rights and indigenous

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[971] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 446 – 447.
[972] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 196.
[973] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 20.
[974] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 195.
[975] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 75.
[976] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] <https://www.icj-cij.org/case/169> accessed 12 September 2024, paragraph 123.
[977] *Case Concerning East Timor (Portugal v Australia)* 1995 <https://www.icj-cij.org/case/84> accessed 23 February 2024, paragraph 102.

sovereignty in shaping modern statehood.[978] For instance, in the case of the *Chagos Archipelago*, the International Court of Justice ruled that the United Kingdom's continued administration of the islands was illegal, recognising the right of the Chagossian people to return to their homeland.[979] Similarly, *East Timor's* eventual independence, following years of occupation by Indonesia, was rooted in the international community's recognition of the Timorese people's right to self-determination.[980] This thesis argues that international law must evolve to incorporate these emerging criteria for statehood, particularly in light of the growing global emphasis on human rights and the rights of indigenous peoples. A modernised framework for state recognition should account for the rights of Indigenous peoples to self-determination and autonomy, even within existing state boundaries. This shift would not only reflect the changing nature of international law but also ensure that the rights of historically marginalised groups are respected in the process of state formation and recognition.[981]

8.5 Relevance and Limitations of the Convention

The Convention remains one of the most widely referenced legal frameworks in discussions of statehood and recognition.[982] Despite its historical significance, however, the relevance of the Convention has been increasingly questioned in contemporary international law, particularly given the emergence of non-traditional political entities and self-determination movements that challenge these rigid requirements.[983]

The first requirement, 'a permanent population,' has traditionally been considered uncontroversial.[984] A state must have a population residing within its borders, and this population must be relatively stable. Yet, in some contemporary cases, such as that of Western Sahara, this criterion proves problematic.[985] Western Sahara has a permanent population, but this population has been divided, with a

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[978] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 109.
[979] *R (Hoareau and Another)* v *Secretary of State for Foreign and Commonwealth Affairs* [2021] 1 WLR 472.
[980] Catriona Drew, 'The East Timor Story: International Law on Trial' (2001) 12 European Journal of International Law 651 – 684, 655.
[981] James Summers, *Peoples and International Law* (2nd edn, Brill 2014) 316.
[982] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontent' (1998) 37 Columbian Journal of Transnational Law 403 – 457, 434.
[983] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21
[984] Martin Dixon and Robert McCorquodale and Sarah Williams, *Cases & Materials on International Law* (7th edn, OUP 2024)
[985] Adriana Kalicka-Mikołajczyk, 'The International Legal Status of Western Sahara' (2021) 18 *Opolskie Studia Administracyjno-Prawne* 35 – 47, 40.

significant number living in exile in refugee camps in Algeria. Despite this, the Sahrawi Arab Democratic Republic has declared itself a state and is recognised by several countries and the African Union, despite the displacement of its people.[986] This demonstrates the inadequacy of the Convention in accounting for populations that are displaced or in exile due to political conflict, as its rigid application of the 'permanent population' criterion does not consider such complex realities.[987] The second requirement, 'a defined territory,' similarly presents challenges in modern contexts, particularly in cases involving territorial disputes. For instance, in the case of Palestine, although the West Bank and Gaza Strip form a recognisable territory, the ongoing Israeli occupation and territorial fragmentation complicate the application of the Montevideo requirement.[988] Palestine has a defined territory that it claims as its own, but the control of this territory is contested. This raises questions about whether a state can be said to exist under the Convention when its territorial integrity is under constant challenge.[989] The example of Palestine highlights how the Convention, formulated in a different geopolitical context, fails to accommodate entities whose territorial claims are disputed or fragmented.[990]

The third requirement, 'an effective government,' is another point of contention, especially in the case of contested or divided governments. Palestine again provides a salient example, where governance is split between the Palestinian Authority in the West Bank and Hamas in Gaza.[991] Although both entities claim to represent the Palestinian people, their ongoing political rivalry raises doubts about the effectiveness of the government in controlling the entire territory.[992] According to the Convention, an effective government is required for statehood. Still, in modern contexts, political fragmentation and shared governance (as seen in Palestine or, historically, in South Sudan) complicate this requirement. Thus, the Montevideo framework does not adequately address situations where divided

