quire determination, by a balancing in appropriate context of principles of military necessity against principles of humanity, of permissible combatants, permissible areas of operation, permissible objects of attack, and permissible weapons and degrees of destruction.

5. The exercise of various controls over people and resources by belligerent elites in territory occupied during the course of hostilities from the enemy. Policy issues require a balancing of the security and other military interests of the occupant against the human rights of the inhabitants. Military occupation after the cessation of hostilities raises very different policy issues and, hence, requires careful distinction.

6. The exercise by contending elites of a great variety of controls over enemy persons and resources located within their own territorial domain. The policy issues again contrapose military necessity and the minimum destruction of values.

7. The deceleration by elites of the degree of intensity of coercion, with concomitant effects ranging from relaxation of controls over persons and resources, both enemy and national, to the partial or total incorporation of enemy persons and resources. The broadest policy issue here is *when* the prescriptions appropriate to situations of conflict cease to be relevant and other prescriptions, better designed for securing a future world order, become applicable.

Such major areas of investigation could be expanded in number as the facts of coercion might make necessary and, within such major areas, subcategorization might be made in any degree required for the precise description of particular events. With some such organization of inquiry, it might be possible more adequately to perform with respect to the problems of international coercion certain intellectual tasks, indispensable to the dispelling of ambiguity in the formulation of issues and of irrationality in decision, which include: the clarification of fundamental community policies, the description of trends in decision and conditioning variables, the appraisal of decisions for conformity with clarified community policies, and the invention and recommendation of alternative prescriptions and procedures.[11]

In the contemporary posture of world affairs the urgent need for such inquiry is not likely to be exaggerated.

MYRES S. MCDOUGAL

IDENTITY OF STATES UNDER INTERNATIONAL LAW

These troubled times since 1914 have seen the coming into existence, transformation, extinction, and resurrection of many states. Whereas in many cases no difficulty has arisen in determining whether a certain state is a new state [1] or identical with a pre-existing state,[2] there are many

[11] Some amplification of what is intended by these "intellectual tasks" is offered in McDougal, "International Law, Power, and Policy," Hague Academy of International Law, *Recueil des Cours* (1953).

[1] Thus Poland, Czechoslovakia, the Baltic Republics, Finland, Iraq after the first World War, and Syria, Lebanon, Libya, Israel, Burma, Ceylon, Indonesia, Pakistan after the second World War.

[2] Thus the Turkish Republic and the Soviet Union, although the latter denied its identity with the Russian Empire.

doubtful cases. They all have significantly to do with cases of fusion [3] or dismemberment [4] of states or with so-called "resurrected" states [5] and, in one particularly important case,[6] with conquest not followed by annexation. These uncertainties in international law are by no means a new phenomenon. They arose in many cases during and after the long Napoleonic Wars, particularly with regard to "resurrected" states. Such uncertainties have also arisen in less troubled times.[7]

The identity *vel non* of a state is of the greatest practical importance. The international rule determining the identity of a state under certain conditions is not only in the interest of the state concerned, but guarantees a legally ordered development of international relations between states, gives security to third states by guaranteeing the continuity of treaties,

[3] The Kingdom of the Serbs, Croats and Slovenes. For identity with Serbia, see Tomitch, *La formation de l'État yougoslave 1927;* for a new state, with convincing arguments, see E. Kaufmann, in *Zeitschrift für Völkerrecht,* Vol. 31 (1923/24), pp. 211–251.

[4] The Republic of Austria, 1918: Austria regarded herself as a new state; but for identity with the Empire of Austria, see the Peace Treaty of St. Germain; Hungary, 1918: for identity with pre-war Hungary, see the Peace Treaty of Trianon; this was also the attitude of postwar Hungary herself.

