

## The State\*

Tom Sparks

### Abstract

*What is it that international lawyers understand by means of the concept of “State”? Although States are fundamental to the international legal order as we know it, it is difficult to capture their essential, core characteristics such that they can be theorised and understood. This Chapter will explore the potential of a socio-linguistic approach to advance the enquiry into the nature of States. It will be identified that States are social phenomena, created and maintained in their existence by the recursive actions of individuals, and it will be argued that they therefore need to be understood as complex and changeable phenomena with an inherent socio-political context. In particular, three aporia will be identified in our current understanding of States: the relationships of statehood with sovereignty, with personality, and with law; and it will be argued that a socio-linguistic approach is well placed to provide insight into these questions. The approach will also identify the significant part international lawyers play in creating and maintaining the concept of State, and will conclude that whether as practitioners, commentators, theorists or teachers, what international lawyers think States are matters, except, perhaps, insofar as we think of them as unchanging.*

Keywords: The State, Statehood, Montevideo Convention, Concepts in International Law, Sociology, Linguistics

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\* The paper is forthcoming at Jean d'Aspremont and Sahib Singh, *Concepts for International Law: The Construction of a Discipline* by Elgar. Citations should be made to the final version.

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# The State

Tom Sparks\*

## I. Introduction

The concept of *State* is, perhaps surprisingly, relatively young. Although the term “State” has had the meaning of *nation*, *realm* or *commonwealth* in the English language since at least the fifteenth century,<sup>1</sup> its technical usage—that is to say, what international lawyers use the term to mean—has changed significantly in the intervening years. Indeed, the term “State” describes, defines and moulds a number of entities which are much older than the concept itself.<sup>2</sup>

The story of States is a story of false permanence. Despite the myth of the everlasting, immortal nation—the proverbial “empire which will last a thousand years”—history is a procession of national births and deaths, of the rise of empires and their ruinous fall.<sup>3</sup> But more significant, perhaps, than change in the membership of the international community, the idea of “State” has undergone even more dramatic changes. From its origins in the Hobbesian tribe or warband, one may trace the development of the “State” through monarchy and feudalism, through the emergence of the *Rechtsstaat* (the State governed by law) and to the idea of the State under law, to the era of

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1 ‘State, N.’, *The Compact Edition of the Oxford English Dictionary* (Book Club Associates 1979) vol 2, 3025. For a fascinating and very revealing history of the closely-connected tern “nation” see Eric J Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge University Press 1990) 14–45.

2 As Ryan reminds us, the concept of “state” was virtually absent in medieval discourse, although there existed at that time entities which, albeit very different from States as conceived today, we would know by that term. See: Magnus Ryan, ‘Freedom, Law, and the Medieval State’ in Quentin Skinner and Bo Stråth (eds), *States and Citizens: History, Theory, Prospects* (Cambridge University Press 2003) 51 et seq.

3 See, e.g. Eric J Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Weidenfeld and Nicholson 1962); *The Age of Empire 1875-1914* (Pantheon Books 1987).

permanence characterised by the idea *uti possidetis juris*.<sup>4</sup> In the modern era this development has continued unabated, and it is at least arguable that we have now entered the era of the *post-sovereign State*.

Change of this type is not incidental to the description or understanding of States; rather, it is a central feature of what States are. States, Giddens says, are ‘like buildings that are at every moment being reconstructed by the very bricks that compose them’,<sup>5</sup> and the analogy indeed seems apposite. States are not innate or physical truths, but rather are recursively created by human social action and interaction.<sup>6</sup> It is perhaps for this reason that the concept of the State sits somewhat uncomfortably with law. The similarities are notable: like States, law is a social phenomenon, and is created by human action. Like States, individual laws come and go, and the idea of “law” has itself been subject to significant change over time. Nevertheless, legal concepts exist in a conceit of timelessness, seeking to encapsulate a “truth” by which the rest of the system may orient itself. A legal definition of the State is an attempt permanently to capture an impermanence.

This short discussion will consider the modern mainstream debates surrounding the nature of States and statehood characterised by the Montevideo convention, and will argue that this paradigm is no longer, if it ever was, capable of providing answers to hard questions in this field. In particular, it will identify three *aporia*—the relationships between statehood and sovereignty, personality, and law—where the current paradigm

4 It should be noted that this is not necessarily, and perhaps has never been, a linear progression, nor one which has been followed at the same speed everywhere. Parts of this history are told variously in Quentin Skinner, ‘A Genealogy of the Modern State’ (2009) 162 *Proceedings of the British Academy* 325; Thomas Alfred Walker, *A History of the Law of Nations* (Cambridge University Press 1899) 30–148; Quentin Skinner, *The Foundations of Modern Political Thought: The Age of Reformation* (Cambridge University Press 1978) vol 2, 349–58; Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford University Press 1999); Ryan (n 2); Martin van Gelderen, ‘The State and Its Rivals in Early-Modern Europe’ in Quentin Skinner and Bo Stråth (eds), *States and Citizens: History, Theory, Prospects* (Cambridge University Press 2003); Raja Prokhovnik, *Sovereignty: History and Theory* (Imprint Academic 2008) 13–25; Jörg Fisch, ‘Peoples and Nations’ in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012); Antonio Cassese, ‘States: Rise and Decline of the Primary Subjects of the International Community’ in Anne Peters and Bardo Fassbender (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

5 Anthony Giddens, *Sociology* (2nd edn, Polity Press 1993) 18. It is important to note that Giddens’ observations are made in the context of an inquiry into the nature of society, rather than “the State”. For this reason the vocabulary used does not comfortably transfer. Giddens refers to societies as structures, using the term “state” to refer to the governmental organs of the society, which he contrasts with “civil society”. See further: Anthony Giddens, *The Nation-State and Violence* (University of California Press 1985) 20.

6 Anthony Giddens, *The Constitution of Society* (Polity Press 1984) 2.

provides no satisfactory answer, and which any new theory of statehood would need to address if it is to advance our knowledge of this subject meaningfully. It will argue that the State should be understood, not as international law is wont to see it, as a single entity, but rather as two coextensive entities. Finally, it will introduce in schema a socio-linguistic approach to statehood, and will argue that it has the potential to provide insights not only into certain of these *aporia*, but into the central and significant role international lawyers play in creating and maintaining the phenomenon of statehood.