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[986] Anon, 'Western Sahara' (House of Commons Library, 29 November 2023) <https://commonslibrary.parliament.uk/research-briefings/cbp-9906/> accessed 21 September 2024.
[987] David Raic, *Statehood and the Law of Self-Determination* (Brill 2002) 29.
[988] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 240.
[989] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 European Journal of International Law 307 – 313, 308.
[990] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 239.
[991] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for Advisory Opinion)* 2004 <https://www.icj-cij.org/case/131#:~:text=The%20Court%20stated%20that%20Israel,ineffective%20all%20legislative%20and%20regulatory> accessed 2 December 2023, paragraphs 197 – 199.
[992] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 142.

governments still have the support of their respective populations.[993] The final requirement, 'the capacity to enter into relations with other states,' speaks to the international recognition of an entity's ability to engage in diplomatic relations. However, this requirement has become increasingly politicised in the contemporary international system. Taiwan is a clear example of an entity that possesses all the characteristics of statehood, including a permanent population, defined territory, and effective government, yet the One China Policy.[994] limits its diplomatic relations. Many countries, under pressure from China, refuse to engage in formal diplomatic relations with Taiwan despite its functioning as a sovereign state in practice. The case of Taiwan demonstrates how the Montevideo Convention's legal requirement can be rendered irrelevant by geopolitical considerations, as the ability to enter into relations with other states is often determined by political realities rather than legal formalities.

The Convention's failure to account for the influence of geopolitics and power structures is one of its most significant limitations. For example, in the case of Kosovo, the International Court of Justice ruled that Kosovo's unilateral declaration of independence did not violate international law.[995] Despite this, Kosovo's recognition has been limited, with several key international actors, including Russia and China, withholding recognition due to political interests. Kosovo meets the Montevideo requirements for statehood, but its international status remains uncertain, again highlighting the influence of international politics on the application of legal frameworks.[996] The Convention does not address the complexities that arise when geopolitical actors exercise their power to prevent recognition, regardless of whether an entity meets the legal requirements for statehood.[997] In addition to these challenges, the Convention does not adequately consider modern principles of self-determination, human rights, and democratic governance. Since the mid-20th century, the principle of self-determination has become a cornerstone of international law, enshrined in the United Nations Charter and other key international instruments.[998] However, the Convention does

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[993] James Ker-Lindsay and Mikulas Fabry, Secession and State Creation: What Everyone Needs to Know (OUP USA, 2023) 4 – 5.
[994] Scott AW Brown, 'Fraying at the Edges: A Subsystems/Normative Power Analysis of the EU's "One China Policy/Policies"' (2022) 252 China Quarterly 1001 – 1025, 1014.
[995] James Ker-Lindsay, *Kosovo: The Path to Contested Statehood in the Balkans* (I.B.Tauris 2011) 52.
[996] Milena Sterio, 'The Case of Kosovo: Self-Determination, Secession, and Statehood Under International Law' (2010) 104 American Society of International Law 361 – 365, 363.
[997] Thomas D Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 99.
[998] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 131.

not provide any guidance on how to address the legitimate claims of self-determination movements that do not meet all of its criteria.[999] For example, the Kurdish people have a well-defined national identity and seek self-determination across multiple states, including Turkey, Iraq, Iran, and Syria. Despite this, their lack of control over a defined territory and divided political leadership prevent them from meeting the Montevideo requirements.[1000] The Convention's emphasis on traditional state structures fails to accommodate such cases, where national identity and self-determination are paramount but do not conform to the rigid legal framework. Jure Vidmar's critique of the Convention is particularly instructive in understanding its limitations in the modern world. Vidmar argues that the Convention's requirements are outdated and insufficient for addressing the complexities of contemporary statehood. He advocates for a more flexible approach that incorporates human rights, democratic governance, and minority protections as key factors in recognising new states.[1001] In this light, the Convention's rigid focus on territorial control and effective government seems inadequate in the face of modern self-determination movements, such as those seen in Catalonia and the Kurdish regions.[1002] Vidmar's proposals for a framework, which would include considerations of internal and external legality, democratic governance, and compliance with international norms, are gaining traction as alternative approaches to state recognition. Although the Convention remains a foundational legal instrument in international law, its relevance in contemporary statehood discussions is increasingly limited. The complex geopolitical realities of the 21st century, including contested territories, divided governments, and self-determination movements, challenge the adequacy of the Convention's requirements. As the case studies of Palestine, Kosovo, Taiwan, and the Kurds demonstrate, the Convention fails to account for the role of political power in shaping state recognition. Furthermore, the growing importance of human rights, democratic governance, and self-determination calls for a more flexible and nuanced approach to statehood, one that goes beyond the rigid

