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Parfitt, Rose and Craven, Matthew (2018) *Statehood, Self-Determination and Recognition*. In: Evans, Malcolm D., ed. *International Law*. Oxford University Press, Oxford, pp. 177-226. ISBN 978-0-19-879183-6.

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## **‘STATEHOOD, SELF-DETERMINATION AND RECOGNITION’**

**MATTHEW CRAVEN & ROSE PARFITT**

**in Malcolm Evans (ed.), *International Law*, fifth edition (Oxford: Oxford University Press, forthcoming, 2018)**

### **I. INTRODUCTION**

It is a remarkable feature of our contemporary understanding of the world that if forced to describe it, we would normally do so in one of two ways. One would be in terms of its physical and biological geography (a description of continents, oceans, climate and plant or animal life-forms); the other in terms of its political geography, as being a world divided systematically and uniformly by reference to the territorial parameters of states (as one would find marked by colours within an Atlas). That the second form of representation appears significant is to mark the extraordinary power that that idea of the state has come to play in the formation of our social, political, economic and cultural world view. Not only is it now an apparently universal institution, but its very centrality in the structures of consciousness by which we construct the social world is to render it, as Bourdieu puts it, almost ‘unthinkable’ (Bourdieu, 2014, p. 4). The languages through which we might want to describe it – like international law – are often the languages that the state itself has produced.

However much we may take its presence for granted in an era in which virtually the entire surface of the earth is now covered in nation-states, this incredibly powerful and monolithic way of organising collective life has not been a permanent feature in history. If, for sake of argument, we identify states simply with the existence of ‘political communities’, then states have been around for centuries, even millennia – from the ancient city-state of Athens (c. 508-322 BCE) to the Kingdom of Aksum (c. 100-940 CE) to the Chinese Empire (c. 221 BCE - 1912 CE). They have, however, also changed much over this time (Tilly, 1992; Spruyt, 1994). Broadly speaking, until about 200 years ago, the distribution of political authority around the globe could largely be described in terms of its relative intensity. High levels of loyalty and allegiance to the ‘sovereign’ were concentrated in ‘centres of power’ within denser urban sites, which then shaded off in the more remote frontier zones at the outer

edges of the realm. Today, by contrast, we inhabit a global order framed in terms of an undeniably Western European model of the nation-state, characterised by the possession of determinate boundaries, centralised bureaucratic structures and a single, uniform system of law (Weber, 1978; Giddens 1985). The purchase of this institution upon the political imagination has been such that not only does the daily routine of 'politics' remain firmly embedded within its frame (institutionalised, for example, in parliamentary debates, elections and campaigns for office), but that even movements of resistance tend to adopt it as their principal mode of emancipation.

This is to prompt a series of questions: what is it about the idea of the state that makes its 'status' so ubiquitously desirable? From the eccentric 'micro-nation' projects of Liberland, North Sudan, Enclava and Sealand, to the international jihadist group which styles itself ISIS or 'Islamic State', to oppressed peoples within states like the Kurds and the Oromo, to former colonies denied like Palestine and Western Sahara which have been denied the right to self-determination through military occupation, the desire to become a 'state' appears to be the uniform objective. So why is collective liberation so consistently narrated in the language of statehood? And why does opposition to the state appear to resolve itself so regularly in the emergence of yet another state?<sup>1</sup>

Yet even as independence movements - in places as diverse as Bougainville, Chechnya, Catalonia, Nagorno-Karabakh, Somaliland, Scotland or West Irian - continue to re-affirm the singularity of the state as the primary mode of political organization, they also threaten it in doing so. Not only do such secessionist movements challenge the integrity of the state against which they assert their independence; they also pose a challenge to the broader international order within which each state necessarily locates itself and upon which it relies for its legitimacy. Not all such movements turn out in the same way of course. In some cases, claims to independence are given the definitive seal of statehood by membership in the United Nations (e.g. Eritrea 1993). In others, effective self-government continues, yet the claim to independent statehood goes decisively unrecognized (e.g. Somaliland 1996-). Still other attempts at forming new sovereign states survive in an apparent twilight zone of partial recognition (e.g. Kosovo 2009-, Palestine 1988-). At such moments, international lawyers are often asked for advice. Is it right or proper for other states

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<sup>1</sup> Some recent examples: the independence of Abkhazia and South Ossetia, officially parts of Georgia, was declared, by decree, by Russia on 26 August 2008; the 'Independent state of Azawad' was declared in northern Mali on 6 April 2012; the 'Republic of Crimea' declared its independence from Ukraine on 11 March 2014. .

to recognize such claims? What are the implications for doing so, or indeed for refusing such recognition? How far does institutional membership go to determine the outcome in such cases? What consideration should be given to the democratic credentials of the new state or the role played by human rights? This, at first, seems appropriate. After all, international lawyers are supposed to possess some special kind of expertise in this area, one that is sought not only by those concerned with the distributional consequences of any political change, but by the public at large. International law is, indeed, usually defined as the law that applies as between sovereign states, and international lawyers have spent an inordinate amount of time on the attempt to determine what they are, how they come into being, and how they change. Yet on closer inspection, this faith in international law as a source of definitive answers to questions about the who, what, why and how of statehood – questions with huge implications for the territories and populations involved – is undercut by the very proximity of the problem to the language and practice of international law itself. The ‘state’ is almost too self-evident.

An initial difficulty here is that the central position assigned to states in the formation of rules of international law has created something of a logical impasse for international lawyers when they attempt to conceptualise how that same law might regulate states’ existence or demise. An early attempt to do so, is to be found in Lassa Oppenheim’s dizzyingly circular explanation in his classic *Treatise* of 1905:

The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised states consider legally binding in their intercourse, every state which belongs to the civilised states, and is, therefore, a member of the Family of Nations, is an International Person (Oppenheim, 1905, p. 99).

In this formulation, states are entities that possess international personality under international law, and they do so because international law lays down that this should be so. But international law is, in turn, merely the ‘body of rules’ which the states consider to be ‘binding in their intercourse’ with one another. The legal personality of the state then, is seen to be a product of the law of which it (the state) is deemed to be the author. As form of ‘bootstraps’ argument, this was clearly an unsatisfactory formulation, but it is important to recall that its origin was found in a determination, on the part of those such as Oppenheim to try to demonstrate that international law could be regarded as a ‘positive’ branch of law, notwithstanding the absence of a

super-sovereign from which normatively binding ‘commands’ could derive (the critique launched by John Austin in 1832; see Austin, 1995, p. 123), without resort to the kinds of normative presuppositions associated with the ‘natural law’ thinking of the previous three centuries. And the centrality of the state in the organisation and ordering of international society was, for international lawyers working in that vein, largely a pre-supposition rather than a conclusion.

A little more than a hundred years later, however, talk of both the exclusivity of states as subjects of international law and of states as primary actors in international relations is regarded as an increasingly antiquated proposition. Within international law itself, international organizations, individuals, minorities, corporations and even animals and rivers have all made the transition from being the object of international law to agents in possession of some kind of international ‘subjectivity’ or ‘personality’ (see Johns (ed), 2010). Non-state actors (whether NGOs or International Organizations) are playing an increasingly important role in treaty-making, and the figure of the ‘international community’ is repeatedly invoked (in the context, for example, of the elaboration of *erga omnes* obligations) as an entity having some, albeit still rather vague, legal status.<sup>2</sup> ‘Statism’, indeed, is increasingly used as a derogatory label, attached to any approach that is seen to prioritise the interests of states over those of the individuals, communities and environments over which they exert authority (see Marks, 2006).

At the same time, however, the story of the gradual ‘decline of the Nation state’ is often told with a hint of nostalgia. Writing in 1998, for example, Oscar Schachter observed that the growth, and increased mobility, of capital and technology, the formation of ‘new social identities’ (forged as much by transnational drugs traffickers and arms traders as by international NGOs), and the emergence of ‘failed states’ (see below) posed enormous challenges to the idea of a global order of states regulated by rules of international law (Schachter, 1998, pp. 10-16). Nonetheless, despite the trends, Schachter concluded that ‘it [was] most unlikely that the state will disappear in the foreseeable future’. Not only has the state provided the structures of authority needed to cope with the ‘incessant claims of competing societal groups’, he argued, but it still promises dignity and protection for the individual with access to common institutions and the equal protection of the law (Schachter, 1998, p 22). For Schachter, then, the key question was not so much whether the state as such would

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<sup>2</sup> See eg ILC Articles on the Responsibility of states for Internationally Wrongful Acts (2001) Articles, 33, 42, 48.

survive, but whether international law would be able to adjust to such phenomena and respond to the changing demands of the environment in which it operated.

Whether or not one accepts Schachter's diagnosis, or indeed his confidence for the future, there are two broad themes interwoven in his analysis that are widely shared. One is a factual or sociological reflection on the changing character of international society and the declining power or authority of the nation-state, witnessed by the emergence of alternative schemes of legal responsibility and a broadening of the range of international actors.<sup>3</sup> The other is a normative or ethical variant which regards the tradition of state 'sovereignty' as an archaic impediment to the pursuit of humanitarian or other cosmopolitan agendas (human rights, environmental protection, criminal justice etc) and which has often been called upon to legitimate interventionist policies aimed specifically at undermining the exclusive authority of the state.<sup>4</sup> To pose this opposition in the form of a question: is the authority of the state objectively-speaking 'in decline', or does that authority *need* to be challenged in order, for example, to 'protect' vulnerable populations? In some ways, of course, these two forms of reflection work against each other: the first seeing states as increasingly marginalised by social forces that escape their regulative or coercive capabilities; the second believing that states retain an authority that needs to be dismantled before emancipatory agendas may be put in place. Where they meet, furthermore, is in an alarming vision of global order in which the state as political agent, instructed with the task of 'mediating' between the individual and the general interest, has neither the ability nor the competence to resist the incursions of a global 'community' that claims both power and justice on its own side.<sup>5</sup>

Before we settle upon such a conclusion, however, we might also want to consider an alternative narrative here – that concerns the way in which state, as the principal mode, or technology, of social and political organisation was, and continues to be, globalised (Badie, 2000). Rather than focusing on its supposedly imminent decline, we might reflect, rather, on the possibility that the state-project was never complete – that having been exported to the non-Western world during decolonisation, it has

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<sup>3</sup> See, for example, proposals relating to the development of 'Global Administrative Law' (Kingsbury, Krisch and Stewart 2005), and other initiatives directed towards the development of the accountability of non-state actors more generally (Clapham, 2006).

<sup>4</sup> See, for example, Orford's genealogical account of the relationship between the Responsibility to Protect and the development of international executive authority (Orford, 2011)

<sup>5</sup> See Hardt and Negri 2000, p. 15: 'Empire is formed not on the basis of force itself but on the basis of the capacity to present force as being in the service of right and peace'.

become the persistent object of a host of projects (humanitarian, political, economic and legal) associated with making the world into a world of nation-states, to shore them up, save them from 'failure', and mute their pathologies. From that standpoint, the role of international law has not been to advance its decline, but rather to 'perform' the state and produce it as an 'effect' of rule (Mitchell, 1999). And if that is the case then we should be equally concerned with material or 'distributive' consequences of that particular way of organising the world – of the forms of domination or exploitation it has brought in its wake, and the other ways of 'being in the world' that it has foreclosed. These are questions to which we will return throughout this examination which follows, beginning first with a look at the emergence of the ideas of statehood, recognition and self-determination between the 16<sup>th</sup> and 19<sup>th</sup> centuries.

## II. HISTORY

At the beginning of the Fourth Edition of his influential *Treatise on International Law*, prepared for publication in 1895, shortly before his death, William Hall offered a succinct definition:

'International law consists in certain rules of conduct which modern civilised states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.' (Hall, 1895, p.1)

This statement – typical of the positivist tradition which emerged in the late-nineteenth century (Koskenniemi, 2001) – is remarkable in several respects. To begin with, there is the question of tone: this is not the beginning of an enquiry, or a speculation that has to be situated in some historical context. There is no attempt to locate his subject in contemporary debate or practice. This is international law written as science. International law, here, is not merely a language, or a way of describing certain activities or practices. It is already a thing with definite content, there to be described. The content of international law was to be found, in turn, in rules of conduct which States, as a matter of fact, regarded as binding upon them. This definition did not rely on some anterior normative order (whether centred on God or the inherent rationality of 'mankind' as in the natural law tradition of Vattel, Grotius and others). Nor did it require any attempt to engage with the complex of social and political relations that, over the course of centuries, had come to constitute the authority of each the states of the 'Family of Nations', such that each could indeed

be regarded as an individual, *sui generis* 'person'. For Hall, international law was simply to be located in an empirical practice of consent and obligation. At the heart of this practice, of course, was the 'modern civilised state' – in practice, the European or (in the Americas) neo-European state – whose actions were both the object and measure of this science. One needed a community of civilised states for there to be rules of conduct. And in order that their commitments should be binding, those states required the necessary will and a capacity to understand that those commitments warranted enforcement 'by appropriate means'. Imagining the state in this way – essentially as a male, Western European individual subject of law 'writ large', to adopt Plato's formation<sup>6</sup> – and placing it at the centre of a global normative universe, allowed an elaborate architecture of legal rules to be described and generated around it.

It is notable, furthermore, that in this definition, and in his *Treatise* more generally, Hall avoids the term 'sovereignty' almost completely, except in relation to those matters which were presumptively 'internal' such as might engage the relationship between the state and its subjects. In place of the word 'sovereignty' when describing the authority, rights and duties of the state, he used the term 'personality'. What was significant about this choice of language was the fact that the term 'personality' assumed the existence of a systemic order that attributed a range of competences to certain designated actors. Just as a corporation might be assigned a specific set of legal capacities under municipal law - such as the capacity to sue and be sued - so, in the case of states, they would be 'accorded' certain capacities in international law – indeed, the fullest set of international rights and duties that it was possible to possess. Once statehood came to be separated from 'international personality' in this way, the state was no longer understood as carrying with it certain natural rights or prerogatives.<sup>7</sup> Instead, 'the state' was now used as a descriptive term, referring to an entity which possessed a specific set of 'objective' characteristics, and which could then be accorded the set of rights and duties (comprising its 'personality') on that basis.<sup>8</sup> In contrast to the Vattelian idea of states enjoying a natural liberty in a state

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<sup>6</sup> *Plato's Republic*, trans. C.D.C. Reeve, Book 4, (Indianapolis, Cambridge: Hackett, 2004), p. 121.

<sup>7</sup> The remainder of a such an idea is to be found in the recognition, within the UN Charter, of the 'inherent' right of self-defense. See article 51 UN Charter.

<sup>8</sup> See O'Connell, 1970, Vol I, p. 80: 'It is clear that the word "person" is used to refer to one who is a legal actor, but that it is of no assistance in ascertaining who or what is competent to act. Only the rules of international law may do this, and they may select different entities and endow them with different legal functions, so it is a mistake to suppose that merely by describing an entity as a "person" one is formulating its capacities in law'.



of nature, for Hall and his colleagues this liberty of action was one 'subject to law' (Hall, 1895 p 24).

At the time in which Hall was writing, nearly all treatises on international law began in similar manner and would be followed by one or more chapters containing an extemporised discussion of the state as the primary subject of international law (See Westlake 1904; Twiss 1884; Lawrence 1895; Wheaton 1836; Phillimore 1889; Rivier 1896; Fiore 1890; Bonfils 1894). Typically this section or chapter would seek to define what was meant by a state for purposes of international law, determine who or what would count for such purposes, and address matters of classification (distinguishing perhaps between 'sovereign' or 'semi sovereign' states, and identifying vassals, protectorates, condominiums and unions as particular classes). Comment would routinely be passed on difficulties of nomenclature - debating whether everything called a state could be treated as a state and whether states differed from 'nations'. In the process, there would usually also be some associated reflections upon the notion of 'sovereignty' and what that might mean in the context of international relations, and of the putative role that 'recognition' might play. Once in other words the issue of who the subjects of law were had been established, together with the framework for determining the extent and scope of their rights and obligations (i.e. the question of sources), those principles could then be applied to a range of more concrete matters such as the law of the sea, the protection of nationals abroad or belligerent relations.

The fact that this discussion of states and their character was always the starting point, for these jurists, was significant in more ways than one. In one respect, it reflected a new determination, on the part of 'professional' international lawyers, to ground international law in state practice and consent rather than in the inherited tradition of natural rights. In another respect, however, it also illustrated the way in which 'the state' had come to supplant other ways of describing political society - whether that be in terms of the people, the nation, civil society, the sovereign, the monarch, or the multitude. Whilst Hall, like many others, continued to use Bentham's terminology in describing his subject matter ('international law'), he no longer attributed any particular significance to the 'nation' as such.