## II. The Montevideo Convention and its Frailties

In 1933 the International Conference of American States made perhaps the most ambitious attempt yet internationally to define the State for the purposes of international law. On the 26<sup>th</sup> December they concluded the Montevideo Convention on the Rights and Duties of States, Article 1 of which provides:

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.<sup>7</sup>

Although this was merely a regional convention, it has acquired a significance far beyond its immediate sphere of application. Grant notes that the convention has ‘become a touchstone for the definition of the state’,<sup>8</sup> and that ‘citation to the convention in contemporary discussions of statehood is nearly a reflex.’<sup>9</sup> Nevertheless, Craven is correct to strike a cautionary note, that the convention definition seems to be a ‘starting point’, rather than a definitive and authoritative statement of fact.<sup>10</sup> It is, further, becoming increasingly clear that the Montevideo description of statehood is no longer capable—if ever it was—of providing answers to hard questions which confront international lawyers in this area; a shortcoming perhaps most obvious in the vociferous disagreements in diplomatic affairs, in national and international

7 Montevideo Convention on the Rights and Duties of States, concluded 22 December 1933, in force 26 December 1934, Article 1.

8 Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’ (1998–99) 37 *Colombia Journal of Transnational Law* 403, 416.

9 *ibid* 415. [Footnotes omitted].

10 Matthew Craven, ‘Statehood, Self-Determination and Recognition’ in Malcom D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 217.

adjudication and in the academic literature over the status (both current and appropriate) of the several state-like entities which exist around the world in a limbo of status. Of these the best known are, perhaps, Kosovo, Palestine and Nagorno-Karabakh.<sup>11</sup> Mention could also be made of Transnistria, Kurdistan, Chiapas, Liberland, Sealand, Bi'r Tawil and SADR. These are entities with claims to statehood of varying credibility, and while some are widely regarded as risible, others are among the most likely flashpoints for future international conflicts.

There is a certain cognitive dissonance associated with the inadequacy of the Montevideo account of statehood. The failings of the account are clear: not only does it fail to provide answers to any but the most straightforward cases, it also fails to provide a coherent common premise for discussions between international lawyers and other actors. To use Kuhn's terminology, the Montevideo account is failing to fulfil the functions of a *paradigm*.

Kuhn argues that the existence of a paradigm facilitates the development of a discipline by supplying a shared foundation which renders cohesible the contributions of scholars, and thus allow the individual scholar or practitioner to rely upon a settled body of work which establishes the fundamentals of the discipline.<sup>12</sup> In other words, one could say that it ensures that scholars and practitioners speak the same language: they speak the language of the paradigm. Kuhn gives the example of work on optics prior to Newton's seminal contribution to that field, and states that '[b]eing able to take no common body of belief for granted, each writer on physical optics felt forced to build his field anew from its foundations.'<sup>13</sup> Absent a paradigm, they were compelled to 'start[] from first principles, and justify[] the use of each concept introduced.'<sup>14</sup> Under these circumstances, Kuhn comes to the conclusion that 'though the field's practitioners were scientists, the net result of their activity was something less than science.'<sup>15</sup>

11 See, for example, John Quigley, 'Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood' (1989) 7 Boston University International Law Journal 1; Jure Vidmar, 'Palestine and the Conceptual Problem of Implicit Statehood' (2013) 12 Chinese Journal of International Law 19; David I Efevwerhan, 'Kosovo's Chances of UN Membership: A Prognosis' (2012) 4 Goettigen Journal of International Law 93; Jean d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' (2007) 20 Leiden Journal of International Law 649; Amit K Chhabra, 'Superpower Responsibility for State Recognition: Charting a Course for Nagorno-Karabakh' (2013) 31 Boston University International Law Journal 125.

12 Thomas S Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 2009) 19–20.

13 *ibid* 13.

14 *ibid* 19.

15 *ibid* 13.

Debates on statehood bear a recognisably similar form. During the course of the Advisory proceedings in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, for example, of the thirty-five States which submitted either written statements or written comments (in addition to the written statement and written comment submitted by the Authors of the Unilateral Declaration of Independence), fourteen addressed the question of Kosovo's future status and, in particular, whether it qualifies as a State. Of these, only three thought it sufficient to cite the Montevideo account of statehood in support of their position, while three impliedly doubted the applicability of the Montevideo account, citing criteria not present in the convention. Most significantly, however, a further eight States cited criteria that were largely consonant with that account, but considered it necessary to justify to a greater or a lesser extent the principles upon which they relied without reference to the Montevideo Convention. Although the Convention is the primary international source of a definition of statehood—or so most textbooks will tell<sup>16</sup>—it is no longer seen as having any great authority.

Yet despite its obvious failings, the Montevideo account provides an intuitively satisfying description of the State: it is, we are told, an entity possessed of a defined area permanently populated, that has a government and the capacity to enter into relations with other States. In other words, a State is an independent political community which resides within and applies to a geographical area. Although some doubt remains over the meaning and scope of the fourth Montevideo criterion (capacity), the picture thus painted of the State does not appear to be incomplete. It is for this reason, perhaps, that Lauterpacht, writing in 1947, cautioned against the addition of additional criteria such as legitimacy of origins, degree of civilisation or political system. 'Once considerations of that nature are introduced', he argued, 'the clear path of law is abandoned and the door wide open to arbitrariness, to attempts of extortion and to intervention at the very threshold of statehood.'<sup>17</sup> Nevertheless, careful consideration by scholars has generated a number of candidates for addition to the criteria of statehood. Grant lists eight factors which might be discussed by an international body revisiting the drafting of a criteria for statehood: independence, a claim to statehood, popular self-determination, external and internal legality, the existence of organic bonds within the community, UN membership, and recognition.<sup>18</sup>

16 See, e.g. Craven (n 10) 217; David Harris, *Cases and Materials on International Law* (7<sup>th</sup> edn, Sweet & Maxwell 2010) 91 et seq.; James Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn, Clarendon Press 2006) 45-46.

17 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 31.

18 Grant (n 8) 450-51.

Sterio also suggests the adoption of additional criteria, although she conceives of them as aspects of the ill-defined requirement that a State have capacity, rather than as new “stand-alone” requirements. A State, she says, must gain, at a minimum, the recognition of the great powers; must show that it will respect human rights and minority rights; and must demonstrate its ‘willingness to participate in international organizations and to abide by the existing world order.’<sup>19</sup>

The search for a new criterion that will reconcile the Montevideo account of statehood with the rather more complex experience of statehood in fact is akin to the efforts more and more sharply to refine the existing Montevideo criteria. A vast amount has been written in these pursuits, and the insights that have been generated thereby have very significantly advanced our understanding of States.<sup>20</sup> It is, nevertheless, fair, I think, to say that no one has yet hit upon the “golden criterion” that will bring the theory of statehood together with international practice. The possibility is therefore raised that although the Montevideo account of statehood may be made more detailed, it cannot be made more valid; that there will remain always a gap between the law of statehood and its actualisation.