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[999] Jure Vidmar, 'The Concept of the State and its Right of Existence' (2015) 4 Cambridge Journal of International and Comparative Law 547 – 565.
[1000] Richard Falk, 'Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars' (1994) 15 Michigan Journal of International Law 591 – 603, 593 – 594.
[1001] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.
[1002] Milena Sterio, 'Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia' (2018) 22 American Society of International Law Insights <https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan> accessed 6 October 2024.

framework of the Convention and addresses the realities of the modern international order.[1003]

8.6 The Role of Constructivism in Understanding Statehood

The traditional legal framework for recognising statehood established by the Convention is rooted in positivist principles, where recognition relies on factual criteria.[1004] However, this framework's limitations in addressing the complexities of modern statehood have been increasingly highlighted by scholars, including Alexander Wendt[1005] and Nicholas Onuf.[1006] Their constructivist approaches provide a more holistic understanding of statehood and recognition, suggesting that these concepts are not solely based on objective legal standards but are socially constructed through interactions among states and international actors.[1007] Wendt's constructivist theory challenges the rigid, legalistic interpretation of statehood as laid out by the Convention. He argues that international relations are shaped by shared ideas, norms, and practices rather than being governed solely by material conditions such as territorial control and governance.[1008] This perspective is particularly important when examining the recognition of entities like Palestine and Taiwan, which meet the traditional requirements for statehood but face significant political obstacles to recognition.[1009] Wendt's famous assertion that 'anarchy is what states make of it' reflects the fluidity of international structures, which are continuously shaped by the interactions and decisions of states.[1010]

Wendt expanded on Nicholas Onuf's constructivism by exploring how normative frameworks influence state recognition. Onuf posited that statehood is not a static or binary condition but rather a socially constructed reality, where the recognition of new states depends on the interplay of legal, political, and ethical factors.[1011] For instance, in the case of Somaliland, despite fulfilling the criteria for statehood

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[1003] Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 International and Comparative Law Quarterly 361 – 387, 386.
[1004] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[1005] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.
[1006] Nicholas Onuf, Making Sense, *Making Worlds: Constructivism in Social Theory and International Relations* (Taylor & Francis 2013) 22.
[1007] Nicholas Greenwood Onuf, World of Our Making: *Rules and Rule in Social Theory and International Relations* (Routledge 2012) 40.
[1008] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 57.
[1009] James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?' (1990) 1 *European Journal of International Law* 307 – 313, 308
[1010] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 218.
[1011] Nicholas Onuf, 'Many Worlds, Many Theories, Many Rules: Formulating an Ethical System for the World to Come' (2016) 59 Revista Brasileira de Política Internacional 7.

the international community's preference for maintaining Somalia's territorial integrity has prevented Somaliland from achieving full recognition.[1012] Onuf highlights how the norms of territorial integrity often conflict with the practical realities of self-determination, resulting in the marginalisation of entities that do not fit neatly into the traditional framework of state recognition.[1013] A critical aspect of constructivist theory is the idea that state identities and interests are not fixed but are constructed through social interactions. A Wendtian approach would argue that states derive their identities and legitimacy through their interactions with other states and international actors.[1014] In the context of state recognition, this means that entities do not become states simply by meeting legal criteria; instead, they are recognised as states when their identities are validated and accepted by the international community. For example, Taiwan meets all the legal requirements for statehood under the Montevideo Convention but is not widely recognised as a sovereign state due to the geopolitical influence of China.[1015] This demonstrates how statehood is not merely a legal status but a socially negotiated condition, shaped by power dynamics and political interests.