Even if Hall and others of the positivist persuasion sought to mark themselves out from their 'naturalist' intellectual predecessors, they nevertheless uniformly saw themselves as working in a well-established tradition with its roots in the Roman Law

notion of the *ius gentium*, as subsequently received and modified through the work of Suarez, Ayala, Gentili, Grotius, Bynkershoek, Pufendorf, Wolff and de Vattel, among others. In many respects, what seemed to tie these classic works together as a single tradition was twofold. In the first place, these authors all sought to identify the existence of a law that both transcended and bound the sovereign, whether that found its origin in principles derived from natural law or from the more immediate practice of sovereigns in their relations inter-se. Secondly, these treatises all assumed the existence of a plurality of sovereign subjects whose 'external' relations were regulated by the terms of this *ius gentium*. A key moment in this story, as it was to be later narrated, was the moment at which this plurality – the 'Family of Nations' – was to appear; and without exception, that moment was identified with the birth of a secular international society within Europe, the inauguration of which was marked by the Peace of Westphalia of 1648. For it was at this point, it was argued, that a nascent international community finally emerged from the shadow of the Holy Roman Empire and from the coercive authority of the Catholic Church (Hall, 1895, pp 55-60).

The emphasis given to the Peace of Westphalia by the likes of Hall made it possible to think of international society straightforwardly as a society of independent sovereigns and their subordinates. But this, of course, said very little about the state itself as an idea, or about the many transformations it underwent over the centuries. Machiavelli's account in *The Prince* had suggested that the archetypal 16<sup>th</sup> Century sovereign existed, 'in a relationship of singularity and externality, of transcendence, to his principality' (Foucault, 2007, p. 91). Since the Prince could receive his principality by inheritance, acquisition, conveyance or conquest, there was nothing but a synthetic link between the two. The principality, including both its territory and population, stood in a quasi-feudal relation to the Prince's individual authority; it had no separate meaning or significance. International relations could thus be understood almost exclusively in terms of the rights, possessions and entitlements of the person of the sovereign.

By the time at which Grotius and Pufendorf were writing in mid-17<sup>th</sup> century, however, two new traditions of thought had started to emerge. One of these, marked by invocation of the idea of the social contract (partially present in the work of Grotius, but given much more concrete form in the work of Hobbes and Locke a little further towards the end of the 1600s), sought to forge a definitive link between the people (understood as a community of individuals or as a 'multitude'), and the

sovereign (the individual or group of people who were endowed with the right to rule). From this point on, those entitled to exercise the prerogatives of sovereignty (what we now call the ‘government’), could plausibly be separated from the place in which sovereignty was located (what we now associate with the ‘state’). The other tradition, which was associated with the emergence of mercantilist thought in the 17<sup>th</sup> Century, began conceptualising the territory and people in terms of a unit of economic activity (Foucault, 2007). Since sovereignty, as Locke in particular was to aver, was underpinned by the appropriation and use of land,<sup>9</sup> the idea developed that the exercise of sovereign rights ought to be oriented in that direction: the people should be governed (put to work) and not merely ruled. This involved not only bringing the population as a productive resource within the boundaries of governmental action (e.g. through the regulation of migration and vagrancy and the introduction of ‘poor laws’). It also pointed to a concern for the maximisation of the productive output of land. In Europe, this led to the forcible ‘clearing’ of traditional land-holdings. Outside Europe, it legitimised the creation of new settler colonies on the grounds that the so-called ‘savages’ of the ‘new world’ had failed to appropriate and use the land they inhabited productively, and therefore had no legal claim over it (see e.g. Bhandar, 2014).

Central to the development, in the 17<sup>th</sup> Century, of this new ‘art of government’ (*raison d’état* as it became known), was an idea of the ‘state’ that had both objective and subjective characteristics. In an objective sense, the state was increasingly coming to be understood in terms of a set of identifiable characteristics (later to be understood as ‘criteria’), including territory, population and government (Elden, 2013) and yet which assumed an identity that was somehow greater than, or at least independent of, the sum of its parts. Governments might come and go, for example, but the state, so long as it retained the core elements, would remain the same. In a subjective sense, on the other hand, the state was increasingly understood as possessing some immanent end – whether that was simply to maintain common peace and security, or further the cause of society. Both of these strands of thought came neatly to be expressed in Pufendorf’s definition of the state as a ‘compound Moral person, whose will being united and tied together by those covenants which before passed amongst the multitude, is deemed the will of all, to the end that it may use and apply the strength and riches of private persons towards maintaining the

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<sup>9</sup> Locke, *Second Treatise of Government* 1690 pp. 18-30. See also Vattel, *The Law of Nations* pp. 37-8: ‘The whole earth is designed to furnish sustenance for its inhabitants; but it cannot do this unless it be cultivated. Every Nation is therefore bound by the natural law to cultivate the land which has fallen to its share’.

common peace and security'. (Pufendorf, *On the Law of Nature and Nations*, Bk VII, c. 2, s. 13).

A significant feature of Pufendorf's definition, here – anticipated in Hobbes' description of the Leviathan – was the personification of the state as a moral entity in its own right. To describe the state as a 'person' in this way had several obvious consequences. In the first instance, it encouraged the ascription to the state of certain passions, interests, and motivations that went beyond the strictly instrumental task of preserving peace and good order, or defending the realm from external attack. As Wolff would later argue, for example, the state was duty-bound to seek its own 'self-perfection' by maximising its wealth and prestige – a task which necessitated the development of new systems of knowledge (statistics) and the bureaucratic organisation of social and economic affairs to that end (police). In the second place, the move towards personifying the state also encouraged the development, in the hands of Vattel in particular, of what has become known as the 'domestic analogy' in which states were to be understood as being in a position analogous to individuals prior to the establishment of civil society, seeking security and community in their relations with others. For Vattel, thus, states existed in a state of nature, enjoying the same rights 'as nature gives to men for the fulfilment of their duties' (Vattel, 1758 p 4) and such natural liberties as befitted their character. The law of nations provided the structure by which that freedom and equality was to be preserve and promoted within the frame of a wider international society.

In many respects, it is difficult to underestimate the enduring significance of Vattel's appealingly simplistic account of the state in international relations. However far international thought may have moved, today, away from the idea of states enjoying certain natural prerogatives, or of sovereignty being sharply demarcated between internal and external domains, the idea that the world could be described in terms of states as a sociological category of 'person', possessing a distinct 'will', 'mentality', or 'motivation' that may encourage them to interact with one another in certain determinate ways is one that endures to this day. This no more clearly demonstrated than in the 'rational choice' analytics that is deployed, in some quarters, to detail the process and efficacy of international law today (e.g. Goldsmith and Posner (2006)).

Nevertheless, for those, like Hall, receiving this tradition in the 19<sup>th</sup> Century, there were always evident complexities that had to be negotiated. To begin with, it was not exactly easy to translate this monadic description of international society as a society

of 'free and independent' nations into practice at the time. Writing in the middle of the Century, for example, Phillimore was to identify eleven different categories of state, four of which were 'peculiar' cases (Poland, Belgium, Greece and Egypt), the rest of which included, in addition to states under one sovereign, two categories of Unions, states that took the form of Free Towns or Republics, Tribute-paying states (Vassals) and two further categories of states under different forms of Protectorate. Further to this, there was the complex phenomenon of the German Confederation (a loose alliance of 70 independent 'states') to be explained (Phillimore, 1871, p. 101). This was, on no account, a uniform scheme of political organization.

Adding to the complexity, by the end of the 19<sup>th</sup> Century, international lawyers were increasingly concerned as to how their received tradition of sovereignty might apply to the non-European world (a concern that was taken up explicitly in 1879 by the newly-formed Institut de Droit International<sup>10</sup>). The problem faced by the Institut's members was this: in their desire to avoid the abstract rationalism of natural law and locate international rights and obligations instead in the empiricism of practice and custom, international lawyers had come to speak about international law in specifically European terms. At a time at which the idea of the nation as a cultural and linguistic community was emerging in a specifically political form (demanding an alignment between nation and state), it seemed obvious that the international relations of such a community of nation-states would be imbued with, or built upon, the same consciousness of history and tradition. Custom seemed to imply some kind of social consensus, and consensus a commonality of understanding and outlook (what Westlake referred to as a 'juridical consciousness') that could only readily be supposed in relation to 'civilised' communities in Europe (or those communities of 'European origin' elsewhere). For some, in fact, international law was actually more properly described as the Public Law of Europe, as in the work of those such as Martens (1864) and Klüber (1851).

Yet for all this, international lawyers in the 19<sup>th</sup> century were also aware of the long history of treaty-making with all manner of local sovereigns in Asia, Africa and elsewhere, the form of which seemed to suppose that those relations were to be governed by the terms of international law (see Alexandrowicz 1967, Anghie 2005). Indeed, the fact that from the early 1880s onwards European exploration of the interior of Africa was to be marked, amongst other things, by the systematic and widespread conclusion of treaties with local kings and chiefs providing for

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<sup>10</sup> Twiss, (1879-1880) p. 301. See generally Koskenniemi, 2001, 98-178.

‘protection’ or for the cession of sovereignty only made the issue more pressing. How might an exclusively European system of public law conceive of such arrangements? And what might this imply as regards the status of those communities?

It was at this point that the language of ‘civilisation’ (Said, 1978) was to invest itself in the realm of law. Although few international lawyers at the time explicitly introduced into their definitions of the state a requirement that they be ‘civilised’,<sup>11</sup> the existence of an implicit ‘standard of civilisation’ ran throughout most their work in relation to recognition or territorial title, or when describing the character of international law (Gong 1985, Anghie 2005). Thus, for example, whilst Hall spoke in quite abstract terms about the ‘marks of an independent state’ (being permanently established for a political end, possessing a defined territory and being independent of external control) he was still to make clear that international law consisted of those rules of conduct which ‘modern *civilised* states’ regarded as being binding upon them. (Hall, 1895 p. 1) One could not, in other words, assume that simply because there existed treaty relations with non-European states such as China or Japan, that those latter states were to be regarded as having the same rights and privileges as European states. As Lawrence was to note:

‘there are many communities outside the sphere of International Law, though they are independent states. They neither grant to others, nor claim for themselves the strict observance of its rules. Justice and humanity should be scrupulously adhered to in all dealings with them, but they are not fit subjects for the application of legal technicalities. It would, for instance, be absurd to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission’ (Lawrence, 1895, p 58).

By and large, thus, international lawyers began to differentiate in their accounts between those ‘normal’ relations that pertained between European states and those that characterised relations with other political communities on the outside. Beyond Europe, the treaties that put in place regimes of protection or for consular jurisdiction and extraterritoriality, or those that purported to ‘cede’ territory, took the *form* of agreements between sovereign states; their substance, however, was to deny any such pretension.

Yet there was a difficulty here. Even if non-European states did not possess a sovereignty equivalent to that of European states, to deny them status of any kind would have put in question the validity of the agreements – treaties of cession,

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<sup>11</sup> See e.g. Phillimore, 1871, p 94. Occasionally, the point was made more explicit. See Westlake, 1984, pp 102-3; Lawrence, 1895, p 58.

boundary agreements, concessions and so on – upon which European privileges seemed to depend (Koskenniemi, 2005, pp 136-143; Anghie, 2004, pp 76-82). Some position within the broader framework of international law therefore had to be found for them; they had to be simultaneously included yet excluded from the realm of international law.<sup>12</sup> Some jurists responded by differentiating between legal relations, as might exist between European states, and non-legal, moral or ethical, propositions that were said to govern relations with the non-civilised world (Westlake, 1894, pp 137-40). Others made a distinction between states enjoying full membership and those enjoying merely partial membership in the family of nations (Wheaton 1866, Oppenheim 1905). Still others drew a line between ‘plenary’ and partial recognition (Lorimer, 1883, pp 101-123). There was agreement on one point, however, namely that in order to be admitted into the family of nations, those aspirant states had to demonstrate their ‘civilised’ credentials. To be ‘civilised’ furthermore, largely meant the creation of institutions of government, law and administration modelled upon those found in Western Europe (Westlake, pp 141-3; Mill, 1859, pp 161-3). This was a message fully understood in Japan, whose rapid process of ‘Westernization’ in the latter half of the 19<sup>th</sup> Century eventually allowed it to rid itself of the regimes of consular jurisdiction that had been put in place in order to insulate Western merchants and traders from the application of local law. Only once this ‘badge of imperfect membership’ had been removed was Japan understood to have become a full member of international society (Westlake, 1894, p 46).<sup>13</sup>

These assumptions, it has to be said, by no means disappeared overnight – if they can be said to have disappeared at all. In the wake of the First World War, many of them were remodelled and given institutional form under the League of Nations. Article 38(3) of the statute of the Permanent Court of International Justice, for example,

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<sup>12</sup> Schmitt, 1974, p 233, examining Rivier’s *Lehrbuch des Volkerrechts* (1889) notes that his overview of ‘current sovereign states’ included 25 states in Europe, 19 in the Americas, then ‘states in Africa’ including the Congo Free state, the Free state of Liberia, the Orange Free state, the Sultanate of Morocco and the Sultanate of Zanzibar. Schmitt notes that in respect of the latter category these were called states but the word sovereign was avoided and in case of Morocco and Zanzibar, Rivier had noted that ‘obviously’ they did ‘not belong to the community of international law’. Schmitt asks pithily: ‘Why were they even included in the enumeration?’

<sup>13</sup> A contrast might be drawn here with the rather slower progress made in the case of China. The Nine Power Treaty of 1922 sought to guarantee the ‘Open Door’ policy in China (by which was meant ‘equality of opportunity in China for the trade and industry of all nations’) to be secured by barring any agreement that might secure special commercial privileges for any one state. A special Commission was set up to examine the question as to whether the continuation of extraterritorial privileges was justified. It reported back in 1926 concluding that although progress had been made, more was needed before such regimes could be suspended. See Summary and Recommendations of the Report of the Commission on Extraterritoriality in China, 1926, in (1927) 21 *AJIL*, Supplement 58.

referred to 'the general principles of law recognized by *civilised* nations' -- a phrase that was incorporated directly, in 1945, into the present statute of the ICJ at Article 38(1)(c). The theme was maintained even more explicitly in the institutions of the Mandate system designed, by the League, to deal with the situation of the colonies and territories extracted from Germany and the Ottoman empire under the terms of the various peace treaties. Under Article 22 of the Covenant of the League, 'advanced nations' (viz Britain, France, Belgium, Australia, New Zealand, South Africa and Japan) were entrusted with the task of exercising 'tutelage' on behalf of the League over those colonies and territories described as 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world'. The purpose of this 'sacred trust' was to advance the 'well-being and development of such peoples', with the precise implications of this phrase depending on a classification set out within that same article. Certain territories (designated as 'Class A' Mandates) were regarded as having 'reached a stage of development where their existence as independent nations can be provisionally recognized', in which case the Mandatory Power was to provide administrative advice and assistance 'until such time as they are able to stand alone'. This category included those territories in the Middle East separated from the Ottoman Empire (Iraq, Palestine and Transjordan, Syria and Lebanon). 'Class B' territories (those in Africa with the exception of South-West Africa) were to be subject to significantly more intensive degrees of administrative control without any explicit expectation of independence, and 'Class C' territories (Pacific Islands and South West Africa) were those declared to be 'best administered under the laws of the Mandatory as integral portions of its territory', subject to certain safeguards 'in the interests of the indigenous population' (see Anghie, 2005, pp 115-195).

Whilst, as Schwarzenberger suggested, the Mandate system came very close to being a mechanism for the continuation of colonialism 'by other means' (Schwarzenberger 1950, p. 134), the very decision to employ 'other means' was significant. To begin with, the institution of international trusteeship seemed to make clear that Mandate powers were not acquiring such territories as 'colonies', and therefore could not be taken to enjoy the normal rights of sovereignty in relation to such territories. But if that was the case, it posed the obvious question as to where sovereignty lay? (Wright, 1930). The territories themselves, could barely be described as sovereign in their own right, as otherwise the restrictions on their independence would have been inexplicable. Some other status had to be devised for them, or at least some language that avoided the problematic implications of the notion of 'sovereignty'. This, of



course, was not a problem solely related to the institution of the Mandate, but was equally relevant to the authority exercised by the League of Nations itself – how might its powers be described within an international order comprising of sovereign states?