Of course, this in turn raises the question of whether statehood is capable of legal definition or regulation at all. Perhaps, rather than being a process of an international system under law, the creation, breakup and identification of States is a pre-legal fact of which the law must take cognisance, but which it is unable directly to influence. This was, for example the conclusion of Willoughby in his examination of statehood. ‘A State is not amenable to the qualification of *de jure* or *non de jure*,’ he argues, ‘because it is not a creature of law.’<sup>21</sup> This is so, Willoughby declares, because ‘[s]overeignty, upon which all legality depends, is itself a question of fact, and not of law.’<sup>22</sup>

In order further to examine these questions it is necessary to adopt a new (or perhaps a very old) approach. Theorists of statehood have, in recent years, tended to adopt an

19 Milena Sterio, ‘A Grotian Moment: Changes in the Legal Theory of Statehood’ (2010–11) 39 *Denver Journal of International Law and Policy* 209, 234–35; see also Crawford (n 16) 91–93.

20 See e.g. Lauterpacht (n 17); Nii Lante Wallace-Bruce, *Claims to Statehood in International Law* (Carlton Press 1994); Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996); Grant (n 8); Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999); David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002); Crawford (n 16); Sterio (n 19); Jean d’Aspremont, ‘The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society’ (2014) 29 *Connecticut Journal of International Law* 201.

21 Westel W Willoughby, *The Nature of the State* (MacMillan and Co, Limited 1896) 224.

22 *ibid* 217.

descending pattern of enquiry<sup>23</sup> That is to say, the search for insights about States is focused on the moment at which they are most clearly observable in the practice: at the moment of State creation. In so doing they hope to perceive the salient features of States, and to identify the ways in which the aspirant State, existing States and the law interact. This school then seeks to derive insights about the nature of States from their observations of State creation. By contrast, the ascending approach—less favoured in modern international law, but the avenue of choice for many of its earliest theorists—takes the opposite route. Rather than beginning with State creation, this second approach seeks illumination of the nature of the State in theory. Following the initial philosophical enquiry, insights into State creation and other subsidiary questions are then derived secondarily, starting from the conclusions reached about the nature of the State. The association of this ascending approach with the natural law theories of the so-called “founding fathers” of international law—in particular Grotius, Pufendorf and Wolff—may account for its neglect, but it is perhaps worth revisiting in light of the obvious frailties in the Montevideo account, and the limitations of the descending pattern of enquiry.

In particular, the Montevideo account leaves three circumstances unexplained: the relationship between statehood and sovereignty; the relationship between statehood and personality; and the relationship between legality and the law. An ascending theory of statehood must show that it can meaningfully advance the debate on these points if it is to enhance our understanding of statehood beyond the Montevideo paradigm.

## A. Statehood and Sovereignty

It has for many years been generally accepted by mainstream international law that statehood and sovereignty are co-identifiable. In its most extreme form, the co-identification is complete: that which is sovereign is a State, says Willoughby, and that which is a State is sovereign. No further inquiry need be made:

An organised community of men either constitute or so not constitute a state, according to whether there is or is not to be discerned therein a supreme will acting upon all persons or other bodies within its limits.<sup>24</sup>

23 See, for example, Crawford, who uses this descending form of enquiry to great effect in his excellent *Creation of States*: Crawford (n 16).

24 Willoughby (n 22) 224.

This line of reasoning, which finds its roots in Vattel's externalisation of sovereign authority,<sup>25</sup> was taken to its logical extreme and was given perhaps its most influential expression in the judgement of the Permanent Court of International Justice in the *Lotus* case. There the Court held that:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in convention or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>26</sup>

Although this account of sovereignty has not been without voices of dissent—perhaps the most important being Ross's functional critique of sovereignty,<sup>27</sup> MacCormick's theory of post-sovereignty,<sup>28</sup> and Koskenniemi's remarkable *From Apology to Utopia*<sup>29</sup>—it has been the dominant narrative for many years. In 2010, however, the International Court of Justice's Advisory Opinion in *Kosovo* presented a very significant challenge to that idea.

The challenge came in the form of the Court's remarks on territorial integrity. Territorial integrity is that feature of States whereby the territory to which they apply is theirs by right, and cannot be encroached upon or diminished, and it is often conceived to be an essential element of sovereignty. In its written comment to the Court, for example, Russia argued that '[t]erritorial integrity is an unalienable attribute of a State's sovereignty.'<sup>30</sup> Vitality, conceived in this way territorial integrity, a corollary of the perfect and implacable sovereignty of the State, is an attribute of the State itself, opposable against all. It was for this reason that Russia urged the Court to declare the Kosovar declaration of independence illegal, stating that:

The Declaration of independence sought to establish a new State through separation of a part of the territory of the Republic of Serbia. It was therefore, *prima facie*, contrary to the requirement of preserving the territorial integrity of Serbia.<sup>31</sup>

25 Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Luke White 1792) 16–18; Stéphane Beaulac, 'Emer de Vattel and the Externalization of Sovereignty' (2003) 5 *Journal of the History of International Law* 237.

26 *Case of the S.S. "Lotus"*, PCIJ, Series A, No.10, p.18.

27 Alf Ross, *A Textbook of International Law: General Part* (Longmans, Green and Co 1947) 33 et seq.

28 MacCormick (n 4).

29 Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2005) 224 et seq.

30 Written Comment of Russia, *Kosovo Advisory Opinion*, [76-77]. [Footnotes omitted].

31 *ibid.*

Serbia's sovereignty gave it a *right* to the maintenance of its territorial integrity, a right which international law should protect by declaring acts impinging upon that right to be prohibited.<sup>32</sup>

The Court disagreed. Far from vindicating this claimed “right of States” to territorial integrity, the Court instead construed territorial integrity as a negative obligation, and held that ‘the principle of territorial integrity is confined to the sphere of relations between States.’<sup>33</sup> That is to say, it held that each State owes a duty to each of the other States members of the international community not to infringe upon the integrity of their territory either by their own actions, or the actions of those attributable to it, but that States have no “right” to territorial integrity save as the corollary of these limited duties. In the context of the Advisory Opinion, this finding was instrumental in the Court's ultimate pronouncement that declarations of independence are neither facilitated nor prohibited by international law, but its wider implications are, if anything, more significant.

Why does Russia insist upon territorial integrity as an aspect of sovereignty? It may, surely, be possible to envisage a State sovereign in the sense that it obeys no superior and is subject to no obligation save that which it chooses to take to itself, but to do so would exclude perhaps the most enduring facet of sovereignty: the right of the State exclusively to control its internal affairs. It is true that territorial integrity and non-intervention are modern additions to the concept of sovereignty (previously it had been understood that the acquisition of territory by annexation was permissible, for example), and it would not be true to say that the Court has through its judgement declared the end of sovereignty. Nevertheless, the Court has declared a feature long understood to be a direct corollary of the modern doctrine of sovereignty to be not, in Ross's terms, ‘a certain quality of the state’<sup>34</sup>—that is to say, a pre-legal fact over which law has no control—but rather a ‘positive legal situation[] created directly by rules of law’, and therefore subject to them.<sup>35</sup>

The pronouncements of the Court in the *Kosovo* Opinion are the latest in a series of circumstances which cast subtle doubt on the integrity of the link between statehood and sovereignty.<sup>36</sup> They follow, for example, MacCormick's controversial declaration of

32 Similar arguments were advanced by Argentina, Azerbaijan, China, Iran, Romania and Spain.

33 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (2010) ICJ Reports 403, [80].