Onuf complements this view by emphasising the role of power structures in determining which entities are granted recognition. He suggests that powerful states, through their political and economic influence, play a significant role in the process of recognition, often shaping the international community's decisions for strategic reasons. The case of Kosovo provides a compelling example of this dynamic. Despite Kosovo's declaration of independence in 2008 and recognition by over 100 states, its statehood remains contested by Serbia and its allies, particularly Russia and China. Onuf's theory highlights how state recognition can be a contested and politicised process, where powerful actors influence the recognition or non-recognition of new entities based on their interests. Wendt emphasises that states do not enter the international system with fixed identities or interests. Instead, their interests are defined by their interactions with other states.[1016] Through processes of communication and socialisation, states develop shared understandings that influence their behaviour This perspective challenges the Montevideo Convention's assumption that statehood is a static condition.

[1012] James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 415.
[1013] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 121.
[1014] Alexander Wendt, Social Theory of International Politics (CUP 1999) 156.
[1015] Catherine Lila Chou and Mark Harrison, *Revolutionary Taiwan: Making Nationhood in a Changing World Order* (Cambria Press 2024) 137.
[1016] Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' (1992) 46 International Organization 319 – 425, 397.

Constructivism allows for a more fluid understanding of statehood, recognising that entities like Palestine, Kosovo, and Taiwan may function as states in practice but lack the full sovereignty accorded to recognised states under international law.[1017] The United Nations Educational, Scientific, and Cultural Organization can indeed serve as an example of how international institutions, as suggested by Wendt, can transform the identities and interests of states. Wendt argues that international institutions do more than regulate state behaviour; they shape the way states understand themselves and their roles in the international system. Through participation in United Nations Educational, Scientific, and Cultural Organization, states often redefine their interests regarding global cooperation rather than purely self-help behaviour.[1018]

Another important contribution of constructivism to the study of statehood is its emphasis on norms and shared understandings as drivers of state recognition. Ruggie argued that international standards are not static but evolve, influencing how states interact and recognise new political entities.[1019] This is particularly relevant in the case of Somaliland, where international norms prioritising territorial integrity have overshadowed the practical realities of its effective governance and political stability. Despite Somaliland's de facto sovereignty, it remains unrecognised because the international community adheres to norms that favour the preservation of existing state borders. Onuf's analysis highlights how these norms can be both a hindrance and a facilitator in the recognition of new states, depending on the political and historical context in which statehood is being contested. The Israeli-Palestinian conflict is deeply rooted in identity, with both sides constructing their national narratives based on religious, ethnic, and historical experiences. The formation of these identities, particularly the Jewish and Palestinian identities, plays a critical role in how both groups perceive their rights to statehood and land.[1020]

The recognition of Kosovo's independence by many Western states can be seen as part of a broader effort to stabilise the Balkans following the Yugoslav Wars,

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[1017] Mehrzad Javadikouchaksaraei and others, 'Reinterpreting the Israeli-Palestinian Conflict: A Constructivism Theory of Understanding a Cross-Ethnic Phenomena' (2015) 11 Asian Social Science 107 – 113, 108 – 109.
[1018] Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' (1992) 46 International Organization 319 – 425, 400.
[1019] John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 International Organization 139 – 174, 139.
[1020] Mehrzad Javadikouchaksaraei and others, 'Reinterpreting the Israeli-Palestinian Conflict: A Constructivism Theory of Understanding a Cross-Ethnic Phenomena' (2015) 11 Asian Social Science 107 – 113, 108.

while the lack of recognition for Palestine by certain states can be understood as a reflection of their political alliances with Israel.[1021] This demonstrates that state recognition is often shaped by historical and political factors that go beyond the legal criteria established by the Montevideo Convention. Vidmar highlights the complexity and ambiguity inherent in the international legal system when it comes to defining territorial status, especially regarding customary international law. Because of the social and political nature of territorial formation, the legal capacity of territorial entities can be relative and subject to interpretation, meaning that territorial status may not always be universally recognised or fully opposable to all other states (*erga omnes*).[1022] This suggests that statehood and other forms of territorial recognition are contingent on political actions and decisions, rather than legal certainty. Vidmar de-naturalises territory and statehood, presenting them as politically constructed statuses subject to international legal processes, rather than fixed or inevitable features of the international order.[1023]