Whether or not as a consequence of reflecting upon such problems, international lawyers writing at the time of the League began to regard the notion of sovereignty and its correlates (sovereign equality and domestic jurisdiction), not as something integral to their understanding of international law, but rather as an obstacle to be overcome. For many, a fixation with the idea of sovereignty as both indicative of the absence of any higher authority, and as the source of law (understood, perhaps, in Austinian terms as the command of the sovereign) had not only left the discipline in a condition of internal contradiction,<sup>14</sup> but ill-equipped to deal with a world of new international institutions and novel forms of governance. Writing in 1928, for example, Brierly joined the emerging chorus, dismissing the idea of sovereignty as ‘an idolon theatre’ that bore little relation to the way in which states and other ‘international persons’ related to one another in practice (Brierly, 1924, p 13). If ‘sovereignty’ was to be retained as an idea it had to undergo nothing less than a conceptual transformation. One place in which the contours of such a transformation can be discerned is in the *Wimbledon case*, which came before the PCIJ in 1923. The case dealt with a claim made by Germany that the granting of an unfettered right of passage to vessels of all nationalities through the Kiel canal – a right stemming from the punitive terms of the Treaty of Versailles, concluded between German and the Allied and Associated Powers at the end of the First World War – would ‘imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty’. The Court responded by stating that it:

‘decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction on the exercise of sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.’<sup>15</sup>

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<sup>14</sup> Kennedy, 1997, p. 114 associates a scepticism of sovereignty with positivism: ‘To fulfil their polemical mission, to render plausible a legal order among sovereigns, the philosophy which sets this question, which makes sovereigns absolute or requires a sovereign for legal order, must be tempered, if not rejected. As a result, to inherit positivism is also to inherit a tradition of response to the scepticism and deference to absolute state authority, which renders legal order among sovereigns *implausible* in the first place’.

<sup>15</sup> S.S. ‘*Wimbledon*’, *Judgments, 1923, PCIJ Rep., Series A., No. 1* at p. 25.

Sovereignty, in other words, was not to be understood as an unfettered freedom from external constraint, but rather as a way of describing a capacity for binding others to, and being bound by, international law. It was no longer something that had any innate content (such as describing certain natural rights or prerogatives), nor something that could be raised as an objection to those obligations once entered into.<sup>16</sup> It was merely a way of describing those remaining powers and liberties afforded to the state under international law.

This new way of thinking was undoubtedly helpful in several respects. To begin with, it allowed a dissociation between the possession of ‘sovereign rights’ on the one hand and the actual order of power on the other. This meant that territories under belligerent occupation,<sup>17</sup> subject to a treaty of Protection or placed under the administration of a Mandatory power, for instance, could be conceived as being subject to the governmental authority of another state, yet not part of its territorial sovereignty. Sovereignty in such cases survived in suspended form. It also disposed of the problem of sovereign equality and domestic jurisdiction: states could regard themselves as equal, so long as it was clear that ‘equality’ meant an equal capacity to enjoy rights and bear obligations. They also retained a right of domestic jurisdiction so far as this described a residual domain of freedom left untrammelled by the constraints of external obligation.<sup>18</sup> It was only a short move from here to the position adopted by Kelsen, amongst others, who came to the conclusion that states were nothing but legal orders, described fully and completely in terms of propositions of law.<sup>19</sup>

However, this determination to formalise statehood and functionalise sovereignty coexisted uneasily with the normative zeitgeist of the post-WW1 era – namely the principle of ‘national self-determination’. This principle, advanced by President Woodrow Wilson, in particular, in 1918 (see below), implied a substantive conception

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<sup>16</sup> See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p 14, para 131: ‘A state... is sovereign for purposes of accepting a limitation of its sovereignty’.

<sup>17</sup> See article 43 Hague Regulations (1907)

<sup>18</sup> See e.g., *Nationality Decrees in Tunis and Morocco, Advisory opinion, 1923*, PCIJ Rep., Series B., No. 4, p. 24: ‘The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations.’

<sup>19</sup> Kelsen, 1942, pp 64-5: ‘The State is not its individuals; it is the specific union of individuals, and this union is the function of the order which regulates their mutual behaviour... One of the distinctive results of the pure theory of law is its recognition that the coercive order which constitutes the political community we call a state, is a legal order. What is usually called the legal order of the state, or the legal order set up by the state, is the state itself.’

of the state rooted in ideas of community and cultural homogeneity, determined for the most part by religious or linguistic markers. The sovereignty that this idea demanded – a sovereignty realised most concretely in new system of ‘national states’ and ‘national minorities’ set up in Eastern Europe – was not one that could be regulated from outside, but that inhered in a determinate people with values and interests that required protection and advancement. Ironically, these simultaneous currents – the promotion of national self-determination and the juridification of sovereignty – left legal doctrine in much the same bind as it had found itself half a century before at the height of the positivist reaction against natural law theory. Systematically cut through by an opposition between two ideas of statehood (one formal, the other substantive) and two ideas of sovereignty (one innate, the other attributed or delegated), neither of which could attain ascendancy, inter-war jurists within the West, found it no less impossible to avoid the trap of analytical contradiction than their teachers had done (Koskenniemi, 1989, pp. 59-60, 224-233). This opposition, as we shall see, was to continue to infect the mainstream discussion of statehood through the period of decolonisation and on into the new millennium – its presence being felt in debates as to the relationship between self-determination and *uti possidetis* (whether ‘people’ determined the territory, or the territory the people) and, of course, in discussions over the implications of recognition (whether it was ‘constitutive or ‘declaratory’). The key observation here, however, is not simply to note the pervasiveness of a set of contradictory undercurrents that underpin the legal formation of statehood in international law, but to note that many of these contradictions were to appear for a particular reason – that this was the means by which European statehood could be globalised and made the universal mode of political organization and emancipation. They express, in other words, how the state comes to be positioned as both an object of desire as well as a presupposition of the expressive order through which it is produced.

### **III. DEFINING AND RECOGNISING THE STATE**

One of the most concrete manifestations of the shift in legal thought described above – from the idea of states existing in a Vattelian state of nature between whom a thin architecture of legal relations came to be established, to one in which states were understood to exist as legal entities endowed with certain competences by international law – can be found in the increasing concern to identify those ‘marks’ or

'criteria' by which statehood could be measured. For Vattel and other natural law scholars, describing or defining the state was primarily a matter of trying to capture the plurality of different kinds of political communities existing in Europe in the middle of the 18<sup>th</sup> Century. For those undertaking the same exercise 100 or 200 years later, however, the project of description had taken on a different character, concerning itself less with describing and indexing those communities that existed, as a matter of sociological fact, and more with the task of prescribing how much sovereignty – how much 'international personality' in the form of rights and duties – they should enjoy.

One result of this shift in emphasis was that the terms of description became more explicitly exclusionary as time went by. Thus, when Wheaton in 1866 endorsed Cicero's classic definition of the state as 'a body political, or society of men, united together for the purpose of promoting their mutual safety or advantage by their combined strength' he also took trouble to specify what entities were not included in this category. It did not include, as far as he was concerned, corporations created by the state itself, for instance, nor 'voluntary associations of robbers or pirates', nor 'unsettled horde[s] of wandering savages', nor indeed nations since the state 'may be composed of different races of men' (Wheaton 1866, s. 17). Oppenheim's 1905 definition – much closer to the definition which the signatories of *Montevideo Convention on the Rights and Duties of States* settled on in 1933 (see below) - was similarly exclusionary in nature. 'A State proper', he wrote, 'is in existence when a people is settled in a country under its own Sovereign Government'. By this definition '[a] wandering people, such as the Jews were while in the desert for forty years... is not a State'. Likewise '[a]n anarchistic community' would be excluded from statehood by its lack of a government; and 'so-called Colonial States' were excluded by their lack of 'sovereignty', a term that referred to 'independence all round, within and without the borders of the country' (Oppenheim, 1905, pp. 100-01). The definition of the state thus became a vehicle not merely for purposes of description (providing an analytical framework for understanding the character of international society for purposes of law) but also for purposes of distinguishing between those political communities that might properly be regarded as subjects of international law and those that would not. For some, this shift in orientation was decisive. As O'Connell was later to suggest (1970 p 81): 'the proposition "France is a State" is not a description or a definition but merely a conclusion to a train of legal reasoning'.

This shift from fact to law (or, if you prefer, from description to prescription) was, nevertheless, to have a particular context. In the first half of the 19<sup>th</sup> century a series of revolutionary wars had inspired a number of independence movements around the world (Belgium, Greece, Haiti, Mexico, Chile, and a host of other Latin American republics) in which claims to statehood grounded in the 'mere fact' of their independence were routinely opposed by the former colonial powers. In this context, international lawyers began to turn to the doctrine of recognition (a doctrine that had previously been employed largely for purposes of identifying a condition of belligerency or insurgency). Even if the independent existence of states was merely a question of fact, they reasoned, it was difficult to judge the legitimacy of such claims except by reference to the competing claims of other states. In case of secession, for example, it was understood that to recognise a new state before the moment at which it had fully established its independence was not merely to offend the sensibilities of the state attempting to suppress the rebellion, but constituted also an act of unlawful intervention. This encouraged a differentiation between the existence of states understood in terms of their internal effectiveness, and the question of their membership in the wider international community which would be determined by the practice of recognition. Wheaton (1866, s. 21, p. 28) distinguished, thus, between internal and external sovereignty for such purposes:

'So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society.'

What this distinction immediately suggested was that questions of status, on the one hand, and of participation in international society on the other, were ultimately separable, with the practice of recognition being relevant to the latter, but not the former. The ensuing hypothesis that there might be states which possessed 'internal sovereignty', but yet which did not participate in the 'great society of nations' found, furthermore, concrete expression in the postulated divide between the European and non-European worlds at the time. This allowed European international lawyers at the time to acknowledge and rationalize the existence of the Ottoman, Chinese, Japanese and Ethiopian Empires, for example, as independent political communities, without needing to accept that they were, as a consequence, subjects of international law in the fullest sense. As non-European jurists well

understood, however (see Becker Lorca, 2015), this new ‘constitutive’ doctrine of recognition gave those states whose sovereignty was not in question an immense degree of power in determining whether ‘outsiders’ should be allowed ‘within the pale of those rights and duties, which civilised Nations are... entitled reciprocally to claim from each other’, as the British foreign secretary, George Canning put it (quoted in Grewe, 2000, p. 499).<sup>20</sup> It was here that the ‘standard of civilisation’ came into its own as an instrument of international law. In addition to having failed to organise themselves collectively in such a way as to resemble states in an ‘objective’ sense, ‘savage tribes’, having been judged incapable of comprehending the rules of international law, could also be denied recognition. This judgement was usually based on their alleged inability to comprehend the rules of international law, and presumed incapacity, therefore, to ‘reciprocate’ any such recognition (Lorimer, 1883-84, p 117). By contrast, entities like the Chinese Empire which did, up to a point, seem state-like in their appearance, could, it was agreed, be ‘partially’ recognised, and hence granted some but not all the rights associated with sovereign statehood (Westlake, 1914, p 82).

Whilst this 19<sup>th</sup> Century practice, however, seemed to rely upon a differentiation between the question of sovereign status on the one hand and that of participation in the international community on the other, it was always clear that the ultimate objective was to achieve congruence between the two. What was ultimately envisaged was a truly global system of inter-state law governed by the principles of sovereign equality and territorial integrity. And so far as that was the objective, participation within that system could not remain dependent upon the benevolence or discretion of imperial powers, but would have to be conditioned upon the pure fact of a state’s independent existence. In the early 20<sup>th</sup> Century, thus, international lawyers began to distance themselves from what they saw to be the 19<sup>th</sup> Century ‘constitutive’ approach to recognition and embraced, instead, a ‘declaratory’ approach the gist of which was to declare that a state would exist for purposes of international law at the moment in which it existed ‘in fact’. This indeed, was the platform adopted by members of the Pan-American Union when they came to draft what is now taken to be the seminal definition of statehood in the *Montevideo Convention on the Rights and Duties of States* in 1933. There, they insisted that the ‘political existence of the state’

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<sup>20</sup> Wheaton, 1866, s. 21: ‘until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those states only by whom that sovereignty has been recognized.’; Lorimer, p. 106 (‘Though recognition is often spoken of as admission into the family of nations, it leaves the State which has claimed and obtained it from one State only, in the same position in which it formerly stood to every other State’).

– which they took to be entities possessed of a permanent population, defined territory, government and a capacity to enter relation with other states – ‘is independent of recognition by other states’. ‘Even before recognition’ article 3 provides, ‘the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts’.

If the authors of the Montevideo Convention clearly aspired to eliminate the role of recognition as a determinant in the enjoyment of the prerogatives of sovereignty, they nevertheless left on the table the question as to how one might conceive the existence of the state for such purposes – was it a mere pre-supposition of international law? Or rather a legally-determined status? Were the criteria legal or factual? And how might one understand the relationship between the two? The title of Crawford’s influential book on the subject, *The Creation of States in International Law*, would appear to attribute a decisively constitutive role to international law in this question. The obvious objection, as suggested above, is that states are clearly not ‘created’ by international law in the same sense that a cabinet maker might craft a piece of furniture. Rather, they emerge through sustained political action and agitation – frequently violent – in which political independence is wrested from forces sustaining the political *status quo*. Indeed, international lawyers (Crawford included) are aware of as much, and routinely place emphasis upon the importance of ‘effectiveness on the ground’, so to speak, for purposes of determining the existence or otherwise of a state. This would seem to suggest, accordingly, that the role of law is, in practice, almost entirely *ex post facto*; indeed, that that ‘sovereignty’ itself should be understood as ‘a political fact for which no purely legal authority can be constituted’ (Wade, 1955, p. 196).

In giving his book this title, however, Crawford was not being naïve. What he was arguing against was an exclusively ‘empirical’ notion of statehood. For, as he points out, however important ‘effectiveness’ might be, a state is not, as he puts it, ‘a fact in the sense that a chair is a fact’; rather, it is ‘a legal status attaching to a certain state of affairs by virtue of certain rules or practices’ (Crawford, 2006, p. 5). A closer analogy therefore might be the status of ‘criminality’, which is generated through the institutions and structures of the criminal law, or that of ‘insanity’, formed through the discipline of psychiatry (Foucault, 2006). Just as ‘thief’ is a designation appropriate only once it has been determined that the person concerned has

unlawfully appropriated the property of another, so the label 'state' makes little sense unless the legal framework within which the powers and competences associated with statehood, and the manner in which they can be acquired, has already been determined (Kelsen, 1942). Both 'fact' and 'law' play a role, in other words, and 'effectiveness', as the summative expression of those facts deemed to be legally relevant, is understood to act as the hinge between the two.

Crawford's assumption here that it is the legal order that accords 'statehood' to those entities that possess the requisite characteristics tends largely to depend upon the hypothesis that states are constituted through essentially consensual processes. The emergence of 12 new Republics out of the defunct Soviet Union in the early 1990s, for example, posed relatively few problems on this score for the simple reason that Russia had effectively renounced, in the Alma Ata Declaration and Minsk Accord,<sup>21</sup> any legal interest or claims to sovereignty over those regions (Mullerson, 1993). Here, one could conceive of the parent state either 'delegating' sovereign authority to the nascent regimes, or simply creating the necessary legal 'space' through the evacuation of its own claim to sovereignty, allowing the new states then to assert their rights over the territories and populations concerned.<sup>22</sup> In similar manner, one might also understand the process of decolonisation to have been enabled through the 'suspension' of metropolitan states' claims to sovereignty over Non-Self-Governing territories, which thereby created the necessary space for the exercise of 'self-determination' (see below).

Yet in many cases the issue is not one of the consensual devolution of sovereign authority (*viz* the *granting* of independence) but rather of the assertion of a new claim to statehood, out of a condition of dispute or conflict. Whatever legal rules might be put in place, in a world already fully demarcated in terms of sovereign jurisdiction (in which there are no longer any 'white spaces on [the] map' (Nesiah, 2003) within which new states might emerge) the process of 'creation' can only be achieved by way of displacing in some manner the prior claims to sovereignty of another, already-existing state. In that sense, unless existing claims to territorial

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<sup>21</sup> Agreement Establishing the Commonwealth of Independent States (Minsk Accord), 8 Dec. 1991, 31 ILM (1992) 143; Alma Ata Declaration, 21<sup>st</sup> Dec. 1991, *ibid*, p. 148.