34 Ross (n 28) 35. [Emphasis omitted]

35 *ibid* 44. [Emphasis omitted].

36 Carty, Anghie, Koskenniemi – sovereignty pace Ntina

1993 that understood as the absence of 'external superior power or [of] other constraints or restrictions legal in nature',<sup>37</sup> the growth of international human rights law and of international organisations capable of making law applicable inside States demonstrates that, to take his example, 'no state in Western Europe any longer is a sovereign state.'<sup>38</sup> 'None', he says, 'is in a position such that all the power exercised internally in it, whether politically or legally, derives from purely internal sources.'<sup>39</sup> Nor, however, does the power exercised in these instances derive from purely external sources, and it would not be accurate therefore to characterise any supra-State structure as having subsumed the sovereignty of the States:

We must not envisage sovereignty as the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it.<sup>40</sup>

To the categories enumerated by MacCormick, one may now add international criminal law, and may reflect that the observation, if valid at all, holds true far beyond Western Europe.

To the extent that MacCormick's thesis holds a real challenge to the concept of State sovereignty, it may be regarded perhaps as a development of Friedmann's challenge to the idea of obligation in international law. MacCormick observes that where a *legal* obligation (properly so-called) prevents a State from exercising its internal freedom of action (and, most obviously where it constrains its internal law-making competence), power exercised within that State no longer 'derives its legitimacy purely from internal sources.'<sup>41</sup> Rather, 'the criteria of validity of [State] law now contain a reference to laws whose validity is or may be determined according to criteria external to [its] legal system(s).'<sup>42</sup> Nor is it fully satisfying to answer with the old conceit that the absence of complete internal competence itself derives from the State's sovereignty under Jellinek's theory of *Selbstverpflichtung*,<sup>43</sup> for, as Friedmann observes, the legal character of the entire international legal system may in this way be denied:

The obvious weakness of this theory is that what states can consent to they can also revoke. The self-limitation of states can derive normative character only from an existing rule that a state is bound to keep its promises. In other words, this theory postulates that the *pacta sunt servanda*

37 Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 14.

38 *ibid* 16.

39 *ibid*.

40 *ibid*.

41 *ibid*.

42 *ibid* 8.

43 Georg Jellinek, *Allgemeine Staatslehre* (J Springer 1922).

principle, in order to constitute an effective basis of international law, must stand above the revocable consent of states.<sup>44</sup>

Returning to the practical there is, as MacCormick comments, something which appears inescapably law-like here, whether one defines law according to an Austinian view of command backed by realistic sanction (economic ills, for example) or a Hartian view that law is that which is recognised as law by system officials in accordance with the rule of recognition.<sup>45</sup>

It is not necessary to attempt to resolve these problems—nor, indeed, to pass comment on the validity of the concerns expressed—here. It is sufficient to observe that the relationship between sovereignty and statehood remains a site for contestation and debate. To the extent that an ascending approach to statehood is capable of advancing our understanding of the subject beyond the Montevideo paradigm, it must at least progress our understanding of the relationship between statehood and sovereignty, and in particular of the extent to which statehood depends on sovereignty.

## B. Statehood and Personality

In the first edition of his hugely influential treatise, Lassa Oppenheim declared that statehood and international personality are separate functions. Statehood, he argues, is a matter of fact: ‘There is no doubt’, he says, ‘that statehood itself is independent of recognition. International law does not say that a State is not in existence as long as it is not recognised’.<sup>46</sup> Nevertheless, international law ‘takes no notice of it before recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law.’<sup>47</sup> There is, in other words, a limited connection between statehood and personality. Statehood is a factual condition, gained or lost by the satisfaction or otherwise of particular criteria. Personality, meanwhile is a function of law, granted to particular entities for political purposes. While it may be that personality is habitually granted only to States (it may even be that only States are considered capable of being granted personality), the functions are not otherwise connected.

44 Wolfgang Friedmann, *The Changing Structure of International Law* (Steven & Sons 1964) 85–86. [Footnotes omitted].

45 MacCormick (n 37) 3–8.

46 Lassa Francis Lawrence Oppenheim, *International Law. A Treatise – Volume 1: Peace* (1st edn., Longmans, Green and Co 1905) 110.

47 *ibid.*

Lauterpacht, meanwhile, strongly rejects the separability of statehood and personality, saying that:

There is, in law, no substance to the assertion that a community is a State unless we attach to the fact of statehood rights and competencies within the internal or international sphere, which international law is ready to recognise.<sup>48</sup>

For Lauterpacht, the term “State” has value only as a signifier of the ability of the entity to act as an international person, and to assume a particular set of rights and duties on the international plane. Without personhood, what does it mean to acknowledge an entity as a “State”? Brölmann and Nijman’s exploration of the idea elsewhere in this volume provides an answer: ‘to be denied [personality] means to be excluded, with ensuing deprivation of for example rightsholdership, capacity to conclude treaties, *ius standi*, or legal responsibility – but it may also mean freedom from normative constraints.’<sup>49</sup>

It is, in other words, a distinctly dangerous state of affairs both for the entity seeking statehood, and for existing States. In modern international law the Montevideo convention attempts partially to address the problem of personality, by way of recognition. Its article 3 declares that ‘[t]he political existence of the state is independent of recognition by the other states’,<sup>50</sup> and this has, perhaps, contributed to what Brölmann and Nijman describe as the ‘reification’ of the doctrine: ‘[w]here the international legal personality of states, organisations, minorities and peoples is a given, social reality becomes the locus of contestation: is the entity *really* a state[?]’<sup>51</sup> In other words, ‘international legal personality [has come] to be regarded as synonymous with statehood’,<sup>52</sup> and it may now be understood rather as a precondition for statehood than as a consequence of it. This is, perhaps, the best reading of the ill-defined fourth Montevideo criterion (capacity). Naffine defines the legal person as ‘someone who is positively able to bear legal duties and to assert legal rights’.<sup>53</sup> At a minimum this implies that the “person” must be capable of action, and must be capable of acting on the basis of reasons.<sup>54</sup> This, in turn, requires a certain level of organisational competence

48 Lauterpacht (n 17) 38.

49 Catherine Brölmann and Janne Nijman, ‘Legal Personality as a Fundamental Concept of International Law’ in Jean d’Aspremont and Sahib Singh (eds), *Fundamental Concepts of International Law* (Edward Elgar Publishing 2017) XXX.