8.7 Challenges of Self-Determination Movements and Recognition

One of the most significant challenges to the Convention in contemporary international law is the issue of self-determination movements, which often seek recognition as independent states but face obstacles due to the rigid criteria set out by the Convention.[1024] Self-determination, enshrined in the United Nations Charter, has become a key principle in international law, providing people with the right to freely determine their political status and pursue their economic, social, and cultural development.[1025] However, as the case studies of Palestine, Western Sahara, and the Kurdish regions illustrate, self-determination movements frequently face challenges in gaining recognition as sovereign states, even when they fulfil many of the Montevideo requirements. The Palestinian struggle for statehood is one of the most well-known examples of a self-determination movement that faces difficulties in achieving full recognition.[1026] Although Palestine

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[1021] Hayder Al-Shakeri, Tim Eaton, and Renad Mansour, *'Ignoring the roots of violence in the Israel–Palestine conflict challenges any future peace'* (Chatham House, 27 October 2023) <https://www.chathamhouse.org/2023/10/ignoring-roots-violence-israel-palestine-conflict-challenges-any-future-peace> accessed 29 September 2024.

[1022] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 196.

[1023] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 196.

[1024] Jure Vidmar, 'Explaining the Legal Effects of Recognition' (2012) 61 International and Comparative Law Quarterly 361 – 387, 387.

[1025] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Articles 1 and 55.

[1026] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 239.

has a defined population, territory, and a degree of governance, its fragmented control and the Israeli occupation complicate the application of the Convention.[1027] The Palestinian Authority governs parts of the West Bank, while Hamas controls the Gaza Strip, creating a divided government that hinders Palestine's ability to present itself as a unified state with effective governance.[1028] Despite this, Palestine has received recognition from over 135 countries and holds non-member observer state status at the United Nations.[1029] The case of Palestine demonstrates how self-determination movements, even when they meet many of the Montevideo requirements, are often hindered by political realities and the lack of consensus in the international community.

The situation in Western Sahara presents another compelling case of self-determination that has been frustrated by international political dynamics. The Sahrawi people, represented by the Polisario Front, declared the Sahrawi Arab Democratic Republic in 1976, claiming sovereignty over Western Sahara, a territory that has been under Moroccan occupation since Spain withdrew in 1975.[1030] The Sahrawi Arab Democratic Republic meets many of the Montevideo requirements, including a defined population and territory, and it has been recognised by over 80 states, primarily in Africa and Latin America.[1031] However, Morocco's occupation and the refusal of key international actors, such as France and the United States, to recognise the Sahrawi Arab Democratic Republic, have prevented Western Sahara from achieving full statehood under international law.[1032] The case of Western Sahara exemplifies how self-determination movements can be blocked from achieving statehood due to geopolitical considerations, even when they meet the legal requirements outlined by the Montevideo Convention. In both Palestine and Western Sahara, the issue of effective governance presents a particular challenge to the Montevideo framework. The Convention assumes a state must have a single, centralised government that

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[1027] *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) 2024 <https://www.icj-cij.org/case/186/advisory-opinions> accessed 9 September 2024.

[1028] James Summers, 'Palestinian Self-Determination and a State of Aspiration' in Carlo Panara and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Nijhoff Publishers 2013) 240.

[1029] Declaration of Principles on Interim Self-Government Arrangements (Oslo I Accords) (signed 13 September 1993, entered into force 13 October 1993) UNTS A/48/486.

[1030] Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law: Recognition Doctrine and Self-Determination* (Taylor & Francis Group 2024) 47.

[1031] Damien Kingsbury, *Western Sahara: International Law, Justice and Natural Resources* (Taylor & Francis 2018) 3.