<sup>22</sup> One may note here, that the answer often depends upon the stance adopted in relation to the role of recognition. See e.g. Hall, 1895, p. 88: 'Of course recognition by a parent state, by implying an abandonment of all pretensions over the insurgent community, is more conclusive evidence of independence than recognition by a third power, and it removes all doubt from the minds of other governments as to the propriety of recognition by themselves; but it is not a gift of independence; it is only an acknowledgement that the claim made by the community to have definitively established its independence'.



sovereignty are lifted or suspended in some way, the emergence of a new state cannot be achieved without some measure of illegality.

It was always evident, of course, that if states were to be regarded as actors endowed with personality by a superordinating legal order, it was necessary to set out somewhere the terms under which this 'attribution' of authority might take place and the consequences of it. Strange as it may seem, however, the process of codifying the rights and duties of states has never been completed to any satisfactory degree. In 1949 the United Nations' International Law Commission (ILC) did produce a *Draft Declaration on the Rights and Duties of States*,<sup>23</sup> which went some way towards summarising what the legal implications of statehood might be. Even though this draft was not, in the end, adopted by the General Assembly, it remains the most complete attempt to summarise the relationship between statehood and personality. Alongside a list of ten duties the Draft Declaration includes four rights: 'the right to independence and hence to exercise freely, without dictation by any other States, all its legal powers, including the choice of its own form of government' (Article 1), 'the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law' (Article 2), the duty of non-intervention in the affairs of other states (Article 3), the right to 'equality in law with every other State' (Article 5), and the 'right of individual and collective self-defence against armed attack' (Article 12). Each of these does indeed seem to describe powers possessed *only* by states – to which may be added, perhaps, a plenary competence to perform legal acts such as conclude treaties; a right not to be subject to compulsory international process or dispute settlement without consent; and the benefit of a presumption that states enjoy an 'unlimited freedom' subject only to those constraints determined by law (the '*Lotus*' principle) (Crawford, 2006, pp 40-41). Taken together, these may give some indication as to why statehood remains such an attractive proposition for oppressed peoples and territories in particular - from the Irish to the Albanian population of Kosovo, and from the Palestinians to the Sahrawi and the Rohingyas.

Whilst drafting the Declaration, the International Law Commission also briefly discussed the merits of seeking a new definition of the state for purposes of international law. The general reaction, at that time, was that such a project was either unnecessary as being self-evident, or indeed too controversial (the concern being that it would only have salience as regards 'new' rather than 'old' states). In

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<sup>23</sup> GA Resn. 375(VI), 6<sup>th</sup> Dec. 1949, Annex.

part at least it was informed by the fact that the Pan American Union had already drafted the *Montevideo Convention on the Rights and Duties of States*, Article 1 of which set out a basic definition which, if not definitive, could be taken as the starting point for most discussions of territorial status. Article 1 provides as follows:

‘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 other states.’

For all its significance, given that article 1 is, in effect, all we have in terms of an accepted definition of statehood, its precise implications remain obscure. In the first place, the ‘capacity to enter into relations with other states’ seems to be a conclusion rather a starting point, and there is no mention of other putatively relevant matters such as independence, legitimacy, democracy or self-determination. Precisely what article 1 ‘declares’, furthermore, requires some interpretive work. As a legal prescription, its terms appear to be either too abstract or too strict. They are too abstract in the sense that to say that an entity claiming to be a state needs to be able to declare itself as having people, territory and a form of government is really to say very little, and certainly does nothing to guide responses to claims by aspirant states such as Chechnya, Kosovo, Northern Cyprus, Palestine or Catalonia. Certainly it may exclude Wheaton’s private corporation or his nomadic society, but one may ask what else? And to what end?

Analytically, the definition would seem to require one of two things: either a quantitative measure of intensity (so instead of merely necessitating the existence of a people, a territory and something that describes itself as a government, it requires that these qualities are possessed in sufficient degree), or a qualitative measure (so that claims to statehood must be justified on the basis of some external standard, by responding to a principle of self-determination, for example, or being capable of substantiation without impinging upon the rights and duties of other sovereign states). But both of these measures – of intensity and justification – seem then to demand too much. The measure of intensity seems to require the articulation of a ‘threshold’ evaluation the establishment of which would be to deny the very ‘factual’ character that it seeks to express – who could say in advance, without lapse into

arbitrariness, how much territory, or how many people, are required in order to create a state? Surely what would matter is whether it is capable of surviving as an independent state, and that, presumably, is something to be determined after the fact so to speak. The measure of justification has a similar problem; it seems to rely upon the prior establishment of internationally recognized regimes of entitlement and responsibility (recognised claims over territory or rights in relation to nationals) the validity of which would assume that the state as a legal subject is already in existence. In either case, the problem is how one moves from fact to law, or from cognition of the existence of something that calls itself a state to its legal recognition without, in a sense, assuming that the thing being offered the imprimatur of 'legality' is not somehow already legally existent. Let us now look in more detail about how this problem plays out in relation to each of the four accepted 'criteria' for statehood.

### **A. POPULATION**

As suggested above, one of the critical ideas accompanying the development of the idea of the state was that the populace should not be understood merely as the accidental objects of a sovereign's authority, but that they also partook of that sovereignty. Increasingly, indeed, as the nation-state emerged, in the late-18<sup>th</sup> and 19<sup>th</sup> centuries, as the dominant rubric for organising collective and inter-communal life, 'the people' came to be regarded as the immediate object of an emergent art of government, for which Lincoln's phrase 'government by the people, for the people, and of the people' was an obvious cumulative expression. A state's population, by the start of the 19<sup>th</sup> century, was not merely a source of wealth and power for the sovereign; nor was it only a means by which the state could ultimately secure itself in competition with other states (through the drafting of troops and the cooption of labour for the production of wealth, for example). In addition, and perhaps even more importantly, the people provided the rationale for government itself: the purpose of government (and hence of the state as a whole) was, above all, the promotion of the prosperity and happiness of the populace.

That the state gradually came to have this immanent end encouraged the idea that, to be politically and economically viable, it needed to be of sufficient size (Hobsbawm, pp. 29-39). The smaller, more 'backward', nationalities, as Mill was to aver, were much better off being absorbed into larger nations, rather than 'sulk on [their] own rocks... cut off from the general movement of the World' (Mill, *Considerations on Representative Government*, 1861, pp 363-4). Unification became, thus, the dominant theme of nation-building in the 19<sup>th</sup> Century, so much so that the claims of

those such as the Fenians in Ireland or the Bretons in France were routinely disparaged. This was an idea that had not entirely been shaken off by the early part of the 20<sup>th</sup> Century, as doubt continued to be expressed as to whether small states such as Luxembourg or Liechtenstein, for example, could properly be regarded as independent states. Liechtenstein, indeed, was denied membership of the League of Nations in 1920, on the formal grounds of its lack of independence from Austria (to whom it had 'delegated' certain customs and postal duties under Agreement). Underlying that rationale, however, was an evident concern over its size and the political implications of allowing micro-states the same voting rights as other, bigger states in the organs of the League (Duursma, 1996, pp 173-4). Later practice in the context of the United Nations, however, has suggested that this concern is no longer quite what it used to be. In contrast to the League of Nations, statehood is a prerequisite for membership of the United Nations. Yet states such as Andorra, Monaco, Brunei, Kiribati, Nauru, Palau, Vanuatu and the Marshall Islands sit alongside Liechtenstein in today's General Assembly, all of them with populations of under 1 million. This has led most scholars of statehood to conclude that, when it comes to the criterion of population, there is no minimum threshold.

The alternative then, to a threshold 'population' is the idea that the people in question must enjoy exclusive relations of nationality with the nascent state. This was an idea, during the early years of the 20<sup>th</sup> Century, that informed the concerted attempt to use the concept of nationality (under banner of 'national self-determination') to demarcate the populations of different states by re-drawing boundaries, instituting plebiscites, and engaging in compulsory population exchanges (Berman, 2012). But as much as this practice pointed to the desire, on the part of the policy-makers at the time, to ensure that the 'nation' and the 'state' be made congruent, it was also made clear that the competence to confer and withhold nationality was a matter falling essentially within the domestic jurisdiction of states. That is to say, international law neither required the conferral of nationality in any particular case nor prohibited its withdrawal.<sup>24</sup> Aside from occasional attempts to deal with the problem of statelessness, the only context in which international law has involved itself in issue of nationality is in relation to the question of diplomatic protection, and specifically in the context in which one state has sought to rely upon a contested bond of nationality when bringing a claim against another state.<sup>25</sup> To the extent, then, that the conferral of nationality has tended to be regarded as a sovereign

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<sup>24</sup> *Nationality Decrees in Tunis and Morocco, Advisory opinion, 1923, PCIJ, Series B, No. 4, p. 24*

<sup>25</sup> *Nottebohm, Second Phase, Judgment, ICJ Rep. 1955, p. 4.*

right, it would seem to be a consequence, rather than a precondition, of statehood. Moreover, as the toleration of multiple nationality has increased (see Franck, 1999, pp 61-75) even the theoretical possibility that the bond of nationality might be regarded as a legally effective determinant of the criterion of 'population' has almost entirely disappeared.

In fact the almost total conceptual separation between statehood and the idea of a constitutive population was marked in the second opinion of the Badinter Commission in 1992 in which the Commission suggested, in the context of the collapse of the Socialist Federal Republic of Yugoslavia, that one of the possible implications of the principle of self-determination was that the individuals concerned should have a right to choose their own nationality.<sup>26</sup> That this offered the possibility that a majority of the population of a new state might 'opt' for the nationality of a neighbouring state was treated as largely irrelevant for purposes of determining whether the new state met the conditions necessary for its own legal existence. Rather than being a condition of statehood, thus, the existence of a 'population' seems to be cast in almost metaphorical terms – the population must exist 'as if' in relationship to an order of government over territory, in which their presence as objects of coercion is necessary, but their identity as participants in that political community remains indeterminate.

## **B. TERRITORY**

Much of what has been argued above also applies in relation to the criterion of territory. Just as there appears to be no threshold requirement for purposes of population, so also it is hard to discern any specific condition concerning possession, on the part of the nascent state, of sufficient portions of land. Monaco has a territory of less than 1.95 km<sup>2</sup> and the Vatican City (a 'non-member state' at the UN) less than 0.5 km<sup>2</sup> (Duursma, 1996, 117). At the same time, it is clear that the real issue in most cases is not size, nor indeed the mere factual possession or control over territory (possession may always be 'adverse', of course, as in cases of belligerent occupation), but rather the ability to rightfully claim the territory as a domain of exclusive authority. If, as Arbitrator Huber put it in the *Island of Palmas case*, sovereignty signifies independence, and independence 'in regard to a portion of the globe... the right to exercise therein, to the exclusion of any other State, the function of a State',<sup>27</sup>

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<sup>26</sup> See also, Articles 1 and 11, ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (1999).

<sup>27</sup> *Island of Palmas Case* (1928) 2 RIAA 829

then the existence or absence of competing claims to sovereignty would appear to be key.

However, if what is required of new states is the possession of territory that is otherwise ‘unclaimed’ or ‘undisputed’ then, unless one were to be able to identify the territory in question as *terra nullius* (unoccupied territory),<sup>28</sup> or territory which has been explicitly or tacitly ‘ceded’ to it, then it is very difficult to see how any such nascent state could fulfil such a criterion. Prior to the mid-19<sup>th</sup> century, it was routinely assumed by international lawyers that a ‘distant’ lands ‘inhabited only by natives’, as Judge Huber put it in the Island of Palmas Arbitration of 1928, were, in effect, unoccupied – or, at least, occupied by a community which did not count as a ‘population’. *Terra nullius* was, thus, the legal doctrine which legitimised the conquest of vast swathes of territory, including the whole of Australia, none of which was ceded. Today, however, that doctrine has been wholly discredited (Moreton-Robinson, 2015) - giving rise in the Australian context, for example, to an entire new right of ‘native title’.<sup>29</sup> With the important exception of Indigenous conceptions of ‘self-determination’ (see below), the effect of this has been to ensure that claims to statehood in the post-decolonisation era are almost routinely oppositional, and rendered in the language of secession.

Even if we were to accept the idea that territory is somehow foundational to the question of statehood, the position requires further nuance. It has long been accepted, for example, that the absence of clearly delimited boundaries is not a prerequisite for statehood. Albania, for example, was admitted to the League of Nations in 1920 despite the fact that its frontiers had yet to be finally fixed, the subsequent delimitation of which came to be the subject of an Advisory Opinion of the PCIJ in the *Monastery of Saint Naoum* case of 1924.<sup>30</sup> Reflecting on this practice, the International Court of Justice subsequently affirmed in the *North Sea Continental Shelf* cases that:

‘The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully

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<sup>28</sup> For a discussion of this notion in the context of Western Sahara, see *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 12, paras. 79-81.

<sup>29</sup> See *Mabo and Ors v Queensland (No 2)* (1992) 175 CLR 1, esp. Judgement of Justice Brennan; *Native Title Act No. 100* (1993).

<sup>30</sup> *Monastery of Saint-Naoum, Advisory Opinion, 1924 PCIJ, Series B, No 9*.

delimited and defined, and often in various places and for long periods they are not...'<sup>31</sup>

What this appears to suggest is that the border and the territory of the state are effectively two different things (notwithstanding the 'Montevideo' stipulation that a state's territory must be 'defined'). Borders, on one side, seem to be the consequence, rather than the cause, of an acknowledgment that the possession of territory by some entity is legitimate. Their delimitation, after all, proceeds on the assumption that there are legitimate entitlements on either side. Territory, by contrast, seems to be a pre-condition for the assertion of rights of property in relation to territory insofar as it concerns the very existence of the legal subject.

This distinction between the territory of a state and its boundaries is an undoubtedly appealing one. It opens up the possibility, in particular, of addressing ongoing disputes over the location of borders (often determined by reference to the classical 'modes' by which territory might be acquired such as discovery, cession, annexation, occupation or prescription<sup>32</sup>) without, in the process, continually calling into question the identity of the states whose borders are the subject of dispute. It would be almost absurd to argue, for example, that the alteration of the UK's jurisdiction that occurred as a consequence of its assertion of sovereignty over the Island of Rockall in 1972 (following an earlier claim to its 'possession' in 1955) was such as to affect its legal identity and therefore require it to apply afresh for membership in the UN.

At the same time, however, it is clear that radical changes to borders can sometimes have precisely that effect. In 1992, for example, Serbia-Montenegro was denied the right to style itself, in the form of the 'Federal Republic of Yugoslavia', as the continuation of the collapsed Socialist Federal Republic of Yugoslavia (in the same way that Russia represented itself as the continuation of the former USSR). The international community refused to accept its claim that Croatia, Bosnia-Herzegovina, Macedonia and Slovenia had 'seceded' from Yugoslavia, leaving Serbia-Montenegro as its remaining 'rump' state. On the contrary, the Badinter Commission in 1991 characterised the situation as one of Yugoslavia's 'dissolution' rather than secession, and in consequence, Serbia-Montenegro was forced, like the other former Yugoslav states, to reapply for UN membership as a different state (see Blum, 1992).

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<sup>31</sup> *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p. 3, para. 46.

<sup>32</sup> For a classical account of the modes of acquisition of territory see Jennings (1963)

Borders, as this suggests, are not merely lines on the ground, or ways of delimiting spheres of public jurisdiction. Instead, they serve to delimit both the identity and existence of a political order by means of its separation from others – the ‘non-democratic condition of democracy’ as Balibar puts it.<sup>33</sup> The supposition, thus, that the existence of borders and the existence of territory are radically different things is hard to sustain. In case of the emergence of Israel in 1948, for example, it was not merely the case that *some* of its borders were in question at the time of its recognition and admission to the United Nations, but *all of them* given that it had been carved out of the defunct Mandate for Palestine. What was undoubtedly of significance here is the general atmosphere of uncertainty that had been generated, amongst other things, by the Security Council’s failure to endorse the General Assembly’s earlier plan for Palestine’s partition, outlined in Resolution 181(II) of 1947, and the apparent termination of the Mandate occasioned by the unilateral withdrawal of the British administration. Since the status of Palestine, as a former mandated territory awaiting recognition, was *itself* in flux at that time, there appeared to be no ‘effective’ interlocutor able to claim that recognition of the new state of Israel constituted a violation of its own territorial sovereignty (even though there were clearly arguments to be made on the part of the Palestinian population generally). The result was such as to allow a space for recognition of the state of Israel to open up without, it seems, the kinds of qualms associated with premature recognition that would naturally have arisen in other contexts. This move was not, of course, universally welcomed. Far from recognising Israel as a state, the Arab states launched a war against it, the result of which was Israel’s occupation of a still-larger area of mandatory Palestine. Israel’s application for UN membership was accepted nonetheless on 11 May 1949, although even these newly-enlarged borders had yet to be fully confirmed. What this example seems to suggest is that the criterion of territory like that of population, operates less as an empirical observation as to the existence of an accepted factual condition, than again as a metaphorical assertion: the state must exist ‘as if’ it possessed territory with determinate boundaries. If that is so, then it might also be the case that it is in the theatrical performance of statehood – through, amongst other things, the rituals of recognition, admission, flying the flag, building walls and policing borders – that states come to acquire the territory that supposedly conditions their existence (Brown, 2014).