50 Montevideo Convention (n 4).

51 Brölmann and Nijman (n 49) XXX.

52 Crawford (n 16) 29. [Footnotes omitted].

53 Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) 60.

54 William Lucy, ‘Persons in Law’ (2009) 29 *Oxford Journal of Legal Studies* 787, 795.

which, if it is not the ‘capacity to enter into relations with the other states’ demanded by the Convention,<sup>55</sup> must be closely paralleled with and concurrent to it.

Hillgruber disagrees. Plenary international legal personality, he argues, is conferred on new States solely by the process of recognition, which in turn is motivated by the effectiveness of the entity – that is to say, its ability within its territory to apply relevant international legal rules.<sup>56</sup> Nevertheless, in order to “test” the effectiveness of aspirant States, ‘existing states confer limited legal personality under international law on newly emerging states as “candidates for statehood” even before their process of development is complete and before all the elements of statehood are fully present’.<sup>57</sup> Satisfactory passage of this proving ground results in recognition, and the incumbent grant of full legal personality.

As with sovereignty, this remains a contested question, and one which has significant implications for, for example, the rights of unrecognised States, national minorities and indigenous peoples, as well as for the ability of international law to regulate territorial changes, sub-State armed groups, and other actors. This, like sovereignty, is an area which requires clarification, and an ascending account of statehood will need to further our understanding of this in order to progress beyond the Montevideo paradigm.

### C. Legality and the Law

There is a marked divide to be found in the literature on statehood between those authors who do and do not regard the acquisition of statehood as a matter capable of legal regulation on grounds of substantive legality of conduct or process. Although there is no doubt that existing States cannot be rendered extinct as a result of their illegal actions (even those conflicting with peremptory norms), a growing number of commentators appear to support the proposition that an effective entity which has been created in breach of international law cannot acquire statehood. Wallace-Bruce, for example, calls such an effective entity ‘an illegitimate child that cannot be clothed with legitimacy by the international community.’<sup>58</sup> Crawford argues that practice supports this conclusion, and adds that the now near-universal acknowledgement of

55 Montevideo Convention (n 4).

56 Christian Hillgruber, ‘The Admission of New States to the International Community’ (1998) 9 *European Journal of International Law* 491, 503.

57 *ibid* 500.

58 Wallace-Bruce (n 21) 67.

*ius cogens* norms should be seen as proof positive: ‘norms that are non-derogable and peremptory cannot be violated by State creation any more than they can by treaty-making.’<sup>59</sup>

Even were this principle universally accepted, it would nevertheless require refinement. Is a breach only of a norm *ius cogens* sufficient to preclude an entity from statehood, or is any breach of an international law rule sufficient? Must the wrongful act be committed by the entity seeking statehood itself, or is a delict by any actor sufficient, providing that it facilitates the emergence of the entity into effectiveness? Is collective non-recognition required in order to effect the denial of statehood, or is the statehood of an entity which attains effectiveness precluded? Some of these questions were raised by participants in the *Kosovo* Advisory Opinion, although the Court provided few clear answers. It noted that recognition of statehood had been withheld from a number of entities, notably Southern Rhodesia, Northern Cyprus and the Republica Srpska, and it held that the illegality attaching to those situations did so as a result of their connection ‘with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character’.<sup>60</sup> Leaving aside the question of whether or not the Court was correct to characterise these as examples of statehood being “withheld”, the ICJ did not state an opinion as to whether statehood was withheld in those instances *as a result of* the substantive illegality of the origins of these entities, or because the Security Council decreed that it should be so. More significantly, the Court did not opine whether statehood was, in fact, *successfully* withheld from the entities concerned in these instances. But the principle has not been universally accepted. Many scholars continue to adhere to the doctrine derived from Vattel, that statehood is a factual estate, and that the enquiry into whether an entity has achieved statehood is concerned only with its capacities and attributes. Chen states the overarching principle: a State, he says ‘if it exists in fact, must exist in law.’<sup>61</sup>

This is a facet of perhaps the most significant debate concerning the nature of the State: whether the State is pre- or post-legal. If the State precedes the law, then statehood is, as Chen argues, a question of fact. The criteria of statehood are not a checklist by which we can assess whether States have been created, but rather are a field guide by which we can identify those that have. Less palatable, perhaps, is the corollary conclusion that statehood is incapable of legal regulation. If statehood comes

59 Crawford (n 16) 107.

60 *Kosovo* Advisory Opinion (n 30) [80].

61 Ti-Chiang Chen, *The International Law of Recognition* (Stevens & Sons Ltd 1951) 38.

before law, i.e. is a pre-legal fact, then it merely forms part of the background onto which law is placed. Law cannot deny the existence of the State any more than it could deny the existence of the sea.<sup>62</sup> By contrast, if the State follows the law then statehood must always be subject to some degree of legal regulation. Although it need not be the case that at any given moment the law requires an entity aspiring to statehood to demonstrate substantive legality of origins, respect for human and minority rights, moral probity or other such things, it is at least likely that any system of post-legal statehood would regulate illegality of origins in line with the equitable principle that a legal claim cannot be premised on an illegality.<sup>63</sup>

The question of the pre- or post-legal nature of the State is one which must be answered, if international law is meaningfully to have a concept of “the State” at all.

### III. An Ascending Theory of Statehood

An ascending theory of statehood is an enquiry into the nature of States. Unlike a descending approach which begins with the moment of State creation (or at some other moment where the essential “State-lieness” of States is uniquely visible), the purpose of the enquiry is primarily to determine something about States at a conceptual level, and only secondarily to produce insights into particular international processes. That is not to say, however, that the enquiry should in any way be divorced from reality: on the contrary, the purpose is not to imagine States as they might be in another time or place, but rather to interrogate the natures of States as they currently exist. In my view, the field of semiotics offers opportunities for significant insight on these terms.

It must first be recalled that States do not, as such, exist. As Raič reminds us:

Standing on the moon, watching the earth from a different perspective, one sees water and land, and, if one would take a closer look, one might see mountains, rivers, forests and deserts. If one would get even closer to the surface of the earth, one would be able to distinguish cities, lakes and roads. One would, however, search in vain if one would wish to identify a “State”.<sup>64</sup>

62 It should be noted however that, as discussed above, “statehood” and “personality” are not necessarily equivalent, and while it may not be possible for the law to refute factual statehood, the acquisition of personality may—but need not necessarily—be via a different process.

63 This principle, most commonly known as *clean hands*, was discussed by the ICJ in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, (1997) ICJ Rep 7, [133].