[1032] Anon, 'United States Recognizes Morocco's Sovereignty Over Western Sahara' (2021) 115 *American Journal of International Law* 318 – 323, 318.

controls its territory.[1033] However, in the case of self-determination movements, governance is often fragmented or contested, making it difficult to apply this requirement. In Palestine, the division between the Palestinian Authority and Hamas weakens the argument for effective governance, while in Western Sahara, the territory remains under Moroccan occupation, preventing the Sahrawi Arab Democratic Republic from exercising full control.[1034] These examples highlight how the traditional criteria of effective government may be too rigid to accommodate the realities of modern self-determination movements, which often face external occupation or internal division.[1035]

The Kurdish struggle for self-determination further illustrates the complexities faced by entities seeking recognition. The Kurdish people, spread across several states including Turkey, Iraq, Iran, and Syria, have long sought independence or autonomy, with various Kurdish movements pursuing different political goals.[1036] In Iraqi Kurdistan, the Kurdish Regional Government has established a degree of autonomy, with its own governance structures, military (the Peshmerga), and control over territory.[1037] However, despite holding a referendum for independence in 2017, in which 93% of voters supported secession, the Kurdish Regional Government's bid for statehood was rejected by the central Iraqi government and did not receive international recognition.[1038] The Convention's inability to account for the complexities of self-determination movements stems, in part, from its reliance on traditional concepts of territorial integrity and effective governance informed by a nineteenth-century positivist perception of 'the real personality of the state'.[1039] These concepts do not always align with the realities faced by self-determination movements, which may control part of a territory or operate under conditions of occupation.

Geopolitical considerations also play a significant role in determining whether self-determination movements achieve recognition. As Wendt's constructivist theory

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[1033] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 40
[1034] Adriana Kalicka-Mikołajczyk, 'The International Legal Status of Western Sahara' (2021) 18 Opolskie Studia Administracyjno-Prawne 35 – 47, 40.
[1035] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 7.
[1036] Richard Falk, 'Problems and Prospects for the Kurdish Struggle for Self-Determination After the End of the Gulf and Cold Wars' (1994) 15 Michigan Journal of International Law 591 – 603, 593 – 594.
[1037] *Pearl Petroleum Co Ltd v The Kurdistan Regional Government of Iraq* (Judgment) 2015 <https://www.difccourts.ae/rules-decisions/judgments-orders/arbitration/pearl-petroleum-company-limited-others-v-kurdistan-regional-government-iraq-2017-difc-arb-003> accessed 30 August 2024.
[1038] Fahrettin Sumer and Jay Joseph, 'The Paradox of the Iraqi Kurdish Referendum on Independence: Contradictions and Hopes for Economic Prosperity' (2018) 45 British Journal of Middle Eastern Studies 574 – 588, 587.
[1039] Stephan C Neff, 'The Dormancy, Rise and Decline of Fundamental Liberties of States' (2015) 4 Cambridge Journal of International and Comparative Law 482 – 500.

highlights, state recognition is not merely a legal process but is also shaped by power dynamics and the social construction of statehood.[1040] In the case of Palestine, international recognition is highly politicised, with states aligning themselves with either the Palestinian cause or Israel based on broader geopolitical considerations.[1041] The United States and several European countries, for example, have been reluctant to recognise Palestine as a state due to their political alliances with Israel, despite widespread recognition of Palestine by other states.[1042] Similarly, in Western Sahara, Morocco's geopolitical influence and its status as a key ally and trading partner with France and the United States have blocked the recognition of the Sahrawi Arab Democratic Republic, even though the Sahrawi people have a legitimate claim to self-determination.[1043] Self-determination movements also challenge the principle of territorial integrity, a cornerstone of the modern international system. The Convention assumes that a state must have control over a defined territory, but self-determination movements often face territorial disputes or occupation, as seen in the cases of Palestine, Western Sahara, and Kurdistan.[1044] The principle of territorial integrity is often used by existing states to block the recognition of self-determination movements, arguing that recognising new states would violate their sovereign rights.[1045] Iraq has used this argument to prevent the recognition of an independent Kurdish state and by Morocco to justify its occupation of Western Sahara.[1046] These examples highlight the tension between the right to self-determination and the principle of territorial integrity, which remains unresolved in international law.