[5] Czechoslovakia, Albania, Ethiopia. See also the divergent opinions as to whether the Austria of 1945 is identical in law with the Austria of 1918. For identity, the Austrian Government since 1945, and most Austrian writers (Adamovich, Verdross, Verosta, Klinghoffer, Seidl-Hohenveldern). For a *new* state, the last Chancellor of the 1938 Austria, Schuschnigg ("The Austrian Peace" in Annals, 1948, pp. 106–118), Kelsen, most German (*e.g.* W. Schätzel, H. Jellinek) and many foreign writers. The Moscow Declaration of 1943 is highly ambiguous in its wording; also doubtful is the Austrian Nationality Law of 1945. The practice of states at the time of the German annexation of Austria in 1938, in the period between 1938 and 1945, and in 1945 and after, varies not only with different states, but sometimes with one and the same state. There are national court decisions in favor of identity (*e.g.,* Bruni *v.* Pizzorno, Corte d'Appello di Torino, July 28, 1948) and for the recognition of the German annexation (*e.g.,* Matter of Mangold's Patent (1951), 68 R. P. C. 1, Lloyd). See also the recent decision of the West German Federal Administrative Court in Berlin, ruling that 75,000 Austrians living in Germany must be regarded as German nationals. Judge Wichert ruled that the annexation of Austria by the Third Reich had been acknowledged in international law, and, therefore, the legality of German citizenship, acquired by the Austrians in 1938, could not be challenged. This, the judge said, was also the basis of the Austrian Citizenship Law of 1945. Only German law can determine, under international law, how German citizenship is acquired and lost. The Austrian state, the judge stated, had been restored as a result of a political decision of the Allies, without, however, regulating this problem. This problem, he stated, would have to be settled in the state treaty or by agreement between Austria and Germany (The New York Times, Oct. 31, 1954, p. 2). Thus the present situation of Austria "is far from being free from dangerous ambiguities" (M. Rheinstein in Michigan Law Review, Vol. 47 (1948), p. 34).

[6] Germany, 1945. See Josef L. Kunz, "The Status of Occupied Germany: a Legal Dilemma," in The Western Political Quarterly, Vol. 3, No. 4 (Dec. 1950), pp. 538–565.

[7] The classical example is the formation of the Kingdom of Italy. For a new state, see D. Anzilotti, in *Rivista di Diritto Internazionale,* 1912, pp. 1–33; for identity with the Kingdom of Piedmont—and that has become the dominant opinion—Romano, *ibid.,* pp. 345–367. The problem was still involved in a recent case, Gastaldi *v.* Lepage Hemery (Annual Digest, 1929–30, Case No. 43).

of international obligations, including concessions, contracts, debts, and so on, and by furnishing the basis for the continued international responsibility of the state. In view of this importance, it seems strange that there is so much uncertainty. What are the reasons for this state of things?

Apart from the fact that the whole problem of identity is problematical from a philosophical point of view—some writers speak rather of the "continuity" [8] of states—there is, first of all, confusion in the doctrine which has been unable to reach either a clear or a unanimous position with regard to the problem of the identity of states under international law. The science of international law has given to this problem relatively scant consideration and mostly only incidentally, not as one problem. This is true of many treatises, although those of Verdross [9] and Kelsen [10] are an exception; the problem is also mostly only incidentally dealt with in monographs on such topics as nationality, coming into existence or extinction of states, and treaties. There is a paucity of monographs [11] on this problem as such, although we have now the recent monographs of Verdross [12] and Cansacchi.[13]

There is, moreover, the fact that political influences sway many writers on this topic, so that they approach the problem with preconceived solutions corresponding to their political wishes. But one of the principal reasons for the confusion of the doctrine is the deep split among writers as to fundamental problems. For many adherents of the "dualistic" doctrine, Italians and Germans,[14] the coming into existence and the extinction of states are purely historical, political facts and international law has no competence to deal with these matters. The only logical consequence, in starting from this basis, is not only that international law does not, but that it *cannot* contain norms concerning the identity of states. If, on the other hand, these writers, in contradiction to their own basic theory, feel compelled to admit that there *are* principles of international law concerning the identity of states, they must take refuge in wholly artificial explanations. Thus Quadri teaches that there is no problem of "identity" of states; in reality, this is only a particular case

[8] But Cansacchi sees in "identity" and "continuity" two different problems, particularly with regard to "resurrected" states. "Identity," according to him, means only identity *after* the state has come into existence again, whereas "continuity" pretends that the state also continued during the period of its extinction.