64 Raič (n 21) 1.

What does a State look like? It is, of course, an impossible question to answer. States do not “look like” anything, because there is nothing capable of being *looked at*.<sup>65</sup> States are not a “thing” which it would be possible to see were one to look from the correct vantage point, in the right light, or using the right kind of lens. Nor, as Ross observes, is there within a given area any person called “State” that can be identified as the locus of its existence.<sup>66</sup> In short, their existence is rather cognitive than objective: States are an example of Searle’s *observer dependent features*, social facts which exist because individuals act in their social relations *as if they exist*.

A feature is observer dependent if its very existence depends on the attitudes, thoughts, and intentionality of observers, users, creators, designers, buyers, sellers, and conscious intentional agents generally. Otherwise it is observer or intentionality independent. Examples of observer-dependent features include money, property, marriage, and language. Examples of observer-independent features of the world include force, mass, gravitational attraction, the chemical bond, and photosynthesis.<sup>67</sup>

The culmination of these observations is the seemingly anodyne remark that States are human creations that, while they may ‘not depend upon the activities of any particular individual, [...] manifestly would cease to be if all the agents involved disappeared.’<sup>68</sup>

Patently obvious though this must appear, it has a number of highly significant implications, and its forceful repetition is therefore warranted. First and foremost, it draws attention to the fact that, as social phenomena, it is primarily to sociology, and not solely to law, that we must turn if we wish to understand the nature of States.

## A. Binary Statehood

If one takes as accurate—as I think one must—Giddens’s observation that social structures like States would cease meaningfully to exist if all the agents involved stopped acting as if they existed, one must logically conclude that those agents must be carrying out some function which creates or sustains its existence. Giddens explains

65 As Runciman observes, the State is a fiction, but is nevertheless “real”: David Runciman, ‘The Concept of the State: The Sovereignty of a Fiction’ in Quentin Skinner and Bo Stråth (eds), *States and Citizens: History, Theory, Prospects* (Cambridge University Press 2003) 28.

66 Ross (n 28) 31; see also David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press 1997) 16 et seq.

67 John Searle, ‘Social Ontology and Political Power’ in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003) 196.

68 Giddens, *The Constitution of Society* (n 6) 24.

that through *recursive social action* individuals ‘continually recreate[]’ social structures ‘via the very means whereby they express themselves as actors. In and through their activities agents reproduce the conditions that make these activities [social interactions] possible.’<sup>69</sup> In other words, groups of individuals create the social reality in which they interact with each other by acting towards one another *as if it exists*. More significantly, doing so is no pretence or blindness: they are correct to do so. They are motivated to do so because they are able to observe the reality of a social structure around them, and they create the same social structure by acting in accordance with it. Searle characterises these creative actions as linguistic, arguing that ‘all of institutional reality is both created in its initial existence and maintained in its continued existence by way of representations that have the same logical structure as Declarations’.<sup>70</sup>

[W]e make something the case by representing it as being the case. [...] For example, we adjourn the meeting by saying, “the meeting is adjourned”; we pronounce someone husband and wife by saying, “I now pronounce you husband and wife.” We thus achieve world-to-word direction of fit, but we achieve that direction of fit by way of representing the world as having been changed, that is, by way of the word-to-world direction of fit.<sup>71</sup>

Both directions, vitally, are correct: it is true to say both that a declaration of this type has a word-world direction of fit (that is to say, that it seeks to shape reality to accord with the statement made), and that it has a world-word direction of fit (that is to say, that the statement made consciously mirrors reality). To speak of the State, then, is not merely to describe or refer to it, but to actively constitute it. It is a speech act – a self-constituting reference that both describes and creates that to which it refers. It remains to be seen, however, *by whom* the State is recursively created, and *what* it is that they create.

To the extent that States are created by those who speak and act as if they existed, there must logically be a functional link between the type of recursive actions performed and the shape of the entity which results. The term “State” has no significance—no reference point—outwith the perception of the structure given that name by the actors concerned. It is a non-ostensive reference – a word which has no correspondence in the physical world. In other words, were the population of an island universally to speak of, act in accordance with, and expect the existence of a social structure which sets and collects taxation for the maintenance of a common

69 *ibid* 2.

70 John Searle, ‘Language and Ontology’ (2008) 37 *Theory and Society* 443, 451. [Emphasis omitted].

71 *ibid*; see also John Lawrence Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa eds, 2nd edn, Harvard University Press 1975) 2–6 et seq.

infrastructure but which has no other role in regulating the behaviour of the inhabitants, the term “State” would mean in that context that body which collects taxation and uses the revenue to maintain infrastructure. To object that “statehood” means more than the Islanders believe it to would be meaningless: statehood is in the eye of the beholder.<sup>72</sup>

Of course, in an increasingly globalised World (and one with such a strong and pervading legacy of Western European colonialism) it is at least likely that conceptions of the State are comparatively general. Nevertheless, at least two different meanings of the term “State” can be identified: “State” appears to refer to different things when viewed from an internal than from an external perspective.<sup>73</sup>

Take first the internal perspective; that is, the State viewed by an individual within its boundaries. It is immediately apparent that “the State” is a very expansive idea, and that while many elements contribute to or are contained within it, there are few or none that seem wholly to embody it or, indeed, to be indispensable to it. There is, first of all, an element to the State which appears to be functional: the State creates and enforces the law, it raises and spends revenue in the form of taxation, it paints markings on roads, and it issues documentation which permits those it designates “nationals” and those it designates “non-nationals” to cross its borders, often on different terms. But it does not appear sufficient to define “State” by means of a list of functions, and nor would it appear to be accurate to describe a “State” which failed to perform one or other of these functions as somehow deficient. A parallel observation can be made when it comes to the various institutions which exist within States. Although most (if not all) States will have a Government, a Legislature, a police force, a military, a central bank, and a department of agriculture, it seems clear that the State is a larger idea than any one of these, and perhaps larger than the sum of them all.<sup>74</sup> Finally, it is not sufficient to identify “the State” with the territorial area to which it applies, nor with the people who inhabit that territory. Rather, the definition of the State must be totalising; must encompass all of these elements and more, but must not be identified with or made equivalent to any one of them. In fact, “the State” appears to be a container – a site for action rather than an actor in its own right. It is

72 Statehood is, to quote Wittgenstein, a ‘beetle in a box’: Ludwig Wittgenstein, *Philosophical Investigations* (2nd edn, Blackwell 1958) [293].

73 Runciman conducts a similar exercise of identification, albeit without separating the internal and external State: Runciman (n 65) 28–30.