8.8 Conclusion

The Montevideo Convention's positivistic requirements for state recognition, combined with additional criteria proposed by scholars like James Crawford and

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[1040] Alexander Wendt, *Social Theory of International Politics* (CUP 1999) 121.
[1041] Jure Vidmar, 'Palestine v United States: Why the ICJ does not need to decide whether Palestine is a state' (EJIL: Talk!, 22 November 2018) <https://www.ejiltalk.org/palestine-v-united-states-why-the-icj-does-not-need-to-decide-whether-palestine-is-a-state/> accessed 10 October 2024.
[1042] Matthew Craven and Rose Parfitt, 'Statehood, Self-Determination, and Recognition' in Malcolm Evans (ed), *International Law* (6th edn, OUP 2024) 240.
[1043] Jure Vidmar, *Territorial Status in International Law* (Bloomsbury Publishing 2024) 164.
[1044] Kenneth Uzor Eze and Godwin N Okeke, 'The Right of People to Self-Determination and the Principle of Non-Interference in the Domestic Affairs of States' (2013) 7 National Academy of Legal Studies and Research Law Review 145 – 164, 145.
[1045] James Ker-Lindsay and Mikulas Fabry, *Secession and State Creation: What Everyone Needs to Know* (OUP 2023) 16 – 17.
[1046] Anon, '*What is Western Sahara and why does Morocco claim sovereignty over it?'* (Middle East Eye, 10 December 2020) <https://www.middleeasteye.net/news/western-sahara-why-morocco-claim-sovereignty-over-it> accessed 20 September 2024.

the guidelines outlined by the Badinter Commission, have shaped the discourse on statehood in international law for much of the 20th century. However, as we enter the 21st century, these traditional criteria may no longer be adequate or just, particularly in the face of non-state actors and human rights considerations. Territory, once considered an absolute criterion for statehood, is now increasingly understood not as a natural or inherent element of statehood but as a socially constructed and politically manipulated phenomenon, as argued by thinkers such as Stuart Elden and Jure Vidmar. This evolving understanding calls for a reconsideration of statehood criteria to account for both practical realities and evolving norms surrounding human rights and self-determination.

The Convention was established in 1933, and these requirements have long been considered the bedrock for the recognition of statehood under international law.[1047] Yet, these requirements, rooted in positivist legal traditions, are increasingly seen as insufficient or outdated in the 21st century, where the emergence of new states often takes place in contested political spaces or in response to humanitarian crises. For example, the status of entities like Palestine and Kosovo challenges the rigid application of Montevideo's requirements. Both possess some degree of governmental control and population but exist in contested territorial spaces that defy easy categorisation under the traditional framework.[1048] James Crawford's contributions to the discussion of state recognition bring additional insights but also reinforce certain positivist assumptions. Crawford suggests that state recognition should also be contingent upon respect for human rights and adherence to democratic principles.[1049] His emphasis on human rights brings much-needed ethical considerations into the debate, but it still relies on a traditional understanding of sovereignty and state control. Moreover, Crawford acknowledged the political nature of recognition, recognising that even if an entity meets the legal criteria for statehood, it may not necessarily gain recognition if powerful states withhold it for political reasons. In the case of Palestine, for example, despite international acknowledgement of its right to self-determination, its full legal recognition as a state remains stymied due to political disputes, particularly with Israel.[1050] The Badinter Commission, which played a key role in

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[1047] The Montevideo Convention on the Rights and Duties of States, adopted by the Seventh International Conference of American States in Uruguay, Montevideo on 26 December 1933, and came into force 26 December 1934, Article 1.
[1048] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 108.
[1049] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 21.
[1050] Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 *Columbia Journal of Transnational Law* 404 – 457, 411.

the dissolution of Yugoslavia, added another layer of complexity to the discourse by emphasising the importance of democratic legitimacy and respect for minority rights in the recognition of new states. The Commission's guidelines reflect an attempt to move beyond pure territorial control and towards a framework where legitimacy is granted based on adherence to principles of human rights and democracy.[1051] While this represents progress, it still does not fully account for cases where territories are under effective control by non-state actors or where state-like entities emerge in response to humanitarian needs, as seen with Kurdistan or Somaliland.[1052]