[9] A. Verdross, *Völkerrecht* (2nd ed., Vienna, 1950), pp. 161–163.

[10] H. Kelsen, Principles of International Law (New York, 1953), pp. 259–264, 416.

[11] Herz, *Die Identität der Staaten* (Düsseldorf, 1931); *idem* in *Zeitschrift für öffentliches Recht*, 1935, pp. 241–268; M. T. Badawi, *La continuité et l'extinction de la personnalité de l'état* (Thesis, Lyon, 1940).

[12] A. Verdross, "*Die völkerrechtliche Identität der Staaten*," in *Festschrift für Heinrich Klang* (Vienna, 1950), pp. 18–21.

[13] Giorgio Cansacchi, "*Realtà e finzione nell'identità degli Stati*," in *Comunicazioni e Studi*, Vol. IV (Milan, 1952), pp. 23–97.

[14] *E.g.* Cavaglieri, Fedozzi, Strupp, but also de Louter. See recently, particularly, Arrangio-Ruiz, *Gli Enti soggetti dell'ordinamento internazionale* (Milan, 1951); R. Quadri, *Diritto Internazionale Pubblico* (Palermo, 1951). This is also the basic presupposition of Cansacchi, whereby his whole, otherwise very interesting, investigation is vitiated *a priori*.

of state succession: a state which has undergone a revolutionary change of government thereby becomes extinct; a new state is formed immediately with universal succession to all the rights and duties of the old state. It is hardly necessary to point out that this construction is, in the light of the practice of states, wholly untenable. Cansacchi admits the international rule concerning the identity of states, but teaches that it constitutes a genuine "fiction" vis-à-vis "reality"; hence the title of his article. But Cansacchi means by "reality" not the reality of natural sciences, but of municipal law, a *legal* reality. Recently also Charles de Visscher [15] has taken the position that international law does not create the state, but presupposes it. But, neither does municipal law "create" the individual: it attributes legal personality and it can make this personality extinct, even if "in reality" the human being remains identical.[16]

International law, like every legal order, must determine who its subjects are and what the conditions are for their coming into existence, extinction, and for their remaining identical in law. It is perfectly possible to speak historically, politically, of Poland of 1920 as being the same as the Poland which became extinct in 1795; but as a legal statement it would be untenable. The problem of the identity of states under international law is a *legal problem.*

Perhaps the most important reason for the lack of clarity and agreement in the doctrine concerning the problem of the identity of states is the uncertainty of the corresponding rules of international law itself. International law determines that a new sovereign state has come into existence if four conditions are fulfilled: an organized and effective legal order, valid for a certain territory and population; this legal order must, further, be exclusively and immediately subject to international law and not to any other national law. International law determines, further, that the disappearance of one of these four elements has as a legal consequence the extinction of the sovereign state. International law, finally, determines that *certain* changes as to the one or other or more elements will *not* have the legal consequence of the extinction of the state, but leaves its identity intact.

Let us first eliminate the hypotheses, where the corresponding norm of international law is perfectly clear and precise. As changes are bound to occur, what may be called "normal" changes do not affect the identity of the state, such as changes in population through increase or decrease by births and deaths, through emigration and immigration, even if on a very high scale,[17] or changes in the ethnical composition of the population. Equally, normal changes in territory, as, *e.g.,* by accretion or avulsion, while they have legal effects, do not affect the legal identity of the state or states concerned. The same is true of changes in government through

[15] *Théories et Réalités en Droit International Public* (Paris, 1953), pp. 204–205.

[16] *E.g.,* under Roman law loss of personality through becoming a prisoner of war. On the other hand, a slave, a thing in law, becomes a person through manumission; see also the *mort civile* of former French law.

[17] The young U. S. with five million and the present U. S. with one hundred and sixty million of inhabitants is, of course, the identical state in law.

death or election and of any change in the form of government or contents of the legal order, brought about in conformity with the constitution of the state in question.