### **C. INDEPENDENT GOVERNMENT**

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<sup>33</sup> Balibar E., *We the People of Europe: Reflections on Transnational Citizenship* (2004) p.



For all of the aporias associated with the requirements of territory and population, those addressing the criteria for statehood are unified on one matter above all else: that the criteria for statehood are ultimately directed towards the recognition of 'effective' governmental entities.<sup>34</sup> Effectiveness in this context is generally taken to mean that the government of a putative state must demonstrate unrivalled possession and control of public power (whatever the specificities of that might be in any particular setting) throughout the territory concerned. Once that unrivalled possession is established, recognition of statehood may follow. This emphasis upon governmental effectiveness forms a key part of Crawford's thesis. Given that 'nationality is dependent upon statehood, not vice versa' and that territory is defined 'by reference to the extent of governmental power exercised', 'there is a good case', he suggests, 'for regarding government as the most important single criterion of statehood, since all the others depend upon it' (Crawford, 2006, p. 56).

Crawford's argument doesn't stop here though. His purpose is not simply to point out that, as the Commission of Jurists maintained in the *Aaland Islands* case, a new state only comes into existence once it is 'strong enough to assert [itself] throughout the territories of the state without the assistance of foreign troops.'<sup>35</sup> Rather, it is to suggest that this criterion of effectiveness operates as a legal principle in its own right, the effect of which is conditioned by other relevant principles of international law, and in particular by norms having the status of *jus cogens* such as the right of peoples to self-determination and the prohibition on the use of force. This leads Crawford to a hypothesis which cuts in two directions. On the one hand, he maintains that the reason why certain relatively effective political entities, such as the Turkish Republic of Northern Cyprus or Southern Rhodesia, were not recognized as independent states was that to have offered such recognition would have violated certain *jus cogens* norms. On the other hand, he also argues that where *jus cogens* norms like self-determination do apply, they are able to displace the criterion of effectiveness, allowing certain 'ineffective' states to be recognised nonetheless.

In this latter context, Crawford cites, by way of illustration, the case of the Belgian Congo which was granted a hurried independence in 1960 as the Republic of the Congo in circumstances in which little preparation had been made for independence

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<sup>34</sup> Lauterpacht, 1947, pp 340-1: 'The principal and probably the only essential condition of recognition of States and governments is effectiveness of power within the State and of actual independence of other States. Other conditions are irrelevant to the true purposes and nature of recognition.'

<sup>35</sup> LNOJ, Sp Supp. 4 (1920) pp. 8-9

and in which public order broke down shortly after (with secessionist factions seeking their own independence in Katanga and elsewhere). Belgian troops were reintroduced into the territory under the guise of humanitarian intervention and the United Nations responded by establishing ONUC (the United Nations Operation in the Congo) for purposes of restoring order whose mission continued until 1964. As Crawford puts it '[a]nything less like effective government it would be hard to imagine. Yet despite this there can be little doubt that in 1960 the Congo was a state in the full sense of the term' (Crawford, 2006, p. 57). Its admission to the United Nations for membership had already been approved and UN action had been taken on the basis of preserving the 'sovereign rights of the Republic of the Congo'. Crawford suggests ultimately that there were three possible ways of interpreting this practice: (i) that the international recognition of the Congo was simply premature because it did not possess an effective government; (ii) that international recognition of the Congo had the effect of creating a state despite the fact that it was not properly qualified (ie. that recognition was thereby 'constitutive'); or (iii) that the requirement of 'government' was, in certain particular contexts, less stringent than might otherwise be thought.

Crawford's clear preference is for the third of these three options and he explains the position as follows:

'by withdrawing its own administration and conferring independence on local authorities, Belgium was precluded from denying the consequences of its own conduct. Thereafter there was no international person as against whom recognition of the Congo could be unlawful. It is to be presumed that a new State granted full and formal independence by a former sovereign has the international right to govern its territory.... On the other hand, in the secessionary situation the position is different. A seceding entity seeks statehood by way of an adverse claim, and in general statehood can only be obtained by effective and stable exercise of governmental powers.' (Crawford, 2006, pp. 57-8)

It is important to understand the role assigned to the idea of effectiveness here. To begin with, it is presented as a general principle of international law – it is not, in that sense, a 'law creating fact' (as might be expressed in the phrase *ex factis ius oritur*), but simply a circumstantial trigger that produces certain legal consequences. Effectiveness, furthermore, is not sufficient on its own: just as some effective entities have not been recognized as states (such as Taiwan whose recognition as an independent state has been almost permanently deferred as a consequence of the claims made by China over its territory), so also other less-than-effective entities have

continued to be regarded as states despite that condition (and one may mention here both states under a condition of belligerent occupation such as the Baltic Republics between 1940 and 1990 and Kuwait in 1990-91, and states which, like Lebanon and Burma in the 1970s, have experienced extended periods of internal turmoil). Effectiveness, in other words, is supposed to operate as a principle the parameters of which are legally determined and may, at that level, interact with other relevant principles.

Yet it is equally clear that the further one goes in seeking to juridify the condition of 'effective government', the more clearly one exposes the inevitable tension between a legal principle that seeks to allow for the recognition of new aspirant entities once they have become legal 'facts', so to speak, and one that prohibits any such recognition as a violation of the territorial sovereignty of the state from which that entity is to emerge. In the 19<sup>th</sup> Century, the criterion of effectiveness was intimately linked with the idea of premature recognition. If a third state were to recognize an insurgent movement as an independent state before the moment at which they had fully established themselves, that recognition would constitute 'a wrong done to the parent state' and, indeed, 'an act of intervention' (Hall, 1895, p. 89).<sup>36</sup> European powers were, thus, very cautious when addressing the recognition of the new states in South America, for example, frequently modulating their response by reference to what seemed to be happening on the ground. Usually the insurgent communities were initially recognized *de facto*, with *de iure* recognition coming only once it was clear that Spain had given up the fight. The importance of effectiveness, in such a context, was found in the way in which it served to mark the moment at which the rights of the parent state gave way in the face of those of the secessionist movement. But an examination of the practice indicates that effectiveness never really meant quite the same thing in every place.<sup>37</sup> What was required in order to establish territorial sovereignty depended upon the nature and strength of rival claims. Thus, a relatively ineffective Congo Free State, for example, could garner recognition in 1885 simply because of the apparent absence of any other recognized sovereign whose

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<sup>36</sup> In practice, even the intermediary step of recognizing insurgents as belligerents, as Britain and France did in relation to the secessionist states in the American Civil War of 1861-5, was frequently treated as an unjustified intervention.

<sup>37</sup> *Island of Palmas Case*, (1928) 2 RIAA 829 per Huber: 'Manifestations of territorial sovereignty assume... different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas.'

rights would be impeded in the process (the local communities having, it was claimed, 'conceded' their sovereignty to King Leopold by way of treaties of protection). Considerably more was required for the recognition of the new Republics in Latin America when it was the sovereignty of another European power (Spain) being displaced. For all the subtle modulations of this early practice, however, such arguments clearly became more problematic in the course of the 20<sup>th</sup> Century once it came to be accepted that the use of force was no longer a legitimate means of acquiring title to territory.<sup>38</sup>

Given that the general prohibition on the use of force seems to prohibit also the annexation of territory, it is very hard to see how one might legitimate the establishment of a state on the territory of another by that means (*ex inuria ius non oritur*). Even though the unilateral use of force was still, under the League of Nations, merely restricted rather than prohibited outright (as it has been since 1945), the case of Manchukuo offers a useful illustration. When Japan invaded the Chinese territory of Manchuria in 1931 and declared a new, supposedly independent state of 'Manchukuo' in its place, the Lytton Commission was dispatched there by the League of Nations on a fact-finding mission. The Commission concluded that the Japanese action was inconsistent with both the League's Covenant and the Kellogg-Briand Pact (Japan and China being signatories to both) and that Manchukuo itself, far from being independent, remained largely under Japanese control. This report underpinned the subsequent articulation of the 'Stimson doctrine', the substance of which affirmed the refusal of the United States (and those states which followed it) to 'admit the legality of any situation *de facto*... which may impair... the sovereignty, the independence, or of the territorial and administrative integrity of the Republic of China' when that situation had been brought about by means contrary to the Pact of Paris.<sup>39</sup> Several League of Nations resolutions were adopted on this basis calling for the non-recognition of 'Manchuko' and the 'state' was finally dismantled in 1945, following Japan's defeat in the Second World War. Likewise, the Turkish Republic in Northern Cyprus, established as a purportedly independent state following the Turkish intervention in 1974, has consistently been denied recognition, principally, once again, on the basis that its creation was the product of an unlawful military intervention.<sup>40</sup> Similar arguments were also put forward by Bosnia in its memorial in

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<sup>38</sup> See article 2(4) UN Charter; Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, GA Resn. 2625(XXV), (24 October 1970), Principle 1. See generally Korman 1996.

<sup>39</sup> 1 Hackworth 334

<sup>40</sup> See *Cyprus v Turkey* [GC] no 2571/94, ECHR 2001-IV, 120 ILR 10.

the *Genocide Case* which maintained that the Republica Srpska was not a state in part at least because its creation was associated with a violation of the prohibition on the use of force on the part of Serbian forces.<sup>41</sup>

It is worth noting, in this context, that the prohibition on the use of force has been instrumental not merely in resisting the establishment of 'puppet' regimes, but also in preserving the formal 'continuity' of states during periods of occupation. The Baltic Republics (Estonia, Latvia and Lithuania), for example, were occupied by the Soviet Union in 1940 and incorporated into the Union. A good many states refused to recognise the legality of the incorporation (Ziemele, pp. 22-27) and when in 1990 the Supreme Councils of the three Baltic states resolved to 're-establish' their independence (which involved the re-invocation of laws pre-dating the occupation and the rejection of obligations assumed on their behalf by the Soviet Union) the EC adopted a Declaration welcoming 'the restoration of sovereignty and independence of the Baltic states which they had lost in 1940' and resolving to re-establish diplomatic relations with them.<sup>42</sup> The prohibition on the use of force, in other words, seems to work not only as a way of denying the recognition to what might otherwise be regarded as effective entities, but also as a way of keeping alive (as a formal idea at least) states which have been the subject of occupation and annexation and which are, to all intents and purposes, therefore 'ineffective'. One may recall, to cite another pertinent example, that the first Gulf War of 1990 was authorized by the Security Council in Resolution 678 (29 November 1990) on the basis of seeking to protect and secure the territorial integrity and political independence of Kuwait. The presumptive illegality of Iraq's invasion of Kuwait made it possible to presuppose the latter's continued existence as a State and in this way to authorise intervention on the basis of collective self-defence, despite the fact that Kuwait's government had been effectively displaced by that of Iraq.

The question remains, however, as to what will become of the principle of governmental effectiveness if it really is, as Crawford suggests, being systematically displaced by the emergence of *jus cogens* norms – in the post-1945 period in particular. On one side, one may note an increased willingness to recognize as states (for one reason or another) entities that are in some respects ineffective. One may recall in recent years, for example, that both Bosnia-Herzegovina and Croatia were recognized by the EC as independent states in 1992 at a time at which the

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<sup>41</sup> Memorial of the Government of the Republic of Bosnia and Herzegovina, 15<sup>th</sup> April 1994, p. 264.

<sup>42</sup> 7/8 Bull EC (1991) 1423.

governments concerned had effective control over only a portion of the territory in question (Rich 1993). On the other side, however, it is hard to think of many examples of new states emerging and being recognized simply because they have managed to secure their independence 'effectively' – that is, as a matter of fact. Over the past decade alone, Abkhazia, South Ossetia, Azawad, South Sudan, Donetsk and several other entities - not to mention 'Islamic State', and of course 'North Sudan' – have all declared their independence under governments (or at least under leaders) which arguably did possess 'effective' control over a particular territory, and yet none of these entities has been recognised as states by more than a few member of the international community. At the time of writing, it seems imminent that Catalonia and Iraqi Kurdistan are about to do the same. Even when it does seem possible that a new state has emerged – in the disputed case of Kosovo, for example, which declared its independence in 2008 – the principle of effectiveness is not usually employed as the definitive explanation. Other frameworks, such as consent, self-determination or disintegration, are usually deployed in its place as a means of displacing the claims of the territorial sovereign. Arguably the most problematic cases were those of Bangladesh and Eritrea, the recognition of which could not easily be framed in terms of the standard understanding of self-determination. Yet even here, commentators have tended to seek some other interpretive framework for explaining such practice: relying, for example, on the idea that Eritrea had been unlawfully seized by Ethiopia, and that Bangladesh had been effectively governed as a non-self-governing territory by Pakistan (a case 'approximating' colonial rule) and could therefore claim a right of self-determination.

This tendency towards the promotion of an exclusively 'juridical' idea of statehood in which questions of effectiveness are routinely subordinated by reference to other legal principles has been noted in the work of Jackson and Kreijen, among others. For Jackson (1990, pp 21-31), decolonisation marked the moment at which the notion of sovereignty increasingly took on a negative cast (as implying merely freedom from external interference as opposed to a positive capacity to act), leading to the recognition of what he calls 'quasi-states'. These are states which, because of their precipitous independence, were given the imprimatur of statehood before they had developed the necessary internal capacity for political self-government and economic independence – that is, before they had become effective. A similar stance is adopted by Kreijen who speaks of this change in terms of the 'transformation of the notion of independence from an inherently material concept based on internal sovereignty to a mere formal legal condition primarily depending on external

recognition' (Kreijen, 2002, p 92). For Kreijen, this 'juridification of statehood' was a situation that demanded ameliorative action on the part of the international community, through the recognition of a right to development, or the reintroduction of the notion of trusteeship into international law.

Such reflections draw, obviously enough, upon themes embedded within the old 19<sup>th</sup> Century 'standard of civilization, and those same themes have been given further impetus in more recent debates over so-called 'failed' or 'fragile' states. The origin of this debate can be traced by to an influential article by Helman and Ratner (1992), in which they were to identify, as a new phenomenon in international relations, a class of 'failed' or 'failing states'. Failed states, for their purposes, were states such as those like Somalia, Sudan, Liberia and Cambodia, in which (in their terms again) civil conflict, government breakdown and economic privation imperilled their own citizens and threatened their neighbours 'through refugee flows, political instability, and random warfare'. The designation of such states as 'failed', of course, was not simply a neutral exercise in description or diagnosis, but formed a necessary prelude for the adumbration of a series of intrusive policy recommendations the central feature of which was the proposed introduction of a system of 'United Nations Conservatorship' along the lines subsequently established in East Timor, Bosnia-Herzegovina and Kosovo for purposes of national, post-conflict, reconstruction.

Whilst for Helman and Ratner, the idea of state 'failure' was one that recommended reconstructive activity, in other hands, it has formed the basis for advocacy of a 'preventive' system including the imposition of sanctions upon such states and their exclusion from membership in international organizations (Rotberg, 2002). In some cases, indeed, the notion has even been employed as the basis for a refusal to recognize or implement treaty obligations.<sup>43</sup> As Simpson points out, such ideas are redolent of those abounding at the end of the 19<sup>th</sup> Century in which critical differentiations were made between different kinds of state and other polities (deemed 'civilized', 'semi-civilized' or 'barbarous') for the purpose of legitimating a range of different kinds of intervention (Simpson, 2004, pp. 240-242). On such a view the re-emergence of this 'liberal anti-pluralist' theme within international legal doctrine (in which the principles of territorial sovereignty and sovereign equality are routinely downplayed or excised) recalls the intellectual structures of 19<sup>th</sup> Century imperialism (Gordon 1997). Yet it is also run through with many of the same kinds of

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<sup>43</sup> See Yoo, Memorandum, 9 January 2002 explaining that the Geneva Conventions did not apply because Afghanistan was a failed state.

contradictions. Just as 19<sup>th</sup> Century international lawyers struggled with the problem of having to simultaneously recognise and deny the status of political communities in the extra-European world, so those invoking the notion of state ‘failure’ seem to maintain in place the idea that they are indeed still states for purposes of attributing responsibility for their condition, yet not entitled to the normal prerogatives of sovereignty that the intervening states would expect for themselves. As Crawford succinctly concludes, ‘[t]o talk of States as “failed” sounds suspiciously like blaming the victims’ (Crawford, 2006, p. 722).