74 See, for example, the observations of the Arbitrators in the Tinoco Arbitration: *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica)*, (Tinoco Arbitration) (1923) 1 RIAA 369, 377–378 et seq.

to this idea, the State viewed from the internal perspective, that Giddens refers when he describes society as a *structure*:<sup>75</sup> “the State” viewed from the internal perspective is a structure—a bounded space—within which a social life is conducted. I refer to this idea elsewhere as a State(Polity).<sup>76</sup>

The result of an inquiry into the nature of the State from the external perspective—from the perspective of international law—could hardly be more dissimilar. International law necessitates the characterisation of “the State” as a rational actor—that is to say, as a single personality that can not only act, but can formulate reasons and justifications for its actions (can generate an *opinio juris*, for example)—and the search for a meaning to attach to the term from the external perspective quickly resolves into a search for a *consciousness*, therefore. I refer to this idea elsewhere as a State(Person).<sup>77</sup> Thus, while the internal perspective results in a totalising description, the challenge of the international viewpoint is to arrive at a description that is sufficiently *discriminatory*. Certain elements of the State(Polity) clearly cannot contribute to the external personality, and must therefore be excluded: remove, first, the territory. Territory cannot “think”, so cannot be or contribute to the actor. Next, the population. Even purely within the realms of theory it is difficult to argue that the population of a State is the source of its *opinio juris*; in practice it is almost impossible: most individuals within a population are unlikely to have sufficient knowledge either of the specifics of a given international situation or of the legal context to meaningfully contribute to the formation of an *opinio*. Each QUANGO, agency, department and Ministry will be considered and discarded, and the search must even exclude the Government and the Head of State: international norms are not addressed to them but rather to “the State” itself, and those obligations will consequently survive not only changes in the personnel of government, but also changes in governmental system,<sup>78</sup> and even prolonged periods during which there is no meaningful Government in place in the State at all.<sup>79</sup> Remove all those elements which, theoretically speaking, cannot or which, practically speaking, do not embody the personality of the State, and

75 Giddens, *The Constitution of Society* (n 6) 16 et seq.

76 Tom Sparks, ‘Speaking the State: Collective Personality, Legal Subjecthood and the Creation of States in International Law’, *Neo-Federalism Working Paper Series No.3/2016*, via [http://www.federalism.eu/resources/working-paper-series/wp\\_3\\_16](http://www.federalism.eu/resources/working-paper-series/wp_3_16), last accessed 16/5/17, 14 et seq.

77 *ibid* 17 et seq.

78 Crawford (n 16) 678–80.

79 Note, for example, that the Democratic Republic of Congo was considered to successfully acquire statehood in 1960 despite its conspicuous lack of an effective government (see *ibid* 56–57.), and the barely-questioned acceptance that Somalia remained a State during the period 1991–2004 (see *ibid* 694.).

one is left with... nothing. One is tempted to conclude that “the State” *cannot* exist. But, plainly, states *do*.

The internal and external views of the State are irreconcilable; the one totalising, the other exclusive. It is tempting to declare one rather than the other to be “valid”, but that is not possible: to the extent that “the State” has any existence at all, it is clearly no less “real” in its effects on those within its borders than without, and vice versa. They do not cancel out, but rather exist as nested oppositions; that is to say, ‘oppositions which also involve a relation of dependence, similarity or containment between the opposed concepts.’<sup>80</sup> How then to reconcile the apparently irreconcilable bifurcated character of the State? The statement of the problem suggests a solution: there are two, and not simply one, entities at play. Viewed from the internal perspective, one discerns most clearly the State as a social, political and physical space; while the external perspective seems to reveal a consciousness, something capable of acting, interacting and cognising action.

#### IV. State in Discourse: the Advantage of a Socio-Linguistic Approach

Far from being the unitary, “black box” or “billiard ball” actor which international law is accustomed to perceive,<sup>81</sup> “the State” is composed of at least two overlapping entities: the State(Polity) and the State(Person). Understanding statehood as a binary concept immediately opens a possible avenue for elucidation of the second *aporia* given above, the contested relationship between statehood and personality, and it may be that this is a promising early indication that a social account of statehood is capable of advancing our understanding of the subject. Indeed, as I argue elsewhere, where the argument laid out in schema here is developed at much greater length, a semiotic analysis of statehood also provides insight into the third *aporia*—the ability of the law to regulate statehood—and identifies three distinct and concurrent routes by which

80 Jack M Balkin, ‘Nested Oppositions’ (1990) 99 Yale Law Journal 1669, 1671.

81 The originator of the “billiard ball” metaphor is believed to be Wolfers, who criticises the (as he sees it) over simplistic view of the international sphere that it engenders: Aronld Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins University Press 1965) 19 et seq; for further discussion of the analogy see Bruno Simma and Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’ (2006) 17 European Journal of International Law 483.

statehood may be acquired.<sup>82</sup> Perhaps more significant than the ultimate ends of the enquiry, though, a sociological analysis of statehood offers a number of insights into the use of the concept “State” by international lawyers, judges, diplomats and other actors.

Language, Patterson tells us, is action.<sup>83</sup> Social reality is not merely shaped by, but is created by language, and linguistic acts are capable, if understood to apply sufficiently generally, of dramatically reshaping that reality.<sup>84</sup> Searle suggests that these powerful linguistic acts possess the ‘same logical structure as Declarations’, that is to say, statements with a word-world and a world-word direction of fit.<sup>85</sup> Thus, to declare that “Jenny and David are married”, “that coin is currency”, or “Parliament is sovereign” is to recreate the social reality of the institutions of marriage, coinage, and legislative primacy. Crucially, as discussed above, while declarations may in the right circumstances dramatically alter social reality, it is the double direction of fit that is the central feature: while declarations shape social reality to fit the utterance (word-world direction of fit), they are motivated by or expressive of social reality as it then exists (world-word direction of fit).

On this account, declarations appear strikingly similar to international custom: a rule of customary law is formed when States perform according to the rule in the belief that the rule requires such performance. But declarations are regulated further than the mere necessity that both directions of fit are present; they are also subject to an obligation built into the structure of language itself, that of sense. Put another way, the terms used in declarations will be subject to individual *language rules*. Baker and Hacker discuss the language rule “red”:

What *justifies* calling rubies ‘red’? Red is this ↑ colour; and rubies are this ↑ colour, i.e. red! Saying ‘rubies are red’ is a correct application of this rule for the use of ‘red’. What *makes* it correct? Nothing. That is what we call ‘applying “red” correctly.’ There is no room for justification.<sup>86</sup>

To proclaim that rubies are blue (that is to say, this ↓ colour) is simply untrue, and it is inconceivable therefore that a statement to that effect could have the structure of a declaration unless and until the language rule “blue” changes to denote this ↑ colour.

The declaration “entity X is a State” is, accordingly, subject to both forms of regulation. It must, first, use the term “State” in a manner compliant with the language rule “State”.

82 Sparks (n 76).

83 Dennis M Patterson, ‘Law’s Pragmatism: Law as Practice & Narrative’ (1990) 76 Virginia Law Review 937, 956.

84 Searle (n 70) 451–52.

85 *ibid* 451.