On the other hand, it is clear that the total loss of population would bring about the extinction of the state. Here it can already be seen—and that is true with regard to changes in any element—that the identity of the state continues, *except* where, by such change, it legally ceases to exist. The problem of the identity of states is not the antithesis of the problem of state succession, but of the problem of the extinction of states.

Apart from "normal" territorial changes there is also a principle of general international law which, insofar as it is clear, can be thus formulated: Territorial changes, whether by increase or reduction of territory, *in general* do not affect the identity of the state. Under this rule fall, for instance, the great territorial increase of the United States, the cession of a province by one state to another, the secession of a part of the state or of a colony, constituting itself—often by revolution or war—a new independent state.[18] Thus far the law, the practice of states, and the doctrine [19] are unanimous. It is equally agreed that the *total change* of territory by a people which, under the same government and law, settles in a different territory, leaves the identity of the state intact.[20] But it is equally clear that total *loss* of territory, *i.e.*, by total cession,[21] brings the identity of a state to an end.[22]

But, as stated, this norm of general international law is valid only *in general.* It constitutes only the general principle to which there are exceptions. Some writers [23] are of opinion that the exception is given by the circumstance that the territorial change is "quantitatively very considerable." But the practice of states shows that the Republic of Turkey, in spite of considerable territorial losses, was held identical with the Ottoman Empire; that Poland, although she lost in the east half of her territory and suffered a considerable decrease of population, is held to be identical today with the Poland of 1920. Other writers point rather to the real issue: the territorial change must leave "a part of the territory which can be recognized as an essential portion of the old state," [24] or the state con-

[18] Thus, *e.g.*, the identity of the British Empire in spite of the coming into existence of the U. S.; of Sweden in spite of the separation of Norway; of The Netherlands in spite of Belgium and Indonesia; of Russia in spite of the territorial loss brought about at the end of the first World War through the coming into existence of Poland, Finland, and the Baltic Republics.

[19] Hence the so-called "principle of the variable limits of treaties."

[20] The Boer Republics after the "trek." [21] *E.g.*, Corea, 1910.

[22] An exception, laid down by a norm of international law, is that even total occupation of the territory of a state and destitution of its government by a belligerent occupant does not constitute conquest and subjugation and leaves, therefore, the identity of the state in question intact, as long as allies of the occupied state continue fighting. (Poland, Yugoslavia in the second World War).

[23] P. Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (1925), pp. 18, 19; *idem, Lehrbuch des Völkerrechts* (1948), Vol. I, p. 407.

[24] Thus, W. E. Hall, A Treatise on International Law (7th ed., Oxford, 1917), p. 22.

cerned must retain its consistency.[25] While correct, these are rather tautological statements, telling us that territorial changes do not affect the identity of the state, except when they do. It really means that, under the rule of general international law, territorial changes do not affect the identity of the state, except if they legally lead to the extinction of the state. But international law does not contain universally valid and obligatory criteria as to what must be the extent or the nature of territorial changes in order to lead to the extinction of the state. The international norm does not specify the exceptions to its general principle. It is this uncertainty in the rule of general international law which leads, particularly in cases of fusion, like Yugoslavia in 1918, or of dismemberment, like the Republic of Austria in 1918, to uncertainty both in the doctrine and in the practice of states.

There is also another old and fully recognized principle of general international law under which the identity of a state in international law is not affected by unconstitutional changes in government, whether brought about by revolution or coup d'état. This rule is so unanimously recognized by writers since Grotius and Bynkershoek, by the practice of states, as illustrated by the well-known London Protocol of February 19, 1831, and by national and international court decisions, that it is superfluous to give quotations. It is irrelevant how far-reaching the revolutionary changes may be; as is also the change of the name of the state. True, the Soviet Government insisted that the rule does not apply to the case of the Bolshevik revolution; but all the other states reaffirmed this rule of general international law, which certainly is the international law actually in force. Occasional considerations that "there is room for reconsideration of the norm"[26] under exceptional circumstances, are proposals *de lege ferenda*. It is equally clear that the fact that the revolutionary regime was a so-called "intermediary" government or was not recognized, in no way affects the identity of the state.[27] For the non-recognition of a *de facto* government leaves the recognition of the state intact.[28]