One way to make sense of this discourse of failure, however, is to notice how it subtly shifts attention away from standard questions as to the ‘intensity’ and ‘exclusivity’ of governmental effectiveness towards its implicit content. According to Crawford, ‘international law lays down no specific requirements as to the nature and extent of [governmental] control, except that it include some degree of maintenance of law and order and the establishment of basic institutions’ (Crawford, 2006, p 56). Yet this definition clearly offers little assistance in the task of distinguishing a government from some other kind of social arrangement – whatever ‘government’ is not. One might ask, in that respect, what type of control counts as ‘law and order’, and what administrative arrangements meet the benchmark of ‘basic institutions’? One does not have to dig too deeply, in fact, to find an answer. In a wealth of cases, from the ‘unequal treaties’ concluded with the Chinese Empire in the late-19<sup>th</sup> century, to the ‘minorities treaties’ concluded with the ‘national states’ of Central and Eastern Europe after the First World War, to much more recent efforts at ‘state-building’ in the Balkans and elsewhere, states have only been recognised as such if, and to the extent that, they have put in place an administrative regime that is capable of protecting a narrow set of individual rights – to personal security, to equal treatment and the protection of property (Parfitt, 2016). The implicit telos of ‘government’, in such cases, has been the establishment of such minimal conditions as might be required to enable global commerce to progressively extend its reach alongside, and within, the armature of the state.

What was evidently missing from this, was any sense that governments might be assessed on their willingness and capacity to minimise hunger or poverty, redistribute wealth, offer universal free education or protect the environment. Even the recent trend towards conditioning recognition upon the implementation of provisions concerning human rights - as in Kosovo and Bosnia-Herzegovina, for example – manifests the same orientation. For example, the ill-fated Comprehensive



Proposal for the Kosovo Status Settlement proposed in February 2007 by the then-UN Special Envoy Martti Ahtisaari, suggested that Kosovo should, as a condition of its recognition as an independent state, commit itself to becoming ‘a multi-ethnic society’, governing itself ‘democratically and with full respect for the rule of law through its legislative, executive and judicial institutions’. In addition, furthermore, to protecting ‘the highest level of human rights’, it was also expected to create ‘an open market with free competition’, compliance with which would be subject to the ongoing ‘supervision’ by the ‘international community’.<sup>44</sup> ‘Effective government’, here, retains the same valence ‘effective occupation’ did in the 1885 Berlin Act’s stipulations regarding the validity of European claims to sovereignty in the Congo Basin – it requires the creation and maintenance of a minimal legal framework required for commodity production and exchange. And it is in that connection that the implicit sub-text of the regime of statehood begins to become apparent: to be a state is to be capable of participating in the global market, and enabling the continued reproduction of conditions that underpin the unequal global distribution of wealth, power and pleasure (Parfitt, forthcoming, 2018).

#### **D. RECOGNITION**

If, as suggested above, one of the primary objectives of the Pan American Union in drafting the Montevideo criteria was to marginalise, or even eliminate, the practice of recognition as a way of regulating the admission of non-European states into the international legal order, it could not succeed in rendering ‘statehood’ an entirely objective category. After all, as critics of the ‘declaratory’ position have argued, however confidently a political community might believe itself to have fulfilled the criteria for statehood, it is only through acceptance of that fact by other states that this belief becomes effective. To such critics, it is meaningless to assert that Somaliland, the ‘Republic of Artsakh’, or indeed ‘Islamic State’ *are* states if no other states are prepared to treat them as such. Those, by contrast, who continue to defend the declaratory approach point to the political and discretionary character of recognition – to the fact that, as in the *Tinoco Arbitration*, a state like the UK may refuse to recognize another (government in that case) not because of any perceived defect in origin or competence, but simply because it does not wish to have diplomatic relations with it.<sup>45</sup> The determinants of statehood must, they argue, be posited as anterior to the practice of recognition (even if the latter may be thought to

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<sup>44</sup> Ahtisaari Plan, (2007) Art. 1, “General Principles”, paras. 1.1-1.4, 1.11.

<sup>45</sup> *Tinoco Arbitration (Costa Rica v Great Britain)* (1923) 1 RIAA 369; (1924) 18 A.J.I.L. 147, at p 154.

provide evidence for the former), simply in order to guard against the risk that recognition might be deployed (or withheld) for political purposes. The real difficulty arrives, of course, when it comes to entities like Palestine and, more recently, Kosovo, which are both recognised and unrecognised by numerous states. Are they states for the purposes of some members of the international community and not for others, as the constitutive position would suggest? Or are they states regardless of their non-recognition by other members of that community, having met the criteria for statehood as judged by some external arbiter, as the declaratory position would suggest – without, however, supplying a satisfactory answer as to who, if not states themselves, that arbiter must be?

To a large extent these respective positions on the question of recognition turn, not so much on the question as to whether the existence of a state is a self-expressive fact, or upon the fulfilment or lack thereof of the requisite criteria, but upon the analytical relationship between the two elements of ‘status’ and ‘relations’. In one (the declaratory approach) these are kept distinct: the question of status has to be determined prior to the creation of relations with others. Only those entities fulfilling the requisite criteria can be said to have the capacity to enter into legal relations with others as states. In the other, the two issues are merged such that the existence or otherwise of such relations becomes the mode by which status is determined. Only those entities having relations with other states can be assumed to have the legal capacity to do so. The difficulty with the declaratory position is that it seeks to maintain both the idea that the creation of states is rule-governed, and that the conferral or withholding of recognition is an essentially political and discretionary act. To postulate the existence of a rule, but then deny it any ground for being applied is to rely rather heavily upon the self-executory character of formal rule. The difficulty with the constitutive position, by contrast, is that it seeks to maintain that the conferral or withholding of recognition is a legal act (or at least one with legal effects) but that in the absence of either a ‘duty to recognize’ (as asserted by Lauterpacht, 1947) or of the existence of an agency competent to adjudicate (as asserted by Dugard, 1987), then allows the question of status to become entirely dependent upon the individual position of the recognizing states. The best one could say from a constitutive position, in any particular context, was that a political community was ‘more or less’ a state.

For the most part, although many profess to prefer the ‘declaratory approach’,<sup>46</sup> doctrine on recognition remains fundamentally ambivalent on most of these key questions.<sup>47</sup> There are two particular difficulties. To begin with, it is clear that recognition of another state will have certain legal implications: it implies, at the very least, a commitment to respect the sovereignty and territorial integrity of the state it has recognized and will also have a range of domestic legal consequences as might concern the recognition of its law and legal transactions occurring within its jurisdiction. By the same token, it is almost universally held that recognition will not necessarily imply a willingness to enter into diplomatic relations with that other state nor indeed, a recognition of its government (prior to 2001, for example, only three states recognized the Taliban as the government of Afghanistan, yet there was no doubt that all recognized the state of Afghanistan). But it is not always easy to dissociate the fact of recognition from the idea of political approval. In the context of governmental recognition (relevant primarily in case of those governments establishing their authority by unconstitutional means) this issue led to the enunciation by the Mexican Secretary of Foreign Relations of what became known as the ‘Estrada Doctrine’ the effect of which was to recommend the recognition of all effective governments irrespective of the means by which they came to power (Jessup, 1931). However, it was inevitable that there would always be question of interpretation in cases in which two (or more) rival governments found themselves competing for power. It is perhaps no wonder, then, that the policy of formal governmental recognition has gradually be abandoned (for a critique, see Talmon, 1998 3-14).

The difficulty of separating law from policy/politics, however, has not been confined to governmental recognition, but has also influenced practice in relation to the recognition of states. Whilst, as we have seen, non-recognition has often been employed as a way of signalling the international community’s condemnation of attempts to subvert processes of self-determination or to establish new states by recourse to force, the fact that it is also still seen to be an essentially ‘discretionary act that other states may perform when they choose and in the manner of their own

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<sup>46</sup> Article 3: ‘The political existence of the state is independent of recognition by the other states’; and article 6: ‘The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law’. See also, Badinter Commission, Opinions 8 and 10, 92 ILR 201, 206 (1992).

<sup>47</sup> See Brownlie, (1982) 197: ‘in the case of “recognition”, theory has not only failed to enhance the subject but has created a *tertium quid* which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation’.

choosing'<sup>48</sup> makes it a somewhat haphazard semeiotic device. In an enlightening typology, Warbrick (1997, pp. 10-11) explains that the mere statement 'We (State A) do not recognize entity X as a State' has at least five possible meanings:

- (1) We take no decision, one way or another, about recognizing X [in A's eyes, X may or may not be a State];
- (2) We have chosen not to recognize X (although we could do) for political reasons not related to X's status [by implication, A does consider X to be a State];
- (3) We do not recognize X because it would be unlawful/premature for us to do so [A does not regard X as legally a State];
- (4) We do not recognize X, although it might (appear to) be a State, because there are customary law obligations or specific treaty obligations which prohibit us from doing so;
- (5) We do not recognize X, although it might (appear to) be a State, because there is a specific obligation imposed by the Security Council not to do so.

Much would seem to depend, thus, upon how the recognising state characterises or understands its own actions. Only by looking behind the refusal to recognise might one determine a difference in stance, for example, between the refusal to recognise the Turkish Republic of Northern Cyprus or, more recently, the 'breakaway Republics' of Abkhazia and South Ossetia (informed, it seems, by a reflection upon the illegality – respectively – of the Turkish intervention in Cyprus and Russian intervention in Georgia) and the similar refusal to recognize the former Yugoslav Republic of Macedonia in early 1992 (informed, it seems, by an unwillingness to prejudice diplomatic relations with Greece). In some cases, however, the position is simply opaque. It was never entirely clear, for example, as to whether those Arab states which refused to recognize the state of Israel before 1993 really believed that Israel *was* not a state (and hence was not bound by the various treaty obligations to which it was a party), or whether they merely desired to make clear that it *should* not exist as a state, even if it did so in fact. If it is necessary to read recognition policy symptomatically – that is, as an expression of a particular standpoint that might, or might not, be made explicit – then it becomes increasingly difficult to disentangle those considerations that bear upon the question of legal status, and those that apparently do not.

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<sup>48</sup> Badinter Commission, Opinion No. 10 of 1992, 92 ILR 206, p. 208.

Bearing this out, even states taking a firm position in seeking to avoid recognition of a state (and hence avoid any sense of condoning its existence) have found themselves, in practice, unable or unwilling to live with the consequences. In refusing to recognise Israel, for example, few of the Arab states were willing to accept as a consequence of that non-recognition that Israel was not bound by the Geneva Conventions of 1949 in relation to its occupation of the West Bank and Gaza, or that it was otherwise free to ignore general principles of international law governing the use of force. More generally, domestic courts have also frequently sought to avoid the consequences of non-recognition policies, and have resorted to a variety of different expedients to allow judicial cognition of the laws of what are formally unrecognized states. In the *Carl Zeiss Case*, for example, the House of Lords avoided the obvious consequences of the British government's refusal to recognise the German Democratic Republic by treating the legislative acts of the GDR as essentially those of the USSR.<sup>49</sup> Similarly, in *Hesperides Hotels*, Lord Denning adopted a policy, already well established in the United States, of allowing recognition of the laws of unrecognized states (in that case the Turkish Republic of Northern Cyprus) insofar as they related to 'the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth'.<sup>50</sup> In the UK, in fact, this latter policy has come to find formal expression in the Foreign Corporations Act of 1991 which states that foreign corporations having status under the laws of an unrecognized state may nevertheless be treated as a legal person if those laws are 'applied by a settled court system in that territory'. In each of these cases, an important consideration seems to have been a concern to insulate the 'innocent' population from the 'illegalities' associated with the claims to authority on the part of their governments. But they also illustrate in some ways a continued prevarication between the need, on the one hand, to recognise 'effective' entities whilst, on the other, to ensure at least the semblance of some commitment to the legal values that a refusal to recognize might have embodied. Just as, in the past, the distinction between recognition *de iure* and recognition *de facto* allowed states the opportunity to have dealings with insurgent governments without, at the same time, being seen to implicate themselves to overtly in an act of intervention, so also the more recent practice of recognising the acts of certain governments whilst not recognising their claims to statehood underlines the point made above, that legal doctrine has consistently sought to embed both law and fact within itself – at the price of an apparently chronic normative instability.

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<sup>49</sup> *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853. See also *Gur Corporation v Trust bank of Africa* [1987] 1 QB 599.

<sup>50</sup> *Hesperides Hotels Ltd v. Aegean Turkish Holidays Ltd*, [1978] QB 205, p. 218.

To illustrate the point, if doctrine on statehood and recognition seems to admit the necessity of a constructive ambiguity, perhaps the most obviously anomalous (or is that representative?) case is that of Taiwan, or the 'Republic of China' (ROC), as it is known officially (Crawford, 2006, pp. 198-221). In 1949, the Nationalist government of what was then the Republic of China, the Kuomintang, fled mainland China during the civil war and took up residence on the island of Taiwan. Until 1971, it continued to be recognised as the official Chinese government, to the extent of occupying China's permanent seat on the Security Council. In 1971, however, Taiwan was removed from the United Nations and its seat was taken up, instead, by the Government of the People's Republic of China (PRC), which had been in *de facto* control of mainland China since 1949, and gradually from the late 1970s onwards states transferred their recognition from the government of the ROC to that of the PRC. The government of Taiwan (the ROC) has never entirely renounced its claim to being the government of China as a whole, however; and nor has it, for this reason, asserted its existence as an independent state unequivocally. Taiwan, nevertheless, has many dealings with other states, largely on the same basis as any other state (but without the same diplomatic privileges). Taiwanese government agencies are often regarded as having legal status in other countries and a capacity to sue and be sued. It is a party to a number of treaties and has membership in the WTO (as a 'Separate Customs Territory' under the name 'Chinese Taipei'). In the UK, Taiwanese corporations are allowed to do business under the terms of the 1991 Foreign Corporations Act 'as if' Taiwan were a recognized state, and in the US relations have largely been 'normalised' under the terms of the Taiwan Relations Act 1979 which seeks to implement the policy of maintaining 'unofficial relations'. So extreme is the mismatch between Taiwan's formal claims and effective status that '[i]t is surprising' as Crawford observes 'it does not suffer from schizophrenia'. (Crawford, 2006, p. 220) The same might be said of international lawyers more generally.

#### **IV. SELF-DETERMINATION**

As we have already seen, one of the key characteristics of the idea of the state as it was to emerge in social and political thought from the time of Grotius onwards was that it was never solely reducible to the authority of the ruler or government of the time. The idea of the state was always organised by reference also to a community, society or nation in relation to which governmental authority would be exercised. It is no accident, thus, that 'international law' acquired the designation, attributed to it

by Bentham, rather than 'inter-state' law or 'inter-sovereign' law, for example. The *ius gentium* was always seen as the law between nations or societies as much as a law between sovereigns, and the term *civitas* or *respublica* more often than not merely denoted the internal relationship between one thing and the other. Nevertheless, there were two immanent traditions of thought which informed this relationship between nation and state as they were to develop (Skinner, 2004, pp 368-413). One of these was a tradition of civic republicanism that conceived of sovereign authority as a product of relations between individuals existing within the frame of a pre-conceived society (exemplified most clearly in the theory of the social contract). The other was a 'communitarian' or 'romantic' tradition that emphasised the corporate character of the society or nation, the institutional expression of which would be the state (exemplified in Pufendorf's characterisation of the state as a 'moral person'). In both cases, the 'nation' remained an important idea – on one side as the social frame that would emerge out of the contract of sovereignty; on the other side as a natural community endowed with certain innate ends and prerogatives (and, indeed, perhaps an independent 'will'). In neither case, however, was the nation entirely reducible to the state itself.