86 Gordon P Baker and Peter MS Hacker, *Scepticism, Rules and Language* (Blackwell 1984) 83.

It must (concurrently, and not-unrelatedly) represent as existing a state of affairs that does, in fact, exist, if it is truly to have the logical structure of a declaration. It is not possible here fully to unpack the effects and implications of these rules, but certain observations may be made. It is likely, for example, that these features would vitiate the declarative aspects of a statement which asserted the statehood of an area within the jurisdiction of an existing State, or which sought to apply the term to an unpopulated territory. It is possible, too, that this cognitive lens can lend some relief to the beleaguered Montevideo criteria, which are perhaps best seen not as a criteria for statehood, but rather as an iteration of a definition of “State”, albeit incomplete.

These questions of State-as-language-rule can be best demonstrated with reference to an example of status-change. While social processes of this type most commonly operate over long timescales, perhaps, they can create moments of extraordinary change where social structures and belief create a common tipping point. The creation of the would-be State of Kosovo was such a moment. On the 17<sup>th</sup> February 2008 the Assembly of Kosovo adopted and proclaimed its Declaration of Independence.<sup>87</sup> It sought a status-change that would deprive the Serbian State of authority over Kosovo, and would create in its place a Kosovan State pertaining to that territory. This may be seen as the tipping point. The Declaration of Independence, coupled with the recursive acts of the individuals who comprised Kosovan society were capable of creating in the territory a new structure within which a social life could be conducted. In other words, a new State(Polity) was created.

A number of variables played into that event. First, it was, I think, significant that the effective control of the Serbian State was removed from the territory by the presence of United Nations, NATO and EU forces and institutions. The social reality in Kosovo was no longer Serbian statehood, and the recursive actions performed by the Kosovan people therefore no longer reinforced the existence of a Serbian State in Kosovo, rather giving life and authority to the infant Assembly of Kosovo and the Provisional Institutions of Self-Government. Secondly, the existence prior to the declaration of Provisional Institutions of Self-Government supported by international aid enabled the creation immediately following the 17<sup>th</sup> February of a governmental system within the new Kosovan State(Polity), which left no space for a subsisting conviction in the Serbian State to re-establish itself. Finally, the 2008 Declaration itself created a moment at which people in the territory were required to *think* about the structures of which they were part. This foregrounding of matters which are more usually merely

87 For a summary of the events surrounding the Kosovar Declaration of Independence see *Kosovo Advisory Opinion* (n 30), [64–77].

the background and context for social life enabled a rapid change in the perceived social reality, and thus in the world to which words refer.

Following 2008, there was incontrovertibly a State(Polity) in Kosovo. It remains unclear, however, whether there is a concomitant State(Person). Although in the intervening years a number of States have recognised Kosovo,<sup>88</sup> and although it has (albeit with certain deficiencies) satisfied to a greater or lesser extent the Montevideo criteria, division remains over its true status. And that is because, I argue, the *definition* of “State” is contested even among practitioners, diplomats, and commentators, who might perhaps be expected as a result of the Montevideo convention and other iterations to share a common understanding of what it means.

Significantly, all of these groups and more are relevant for the purposes of understanding statehood. In stark contrast to theories of recognition which make the creation of States the purview only of existing States, an understanding of statehood as a social phenomenon requires that the whole of the social system be kept in view. Declarations representative and constitutive of social reality are not confined to one sphere or strata of society, but rather may be effectively made at any and all levels, where conditions are conducive. The implication, of course, is that the expressed belief that an entity is a State by international law practitioners or academics may be directly relevant to its acquisition of that status. Similarly, in their discussions of what it is to be a “State”—what the content of the language rule applying to the term “State” is—international lawyers do not merely comment on, but may actively change the conditions on which a social understanding is formed.

## V. Final Thoughts

Do declarations create social reality, or does social reality give rise to declarations? The answer, of course, is “yes” to both. In fact, only a statement that affirmatively answers both parts of this seemingly contradictory question has the logical structure of a declaration, that form of speech act which, according to Searle, creates and maintains all of institutional reality.<sup>89</sup> It is a fact perhaps not sufficiently readily appreciated by international law that States, as social phenomena—observer dependent

88 The website of the Government of Kosovo puts the number at 91: see <https://www.rks-gov.net/sq-AL/Pages/ShtetKaneNjohurKosoven.aspx>, accessed 12 December 2016.

89 Searle (n 70) 451.

features<sup>90</sup>—fall easily within Searle’s proposition, and thereby show themselves in some quite significant ways to be un-“real”.

To describe them as constructed entities is not, of course, to deny their intra-societal reality—they are real—nor to seek to swear away their action-power—they wield immense power, sometimes with extreme consequences for vast number of people. Still less is it to imply that most actors in the relevant society—whether it be a national or an international society—are conscious of the acts of creation and maintenance that they perform on a daily basis, that they desire or intend the consequences of those actions, or that States are thereby “willed” or “intended” by the actors who create and maintain them. Generally, they are not. The constitutive actions which create and maintain them are recursive: merely by acting within the social reality in which individuals find themselves they sustain that reality. It is for this reason that a socio-linguistic account of statehood in no way contends that States, their natures, forms and capacities, are subject to deliberate change to any greater extent than other accounts.<sup>91</sup> While a widespread change of belief in what the State is would be capable of changing the types of actions performed and thus the nature of the State itself, no desire or wish, however widespread, would be sufficient to effect that change unless accompanied by a belief that the change had been successfully accomplished.<sup>92</sup>

While the socio-linguistic approach may not provide activists with any great additional facility for the task of reshaping States, it offers a plethora of new tools to scholars for the purpose of understanding them, and in particular it sheds light on the central role international lawyers play in these processes. The term “State” is governed by its language rule; that is to say, by its definition. Lacking a proper definition, statehood is not like the ruby called “blue”, but becomes a beetle in a box: ‘it cancels out, whatever it is’.<sup>93</sup> International lawyers, as one of the groups most actively engaging with States and statehood on the international plane, are the keepers of that definition. Whether as practitioners, commentators, theorists or teachers, what international lawyers *think States are* matters, except, perhaps, insofar as we think of them as unchanging.

90 Searle (n 67) 196.

91 Durkheim argued that social facts should be regarded as “things”, that is to say, as something *real*, which has an objective existence. As Giddens notes, for Durkheim “[t]he most important feature of a “thing” is that it is *not plastic to the will*: a chair moves if it is pushed, but its resistance demonstrates that it exists to whoever is doing the pushing. The same is true of social facts, even if these are not visible in that way that a physical object like a chair is.’ Anthony Giddens, *Durkheim* (Fontana Press 1978) 35. [My emphasis.]

92 For more on this idea, which Giddens calls the *double hermeneutic*, see generally Anthony Giddens, *Social Theory and Modern Sociology* (Polity Press 1987) esp. 18-31.

93 Wittgenstein (n 72) [293].