Jure Vidmar offers a potential solution that might align more closely with modern understandings of territory and sovereignty. Vidmar's approach de-naturalises the concept of territory, arguing that it is not an inherent component of statehood but rather a legal status created through political processes. He challenges the traditional view that a state exists because of its control over a specific geographic territory and proposes that recognition should be based on a broader array of factors, including the capacity for self-governance and the ability to fulfil international legal obligations.[1053] In this view, statehood is not simply about controlling land but about participating as a responsible actor within the international community. Vidmar's argument for subjectivity in statehood recognition also aligns with contemporary legal and geopolitical challenges, where non-state actors, such as the Kurdish regional government or even non-recognised states like Somaliland, function with a degree of legitimacy without being recognised as full-fledged states.[1054] Moreover, the increasing emphasis on human rights in international law requires a shift in how state recognition is approached. The traditional model, which prioritises control over territory and governmental authority, often overlooks the rights and needs of the populations within these territories.[1055] For instance, in cases like Palestine or the Rohingya crisis, statehood and territorial control are tightly intertwined with questions of human rights violations. The right to self-determination, a cornerstone of international human rights law, has often been interpreted narrowly, applying

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[1051] European Community Arbitration Commission on Yugoslavia (Badinter Commission) Opinion No 3 (11 January 1992) 31 ILM 1488, 1497.
[1052] Milena Sterio, 'Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia' (2018) 22 American Society of International Law Insights https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan accessed 2 September 2024.
[1053] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 21.
[1054] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 84.
[1055] Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' (2006) 28 Human Rights Quarterly 186 – 206, 199.

primarily to colonial contexts. However, in the 21st century, the right to self-determination needs to be expanded to include not only political independence but also the protection of human dignity and fundamental rights within contested territories.[1056] Vidmar's focus on the legal subjectivity of statehood, alongside a human rights-focused approach, offers a framework for recognising entities that meet the needs of their populations without necessarily fulfilling all the traditional requirements of statehood.

The Palestinian situation, in particular, serves as a compelling example of the need to reconsider the positivist criteria. Palestine possesses many of the elements outlined in the Montevideo Convention but continues to face challenges to its statehood due to its lack of control over its full territorial boundaries and the ongoing Israeli occupation.[1057] The International Criminal Court case on Palestine's territorial scope highlights the tension between legal recognition and political realities.[1058] As the court's analysis acknowledges, determining the territorial boundaries of Palestine is not straightforward due to the lack of a settled political process and clear borders, demonstrating the limitations of traditional statehood criteria in resolving complex territorial disputes. In light of these issues, a 21st-century framework for state recognition should move beyond the rigid application of Montevideo's requirements, incorporating a broader understanding of territory as a social and political construct, as well as a stronger emphasis on human rights and practical governance capacities of non-state actors. The international community should recognise that entities like Palestine, Kurdistan, and Somaliland play significant roles on the world stage, often providing governance, security, and services to their populations in ways that fulfil many of the functions of a traditional state.[1059] By reconsidering the requirements for statehood and embracing a more flexible, human rights-oriented approach, international law can better address the evolving challenges of statehood in the modern world. Finally, while the positivistic framework provided by the Montevideo Convention, Crawford's additional requirements, and the Badinter Commission's recommendations have been instrumental in shaping international discourse on statehood, they are increasingly inadequate for the realities of the 21st century. Scholars like Jure Vidmar and human rights frameworks provide promising

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[1056] James Summers, *Peoples and International Law* (2nd rev edn, Brill 2014) 425.
[1057] John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (CUP 2010) 226.
[1058] *Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine"* (5 February 2021) ICC-01/18.
[1059] Jure Vidmar, *Territorial Status in International Law* (Hart Publishing 2024) 75.

pathways for rethinking state recognition, moving towards a system that acknowledges the fluidity of territorial control and prioritises the rights and well-being of populations over strict territorial definitions.[1060]

[1060] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 446 – 447.

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