The theoretical construction is different with different writers. Some adherents of the "dualistic" doctrine, following the reasoning of Aristotle, hold that the legal order is the most important element of the state; hence, revolutionary change extinguishes the state.[29] But Kelsen does not follow Aristotle; he says that this would be the case only if there were no international law, but that revolutionary change is now, by international law,

[25] Thus, F. v. Liszt, *Das Völkerrecht* (12th ed., 1925), p. 275.

[26] Thus, Oppenheim-Lauterpacht, International Law. A Treatise (7th ed., London, 1948), Vol. I, p. 148, n. 2.

[27] The Tinoco Arbitration, this JOURNAL, Vol. 18 (1924), p. 147.

[28] See Acting Secretary of State to Attorney General of New Jersey, Oct. 31, 1922 (U. S. For. Rel., 1922, Vol. II, p. 715), and many court decisions, *e.g.*, *The Sapphire* (U. S. Supreme Court, 1871, 11 Wall. 164), Lehigh Valley Railroad Co. *v.* State of Russia (U. S. 1927, 21 F. 2nd 396), and many others.

[29] Cansacchi, following Kelsen on this point, holds that the state becomes extinguished only when the revolutionary change can no longer be based on the pre-revolutionary "Grundnorm" of the constitution.

a form of change that does not affect the identity of the state. Kelsen holds that, with regard to the identity of the state, in spite of revolutionary changes, the most important element is territory:[30] revolutionary changes do not affect the identity of the state, "if the territory, by and large, remains the same." For many writers since Grotius and Bynkershoek[31] population is the essential element and this thesis has recently been vigorously defended by Verdross. But, apart from the fact that the Latin term *populus* and the English and French term "nation" means the *state* rather than the population, Verdross speaks of the population as "the people organized as a state." Where there is no organization at all the state becomes extinct in international law. Here again the problem of identity is the antithesis of the problem of the extinction of the state. The norm of general international law guarantees the identity of the state, in spite of revolutionary changes, as long as this state does not become extinct; for when a state becomes extinct under international law, there can, of course, be no identity,[32] even if territory and population remain the same.[33] Now general international law contains no special norms, according to which, under certain conditions, a state which has lost *all* government and also its immediacy to international law, nevertheless does not become extinct if it is "resurrected" within a reasonable time.

It is this uncertainty or lack of a norm of general international law regarding so-called "resurrected" states that is the reason for the uncertainty of the practice of states and of the doctrine, both of which use rather political arguments. Thus, in the case of Germany the argument is used that a state only becomes extinct if its territory and population are definitely imputed to other states, that in the case of Germany at least subordinate organs represented the state. But it is well known that the Occupying Powers took over the supremacy over all federal, state, and local organs, so that *all* organs depended on them. *All* law in occupied Germany in 1945 after the unconditional surrender had its only reason of validity in the supremacy of the Occupying Powers. Even in 1954 there was still no sovereign Germany. Now the Bonn Republic will finally become an almost sovereign state, but a state which does not control the German Democratic Republic or the two Berlins, a state which contains neither the pre-war Germany east of the Oder and Weichsel, nor the Saar, and where for nearly ten years there has been no sovereign state at all. Under these conditions it seems impossible not to recognize that it "is

[30] Fricker and Preuss had, very differently, put the emphasis on territory as the most important element, by asserting that *any* territorial change, also without revolution, necessarily extinguishes the state, a statement fully in contradiction with positive international law.

[31] Thus, *e.g.*, Anzilotti, Cavaglieri, Fedozzi, Ottolenghi. Cansacchi also insists on the element of population, but only as an element for what is for him basically a fiction.