As noted above, over the course of the 19<sup>th</sup> Century, and in particular in the immediate aftermath of the First World War, these two themes came to be summarised in a single verbal expression, that of 'national self-determination'. Far from resolving the tension between them, however, the various iterations of this idea merely internalised and reproduced the two traditions. Those who associated themselves with the tradition of civic republicanism (with its roots in the enlightenment and the work of those such as Kant), conceived of self-determination primarily in terms of representative self-government: it being the promotion of individual liberty through the technique of self-rule that was sought. Here, the nation was not so much a condition or pre-supposition, but something that was to be developed through a practice of self-rule marshalled by the state – it was, the state, as Bourdieu put it, that was charged with making the nation rather than the other way round. (Bourdieu, pp. 346-52) By contrast, the version of self-determination that came to be associated, in the early part of this period, with emergent nationalist thought in Latin America, Greece, Germany, Italy and elsewhere (sustained in the work of Herder, Fichte, and Mazzini amongst others) insisted that if this principle was to be realised, it was the nation that came first, and the state had to be mapped around it. It was, thus, the perfection of national society (whether determined by reference to racial, ethnic, religious, linguistic or historic homogeneity) that was to be

sought in the promotion of its self-determination. These two concepts of self-determination presented very different challenges to the existing order of sovereign states. The first presented a challenge to the authority of those government which sought to represent the will of their populations externally without necessarily being willing to make themselves responsible to them internally. The second offered an 'external' challenge to the spatial ordering of a dynastic European society and its failure to map itself congruously with the geography of 'nations' as they were to perceive themselves. These were not identical challenges by any means: the former appeared to confront the sovereign's authority with a criterion of legitimacy founded upon a rationalistic conception of representation, whereas the latter appeared to challenge even representative authority with a claim to power based upon group identity (Berman, 1987-88, p 58). In either sense, however, national self-determination was clearly the language of change and reform (see Cobban, 1945), at least until the full horror of its potential became clear, in later years, in the doctrines of *lebensraum*, *spazio vitale* and *Hakkō ichiu*.

It was in the reconstruction of Europe in the aftermath of the 1914-18 War, however, that the principle of national self-determination was to obtain its most concrete institutional expression. The agenda had been set by President Wilson in his speech to Congress in 1918 in which he famously set out the 'Fourteen Points' which he believed should inform the peace process. None of these points referred explicitly to the principle of national self-determination, but it was nevertheless made clear that boundaries in the new Europe should be configured so far as possible by reference to 'historically established' relations of nationality and allegiance. The Polish state was resurrected, Czechoslovakia and a Serb-Croat-Slovene state created out of the former Austro-Hungarian Empire and various other border adjustments made with provision for plebiscites in various locations. In many respects, however, it was an imperfect plan. On the one hand, it was always evident that the task of aligning political boundaries around the various 'nations' of Europe would be 'utterly impracticable', not simply because of the difficulties of determining which 'nation' deserved a state, but also because of their dispersed character (Hobsbawm, 1992, pp 131-141). This recommended two expedients – one being the forcible transfer of certain populations (between Greece and Turkey, for example<sup>51</sup>), the other being the institution of minority protection regimes within the various Peace Treaties in order to safeguard the position of those residual national communities that found

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<sup>51</sup> Convention Concerning the Exchange of Greek and Turkish Populations, Lausanne, January 30, 1923



themselves suddenly cut adrift from the 'kin state' to which they were thought naturally to belong (Fink, 2004; Claude, 1955, pp. 12-30). On the other hand, it was also evident that the Wilsonian project of self-determination was destined to be geographically limited – national self-determination was not something that was envisaged as being applicable in relation to the victorious powers themselves (e.g. for the Flemish, the Irish or Basques) or, indeed, to any of their colonies. Notwithstanding the promises made to Arab nationalists during the War, and the many non-European nations which sought recognition of their territorial claims at the Paris Peace Conference – from Ho Chi Minh on behalf of Vietnam, then part of French Indochina, to [Serif Pasha](#), representing the [Society for the Ascension of Kurdistan](#) – the closest thing to 'national self-determination' implemented outside Europe was the institution of the Mandate System.

If national self-determination was merely the implicit and rather contradictory premise behind the reorganisation of Europe after the First World War, it became a very much more explicit part of the settlement after the Second World War, though on quite different terms. The UN Charter identified respect for the principle of equal rights and self-determination of peoples as being one of the purposes of the Organization (Article 1). Meanwhile, Chapter XI of the Charter underlined the duty of administering states to foster self-government, development and the political, economic, social and educational 'advancement' of those peoples which had 'not yet attained a full measure of self-government'. In effect, while Chapter XII transformed the League's 'mandated territories' (and some others) into 'trust territories' under its 'administration and supervision', Chapter XI undertook (even to the extent of reproducing the language of the 'sacred trust') to transform *all* remaining colonies into the equivalent of 'Class A' mandated territories, whose 'free political institutions' metropolitan powers were duty-bound to 'develop' on a 'progressive' basis (article 73). The populations of such 'non-self-governing territories' had other ideas, however, and by 1960 decolonisation was well under way. As was made clear by the newly-enlarged General Assembly in a series of Resolutions beginning with the Declaration on the Granting of Independence to Colonial Territories of 1960, 'self-determination' was a right belonging to all colonies, entailing an obligation to take 'immediate steps...in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations'.<sup>52</sup> Over the course of the next 30 years most of those territories identified as 'non-self-governing' by the

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<sup>52</sup> GA Resn. 1514 (14<sup>th</sup> Dec. 1960), para. 5. See also, GA Resn. 1541 (15<sup>th</sup> Dec. 1960).

United Nations were to acquire their independence and become, as an important marker of their new status, members of the United Nations.

Whilst decolonisation was obviously to transform the membership of the UN, and radically re-shape the character and nature of its activities, the scope of the right of peoples to self-determination which emerged, remained unclear for some time. In one direction, the question as to whether self-determination was a principle applicable only in the context of decolonisation, or whether it might also legitimate secession in other contexts, remained unanswered. Apart from the problematic example of Bangladesh, which having seceded from Pakistan received UN membership in March 1972, UN practice seemed limited in that sense, but limited in a way that seemed to speak of pragmatism rather than principle. If what was in contemplation was the 'self-determination' of 'all peoples' as article 1(1) of the two UN Covenants on Human Rights affirmed in 1966,<sup>53</sup> then why did practice seem to restrict it only to those overseas territories that had formed part of the maritime empires of European states? Was it only in that context that one could speak of peoples being non-self-governing or subject to oppression or alien rule? And where (as the Ibo in Biafra and the Katanganese in Congo wondered) had the word 'national' gone?

It soon became apparent in the 1960s that the right to self-determination, understood as a right to opt for independent statehood, was not allocated on the basis of ethnic or linguistic homogeneity, but rather on the basis of pre-existing – that is, colonial – administrative boundaries. In some instances, the external boundaries of the colony defined the presumptive unit of self-determination – as, for example, in the case of Ghana or the Belgian Congo. In other cases, the extent of that unit was determined by reference to the internal boundaries that demarcated the different administrative units of a single colonial power, such as the boundary between Uganda and Tanganyika, for example. The principle, in this second case, came to be expressed in the phrase *uti possidetis iuris* ('as you possess under law') and had its origins in the somewhat hazy practice of boundary delimitation in Latin America. Following its implicit endorsement by the Organisation of African Unity's Heads of State and Government in 1964,<sup>54</sup> it subsequently came to be affirmed as 'a general principle... logically connected with the phenomenon of obtaining independence, wherever it

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<sup>53</sup> International Covenant on Civil and Political Rights (1966) Article 1(1); International Covenant on Economic, Social and Cultural Rights (1966), Article 1(1).

<sup>54</sup> 'Cairo Declaration on Boundaries', Organisation of African Unity Heads of state and Government, Cairo, July 1964, AHG/Res.16(1) 1964).

occurs' whose 'obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles'<sup>55</sup> (see generally Shaw, 1996). While it did provide a way of resolving the prior question of who 'the people' were, enabling them then to decide collectively on the shape of their political future, precisely what 'logic' strictly required obedience to the inherited parameters of colonial administration was not clear (Mutua, 1995). Certainly, however, an awareness of the role played by the minorities regime and by nationalism more generally in triggering the Second World War and subsequent genocidal practices, played no small part in the gradual abandonment of the idea of 'national' self-determination in favour of a self-determination of 'peoples'.

In many ways – as divided peoples like the Kurds, Zulu and Tamils, ethnic minorities within the new states like the Rohingya, and the Lozi, and Indigenous peoples throughout Australia, New Zealand, Canada and elsewhere could hardly fail to notice – the implementation of self-determination proved, in practice, to deliver far less than it had promised. If, as Berman puts it, the principle of self-determination challenged some of the most basic assumptions of legal thought 'by posing the problem of law's relationship to sources of normative authority lying beyond the normal rules of a functioning legal system' (Berman, 1988-89, p. 56), already by the 1980s it had already assumed a quiescent form. The more it came to be identified as a prosaic institutional practice, or as a pragmatic obedience to the determined character of existing boundaries, the less dangerous (and indeed less emancipatory) it seemed. As the Supreme Court of Canada subsequently clarified in 1992, the right *to be* a state (or at least to include that option on the list of possible outcomes) was, according to extant customary international law, possessed only in 'exceptional' situations, those being 'at best' in 'situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development' – the latter situation remaining, as we shall see, extremely contested.<sup>56</sup> In all other situations, the right to self-determination was an 'internal' one, amounting to 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state' (para. 126). Only through this distinction between 'external' and 'internal' self-determination, coupled with an increased emphasis placed upon the intrinsic relationship between 'internal' self-determination and the protection of individual and collective human rights

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<sup>55</sup> *Frontier Dispute, Judgment, ICJ Reports 1986*, 554, para. 20.

<sup>56</sup> Supreme Court of Canada, *Reference Re: Secession of Quebec*, 2 S.C.R. 217, para. 138.

(Cassese, 1995, pp. 101-140; McCorquordale 1994), can it now be construed as a right of 'all peoples'.

Yet if self-determination does, nonetheless, amount to a right to statehood at least in the 'exceptional' cases of colonialism and military occupation, this leaves open the question of how that right can be squared with the rights of existing states, and in particular with the right to territorial integrity. For some colonial powers, after all, the colony was still largely regarded as an inherent part of the metropolitan state (very much more so for Portugal and France, for example, than for Britain) the separation of which necessarily implied some diminution of the sovereign claims of the colonial powers. If this made the ('external') right of self-determination a difficult one to assert, the yet-to-be-determined status of claimant 'people' made it still harder. By its nature, the right of self-determination seemed to speak of a process of determining future status, rather than a status in its own right. This, as Berman notes, posed the question as to how international law could possibly 'recognize a right accruing to an entity which, by its own admission, lack[ed] international legal existence?' (Berman, 1988-89, p 52). The answer to that question, as it was to emerge during decolonisation, seemed to be that self-determination had a suspensive capacity the effect of which was to displace claims to sovereignty on the part of the parent state, and affirm, somewhat obscurely, the nascent claims to sovereignty on the part of the people whose future had yet to be determined. There was, in fact, a model for this idea already in place and which had already informed some of the practice of the ICJ in its deliberations on the question of sovereignty in case of Protected States (such as Morocco)<sup>57</sup> and Mandate territories. In the case of the latter, as McNair was to put it, the question of sovereignty seemed to lie in 'abeyance'.<sup>58</sup> The rights of the mandatory power, he suggested, were not those of a sovereign, but rather those enjoyed in virtue of agreement, to be exercised by way of the 'sacred trust' spoken of in Article 22 of the Covenant. Independence thus in no way implied a loss of sovereignty, or a violation of the principle of territorial integrity, on the part of the Mandatory power, but rather the fruition of a status temporarily subordinated by the fact of colonial administration. In that respect, the most remarkable feature of the process of decolonization was the much more generalised, and quasi-legislative, statement found in the General Assembly's Declaration on

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<sup>57</sup> *Case Concerning rights of nationals of the United States of America in Morocco, Judgment, ICJ Reports 1950, 172*, at p. 188 where, despite the French Protectorate, Morocco was declared to be 'a sovereign state'.

<sup>58</sup> *International Status of South West Africa, Advisory Opinion, ICJ Rep 1950, 146*, Separate Opinion of Judge McNair, p. 150.

Friendly Relations<sup>59</sup> which declared that ‘the territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, *a status separate and distinct from the territory of the State administering it*’ [emphasis added]. When approached from this angle, any apparent tension that existed between the General Assembly’s espousal of the principle of self-determination and its simultaneous reaffirmation of the principle of territorial integrity could be resolved by means of re-casting the relationship between the coloniser and the colonised.

If the principle of self-determination implied a suspension of claims to sovereignty on the part of the metropolitan state, it also entailed the non-recognition of attempts to subvert that process. Thus, for example, when a minority white regime in what was then Southern Rhodesia declared its independence from Britain in 1965, its unilateral declaration of independence was immediately condemned by both the UN General Assembly<sup>60</sup> and the Security Council. The latter called upon states not to recognise the ‘illegal racist minority regime’, and provided for a regime of sanctions to be imposed.<sup>61</sup> Similarly, but in a different context, when the South African government, in pursuit of its policy of apartheid, established the Bantustans of Transkei, Ciskei, Venda and Bophuthatswana in the years 1976-1981 under the pretext that this constituted an implementation of the principle of ‘self-government’, those claims were again rejected with the General Assembly and Security Council, condemning their establishment and calling for non-recognition.<sup>62</sup> Only in cases in which the subversion of self-determination came at the hands of another ‘newly independent state’ (eg. Goa, West Irian, East Timor and Western Sahara) was the reaction somewhat more muted or equivocal. The rubric of anti-colonialism, it seems, had somewhat less purchase in such cases.

If self-determination was the principal mode through which decolonisation was to be pushed forward in the 1950s and 60s, its significance was not to be confined to that era. On the one hand, there remained – and remain – several colonial and/or territories still under military occupation, for whom the enjoyment of a widely-acknowledged right to ‘external’ self-determination continues to be thwarted. Whereas the statehood of Namibia, first a German colony and then a South African mandated territory, was finally recognised in 1990, and whereas East Timor, once a Portuguese colony, at last achieved a troubled independence from Indonesian rule in

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<sup>59</sup> GA Res 2625 (XXV), (24 October 1970)

<sup>60</sup> GA Res. 2379 (SSVI), (28 October 1968).

<sup>61</sup> SC Res. 232 (16 December 1966); SC Resn 235 (29 May 1968).

<sup>62</sup> GA Res. 31/6A (26 October 1976); SC Resn. 402, (22 December 1976).

1999, the same cannot be said either for Western Sahara (a former Spanish colony, now occupied by Morocco), or, perhaps most notoriously of all, for Palestine. As Drew has pointed out, the turn to peace negotiations has arguably contributed to the problem, amongst other things by equalising the status of the two negotiating partners (Israel and the Occupied Palestinian Territories) and, in doing so, relinquishing the particular content of self-determination, whose purpose it is to elevate the rights of occupied people above the rights of the occupying power (Drew, 2001, p 681).

On the other hand, however, the international community has become increasingly troubled, particularly since the fall of the Berlin Wall in 1989, by a spiralling number of intractable conflicts fought in the name of self-determination, and yet where a right of 'external' self-determination was not thought to apply in the classical sense. In the immediate aftermath of the collapse of Communism the customary distinction between 'external' and 'internal' self-determination was protected, in large part through a resort to the terminology of 'dissolution' or of 'consent'. Thus, whilst many of the new states which emerged from behind the 'iron curtain' in the late 1980s and early 1990s employed the language of self-determination - holding plebiscites or national polls by way of authorisation, and in some cases even making a capacity to speak the 'national' language a determinant of subsequent citizenship (Cassese, 1995 pp. 257-277) - the idea that this practice might have instanced a displacement of the principle of territorial integrity was carefully avoided. In the case of the USSR itself, for example, while widespread and violent demands for independence from Soviet rule, unleashed during the period of Perestroika, were certainly a cause of the USSR's collapse, the fact that Russia had effectively renounced, in the Alma Ata Declaration and Minsk Accords,<sup>63</sup> any legal interest or claims to sovereignty over those regions was to lend the process the aura of a consensual 'parting of ways' (Mullerson, 1993). The two agreements themselves suggested that the Soviet Union had, in fact, 'ceased to exist' allowing for the emergence to independence of 12 of the 15 the former Soviet Republics within a loose confederation (the Commonwealth of Independent States) out of the ashes of a now defunct state. That Russia was to claim shortly afterwards that it was in fact 'continuing' the legal existence of the USSR (retaining importantly the privileges of the latter within the UN), did not, ultimately, profoundly change the analysis apart from suggesting that the process was better seen as one of consensual secession than of disintegration. Elsewhere, the three Baltic states asserted their

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<sup>63</sup> Agreement Establishing the Commonwealth of Independent States (Minsk Accord), 8 Dec. 1991, 31 ILM (1992) 143; Alma Ata Declaration, 21<sup>st</sup> Dec. 1991, *ibid*, p. 148.

independence separately on the grounds of their unlawful annexation by the USSR in 1940, and the former Warsaw Pact states, Hungary, Romania, Poland, and Bulgaria, were seen to have merely 'transitioned' from Soviet control to full independence through the medium of a change of government.