[32] T. J. Lawrence (The Principles of International Law (7th ed., London, 1925), p. 89) writes that revolutionary changes, in spite of non-recognition of the *de facto* government, do not affect the identity of the state; but "a state loses its existence where it is obliterated as a subject of international law."

[33] As with the Boer Republics in 1902 or Corea in 1910.

clearly not identical with the former German Reich. It is a new state . . . a successor state to the German Reich."[34]

In the cases of Ethiopia, Czechoslovakia, and Austria, where it cannot be denied that population and territory *were* imputed to other states, other arguments are used: no sufficient duration, merely *de facto* recognition of the annexation, unlawful character of the annexation making it only an "occupation," and the "non-recognition-doctrine." But none of these arguments is very solid from a legal point of view. Obviously, a certain duration is necessary; it forms an element of the effectivity prescribed by international law; but four years in the case of Ethiopia, seven years in the case of Austria, seem to fulfill this requirement, especially as in 1936 and 1938 those annexations were taken to be definitive; it was only the outbreak of war which again put them in question.

These annexations *have* been recognized, however reluctantly, by most states. No one can deny that the United Kingdom recognized Italian sovereignty over Ethiopia *de jure,* a recognition which is irrevocable in international law. As far as the "non-recognition doctrine" goes, it is not pertinent in these cases. In addition, this doctrine is not, as is sometimes believed, a sanction, but merely a political statement which needs a sanction. If nothing is done to change the situation, the illegal act will stand. But even if something is done successfully, it can, at the best, restore the *status quo ante;* it can act *as if* the illegal act had not occurred, but it cannot make the illegal act undone, just as municipal law can punish the murderer, but cannot revive the dead man. The declarations that the annexation of Austria or the Munich Agreement are "null and void" are *ex post facto* political statements in time of war. As de Visscher[35] correctly states, the resurrection of Ethiopia was due to the outbreak of war, not to the "non-recognition doctrine." *A contrario,* we can point to the illegal annexation of the Baltic Republics by the Soviet Union, against which some states applied the "non-recognition doctrine." But even these states did not and do not now expect that this state of things will be changed. But in case of a new war, these problems might very well be revived and this annexation declared "null and void."

On the other hand, the doctrine *can* point to the practice of states which shows cases in which states acted in instances of "resurrected" states, recognizing the identity of such states, contrary to the norm of general international law under which they had become extinct. But the practice of states after the Napoleonic Wars and in our times not only differs among different states with regard to the same case, and differs with the same state as to different cases, but it often changes in time with the same state toward the same case, and even in the same case diplomatic practice or even treaty norms are often ambiguous, lacking in consequence or contradictory. Thus Ethiopia seems to represent an "automatic" revival, since Italy in the Peace Treaty of 1947 only had to recognize Ethiopian sovereignty and not renounce Italian sovereignty, as should have been done

[34] E. Plischke, in Political Science Quarterly, Vol. 69 (June, 1954), p. 262.
[35] *Op. cit.* (above, note 15), p. 208.

in accordance with classic international law. On the other hand, the Allies promised only to *re*-establish a sovereign Austria; and Austria, whether a new state or identical with the 1938 Austria, is not yet a fully sovereign state even in 1954. On the one hand, Hitler's annexation was declared "null and void"; consequently what the Germans took in Austria should have been restored to Austria; but the Potsdam Declaration gave the "German assets in Austria" to the Soviet Union. It would be easy to show a long line of other ambiguities and contradictions in the practice of states.

In a word, a scrutiny of the practice of states after the Napoleonic Wars and since 1914 shows convincingly that no new general international rule concerning such cases has been developed; there is neither an established clear usage, nor the *opinio necessitatis*. States have acted, and do act, in such cases less according to legal considerations than according to what Lauterpacht once called "the amorphous principles of politics." It is the uncertainty of the law—the lack of the determination of exceptions to the general norm of identity in spite of territorial changes, and the lack of determination of the conditions under which the rule of identity works in spite of revolutionary changes, notwithstanding the extinction of the state under another norm of general international law—which is the ultimate reason for the lack of clarity and agreement in the doctrine.

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