The case of the Socialist Federal Republic of Yugoslavia was probably the most revealing however (see Radan 2002). Prior to 1989, Yugoslavia had (like the USSR itself) been a federal state comprising six Republics, representing the major 'nationalities', and two autonomous enclaves (Kosovo and Vojvodina), each of which had representation in the administration of the Federation. The death of President Tito in 1980 was followed by a power-struggle within the Federation culminating in declarations of independence being announced on the part of Slovenia and Croatia in 1991. Both declarations recalled the principle of national self-determination (which itself had some recognition in the Federal Constitution). These initiatives, however, were forcibly resisted and the subsequent violence that was then to engulf first Croatia and then Bosnia-Herzegovina was so severe that it led to the dispatch of peacekeeping forces (UNPROFOR), the establishment of the International Criminal Tribunal for the Former Yugoslavia and the later submission of claims of genocide to the International Court of Justice.

One of the key questions here for other states was whether or not to recognize the statehood of the entities emerging from the conflict. Doing so had several important implications as regards the characterisation of the then-ongoing conflict (whether, for example, it was an international rather than merely an internal armed conflict (see Gray, 1996)). In terms of the relationship between statehood and self-determination, however,<sup>64</sup> the question of recognition brought into play the possibility that a 'post-colonial' right of secessionary self-determination might be sanctioned in the process, the implications of which would extend far beyond the confines of the conflict itself. Sensing that there were a number of delicate issues involved, the states of the European Economic Community (EEC) formed a Conference on Yugoslavia which, in 1991, established what became known as the 'Badinter Commission' (so named after its Chairman Robert Badinter, President of the French Constitutional Court) to provide advice on the legal issues arising from Yugoslavia's imminent implosion (see Craven 1995, Terrett 2000). In the Autumn of 1991 the Badinter Commission issued two significant Opinions that set the stage for the subsequent international recognition of Croatia, Slovenia, Bosnia-Herzegovina

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<sup>64</sup> See, on this Koskenniemi, 1994a.

and, somewhat later, that of Macedonia. The key advice given by the Badinter Commission, having specifically been asked about the implications of the principle of self-determination, was to declare that the former SFRY was 'in the process of disintegration' on the basis that the Federal Organs could no longer wield effective power (the suggestion being that the remainder of those Federal organs, and in particular the Yugoslav National Army, had effectively been co-opted by the Serbian government).

Perhaps what is most interesting about this Opinion, however, is what it left out. What the Commission signally did not say was that the 'nationalities' within the federation possessed a right of secessionary self-determination. On the contrary, it remained remarkably silent on the matter of self-determination except to note the responsibilities, in terms of human rights, of the new states towards the human rights of their future minorities. The Commission's general reluctance here, no doubt, was informed by the sense that the recrudescing ethnic nationalism that underpinned these claims to independence, if encouraged, would only exacerbate the conflict still further. Caught thus in a position of neither wanting to ally itself with the Milosevic regime, whose campaign of violence had been pursued under the banner of the preservation of the territorial integrity of Yugoslavia, nor wanting to provide a continuing justification for inter-ethnic violence in the name of national self-determination, the Commission's determination that the Federation was in the process of dissolution was thus a dextrous act. Its effect was to provide a necessary analytical space within which the recognition of the six emergent Republics could take place without risk of undermining respect for the principle of territorial integrity. Indeed, in its second Opinion the Badinter Commission reaffirmed the principle of *uti possidetis* explicitly, making clear in the process that the entities emerging from the former Yugoslavia were to be those that already had enjoyed administrative recognition within the Federation.

This solution proposed by the Commission was always to leave a certain ambiguity as to the status of Kosovo, which had possessed a degree of administrative independence within the Federal structure, but yet had not been one of its constituent Republics. Whether the principle of *uti possidetis*, as it has come to be construed, was sufficiently subtle as to enable an effective distinction to be made between different kinds of internal administrative borders is perhaps an open question. But the case of Kosovo poses a slightly different set of questions insofar as it is held up by some as an illustration of the possibility, alluded to by the Supreme



Court of Canada (see above), that a ‘external’ right of self-determination may emerge in a context in which a people is systematically and violently denied its right to ‘internal’ self-determination (Williams, 2003). This amounts, as we shall see in the next section, to the argument that there has come to exist, as a matter of post-Cold War international law, a right of ‘remedial’ secessionary self-determination.

## V. DEMOCRACY AND HUMAN RIGHTS

If the collapse of Communism in Central and Eastern Europe challenged the international community to find a way to uphold international law’s uneasy balance between the promises of self-determination and the preservation of state sovereignty, it also presented it with an opportunity. For, from its very earliest articulation, the idea of self-determination has appeared to give expression to one simple idea – that, as Wilson was to put it, ‘governments derive all their just powers from the consent of the governed’.<sup>65</sup> Whilst undoubtedly a latent idea in most schemes of political organisation through the 20<sup>th</sup> Century, it has in recent years been given further legal impetus in idea that there exists an ‘emerging right to democratic governance’ in international law (Franck 1996; Fox and Roth, 2000) - the source of which is traced to the linkage between the principle of self-determination and the individual rights of political participation (article 25 ICCPR) and evidenced in the emerging practice of multilateral election monitoring and other initiatives designed to promote democracy and human rights (‘low intensity democracy’ as Marks puts it (Marks, 2003)).

There are two plausible ways in which this concern for democracy and human rights may impinge upon the question of statehood: one as an additional ‘condition’ that needs to be met before independence may be recognized (one of the earliest examples being Fawcett’s interpretation of the Southern Rhodesian crisis in 1965 (Fawcett, 1965-66)); the other as a basis for the exercise of self-determination on the part of a community suffering oppression or systematically excluded from access to government (sometimes referred to, as noted above, as ‘remedial secession’). In respect of the first, there is some evidence to suggest that, in Europe at least, states have been keen to incorporate questions concerning human rights and democracy into their decision-making on recognition. Thus, shortly after the beginning of the conflict in Yugoslavia in 1991, the EC member states convened at an extraordinary EPC ministerial meeting to adopt a common policy on the recognition of states

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<sup>65</sup> President Woodrow Wilson, Second Inaugural Address, 5 March 1917.

emerging from the Soviet Union and Yugoslavia. The result was a set of guidelines in which they affirmed 'their readiness to recognise, subject to the normal standards of international practice and political realities in each case, those new states which... have constituted themselves on a democratic basis'.<sup>66</sup> Further to this, they set out several additional conditions including: (1) respect for the provisions of the UN Charter and the Helsinki Final Act 'especially with regard to the rule of law, democracy and human rights; (2) guarantees for the rights of ethnic and national groups and minorities; (3) respect for the inviolability of existing borders; (4) acceptance of all relevant arms control commitments; and (5) a commitment to settling all future questions of state succession and regional disputes by agreement. In the event, these guidelines were very loosely applied. The recognition of Croatia, for example, proceeded in early 1992 despite the fact that the Badinter Commission had found that it had not fully complied with the relevant conditions. By contrast, the recognition of Macedonia was held up not on the grounds of its failure to meet these conditions, but rather as a consequence of an ongoing dispute with Greece over its name.<sup>67</sup> Thus, while considerable enthusiasm remains for the idea that the new states acquiring their independence would remain bound by all pre-existent human rights treaty commitments that were formally applicable to that territory (Kamminga 1996, Craven, 2007, pp. 244-256), commentators remain cautious as to the legal significance of the Guidelines when taken by themselves (Murphy, 2000, p. 139).

When placed in the context of other developments, however, the picture looks rather different. For example, in the 1990s several regimes of international territorial administration were put in place, both in Eastern Europe (in Bosnia-Herzegovina and Kosovo) and elsewhere (in East Timor, for example), in the wake of wars characterised by widespread abuses of human rights and international humanitarian law, which placed the task of securing the rule of law and the protection of human rights at centre stage (Wilde, 2008). As some have argued, such regimes seemed to function as institutional precursors to independence in such a way as to be evidence of a new emerging doctrine of 'earned sovereignty'- earned in the sense of being phased, conditional and perhaps even constrained. 'Sovereignty', on this view, is no longer a right of states or colonised/occupied peoples but rather a 'bundle of rights' available to be allocated, by the 'international community' and by degrees, depending on the extent to which such conditions are met (Williams, Scharf and Hooper, 2002-

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<sup>66</sup> Declaration on the 'Guidelines on the Recognition of New states in Eastern Europe and in the Soviet Union', (1992) 31 ILM 1486.

<sup>67</sup> See *Application of the Interim Accord of 13 September 1995 (The former Yugoslav Republic of Macedonia v Greece, Judgment*, ICJ Reports 2011.

3). Yet as critics of this ‘earned sovereignty’ approach have noted, whatever the perceived merits of such an agenda, and however far this may be thought to open out a new realm of policy alternatives, it is hard to shake off the sense that this amounts to anything other than a new ‘standard of civilisation’ – that is, a highly selective reinstatement, under UN auspices, of the old Mandate/Trusteeship arrangement in which territories were ‘prepared’ for independence under the tutelage of colonial masters (Drew, 2007, 87-92; Wilde, 2010, pp. 261-62).

Just as there is a certain hesitancy about the role that considerations of democracy and human rights might play in the recognition of new states, so also there is significant equivocation over the extent to which those considerations might serve as a basis for legitimating secession. As we have seen, in its advisory opinion concerning the secessionist claims of Quebec, the Canadian Supreme Court had asserted that the international law right to self-determination gave a right to external self-determination in situations ‘where a people is oppressed’ or where ‘a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development’.<sup>68</sup> It was to conclude, however, that Quebec ‘did not meet the threshold of a colonial people or an oppressed people’ and since the Quebecers had not been denied ‘meaningful access to government’ they did not enjoy the right to effect the secession of Quebec from Canada unilaterally. Rather, they enjoyed a (Constitutional) right to negotiate the terms of a separation.

A somewhat different context was to pertain, however, in the case of Kosovo when the International Court of Justice was requested by the General Assembly to consider the lawfulness of its Declaration of Independence of 2008.<sup>69</sup> As was detailed in the evidence presented to the Court (and had earlier been highlighted by the ICTY in the Mulinovic case<sup>70</sup>) the Kosovo Albanians had been the object of discrimination, repression and violence throughout the 1990s, and in particular during the violence of 1998-9 which had itself ultimately led to the adoption of Security Council Resolution 1244 (1999) and the establishment of UNMIK. Whilst, as several judges pointed out in their Separate Opinions (eg Judges Yusuf and Sepúlveda-Amor) the Court might naturally have been led to consider whether, in the circumstances, the population enjoyed a right of remedial secession, the majority evaded the question entirely; and focused rather on the narrowest of issues - whether the authors of the

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<sup>68</sup> *Reference Re Secession of Quebec*, Canadian Supreme Court (1988) 37 ILM 1340, para. 138.

<sup>69</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, p 403.

<sup>70</sup> *Prosecutor v. Mulinovic et al*, Judgment, 26 February 2009.

Declaration had acted in violation of international law (which, it found, they had not). That this neither resolved the issue as to whether the Kosovars had a right to external self-determination, nor whether the subsequent recognition of its independence might constitute a violation of Serbian sovereignty, was to leave Kosovo ultimately in a state of limbo (recognised by 115 states as of February 2017, but unrecognised by many others).

One reason for caution on the part of the International Court, no doubt, related to the fact that it wanted to avoid setting some kind of precedent in light of the various movements that were seeking independence in the region around the Black Sea and the Caucasus. Between 1990 and 2014 at least seven purported new states have declared their independence in this region, starting with the 'Pridnestrovian Moldavian Republic' or 'Transnistria', which declared its independence from Moldova on 2 September 1990, and the 'Republic of Artsakh' (more commonly known as Nagorno-Karabakh), on 2 September 1991 in territory claimed both by Armenia and Azerbaijan. Then, in mid-2008, two nascent states – the 'Republic of Abkhazia' or 'Apsny' and the Republic of South Ossetia, also known as 'Alania' – declared their independence from Georgia with strong Russian support. Transnistria and Artsakh have been recognised either not at all (in the case of the latter) or (in the case of Transnistria) by their fellow separatist entities in the so-called 'Community for Democracy and Rights of Nations' formed by these four renegade republics. By contrast, both Abkhazia and South Ossetia were immediately recognised by Russia, along with a handful of other states (such as Nauru and Venezuela). Finally (at least for the moment), in 2014, the 'Republic of Crimea', the Donetsk Peoples' Republic' and the 'Luhansk People's Republic' all declared their independence from Ukraine.

In all of these cases, the assertion of a right to self-determination was accompanied by allegations of ethnically-motivated oppression on the part of the state from which they wanted to secede. These claims have, in case of the Georgian and Ukrainian entities, been supported by the Russian government. Explaining Russia's recognition of Abkhazia and South Ossetia's independence, for example, Russian Prime Minister Dmitry Medvedev insisted that in doing so his country had been acting on the basis of 'their freely expressed desire for independence...based on the principles of the United Nations Charter' as well with 'international precedents for such a move', specifically the recognition of Kosovo's independence by 'Western countries'. 'In international relations,' Medvedev warned, 'you cannot have one rule for some and another rule for

others.<sup>71</sup> The question remains, however, as to whether ethnic Abkhazians, Ossetians and (in Crimea, Donetsk and Luhansk) ethnic Russians have, indeed, been the subject of ‘ethnic cleansing’ on the part of Georgia and Ukraine respectively sufficient to justify their claims to external self-determination; and how any response to that question might take account, also, of similar allegations regarding the ‘ethnic cleansing’ of Georgians, Ukrainians, Ukrainian Tartars and others in the territories concerned. According to Georgia, for example, in its application to the ICJ, ‘[t]he Russian Federation’s support of separatist elements within the Ossetian and Abkhaz ethnic minorities and their *de facto* authorities has the effect of denying the right of self-determination to the ethnic Georgians remaining in South Ossetia and Abkhazia’.<sup>72</sup> Ukraine, in similar vein, alleges systematic discrimination by Russia both prior to and in the wake of the annexation against Crimea’s Tartar population amounting, in its terms, to ‘collective punishment’ and ‘collective erasure’.<sup>73</sup>

What is most striking, of course, has been the spectre of Russian intervention, both direct and indirect, in all of these secessionist enterprises with the exception only of Artsakh/Nagorno-Karabakh. Whilst in all cases the declarations of independence had been underpinned by referenda (the Transnistrian referendum only being held, however, several years after the event in 2006), those referenda have nevertheless been widely condemned as having been underpinned by a climate of intimidation allegedly engineered, in each case, to ensure a favourable vote. Indeed, so violent and extensive has Russia’s involvement in these secessionist movements been that both Georgia and Ukraine have brought cases against Russia before the ICJ, as noted above, alleging the latter’s violation of the *Convention on the Elimination of All Forms of Racial Discrimination* and, in Ukraine’s case, also of the *Convention for the Suppression of the Financing of Terrorism*.

Of particular note, here, is the case of Crimea which stated its intention, prior to the holding of the referendum, that if a majority returned a vote in favour of independence, that it would simultaneously seek integration into the Russian Federation. Two days after that ‘yes’ vote was received in the referendum on 16 March, the self-declared Republic of Crimea concluded a treaty with Russia to bring

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<sup>71</sup> Dmitry Medvedev, ‘Why I had to recognise Georgia’s breakaway regions’, *Financial Times*, 27 Aug. 2008, p. 9.

<sup>72</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Application Instituting Proceedings at the International Court of Justice, Georgia v Russian Federation, 12 Aug. 2008, p. 10, para. 14.

<sup>73</sup> *Terrorism Financing and Racial Discrimination in Ukraine*, Application Instituting Proceedings of the International Court of Justice, Ukraine v Russian Federation, 16 Jan. 2017, p. 27.

this about. Given that the referendum in Crimea was not only unconstitutional under Ukrainian law, but also held in a situation in which masked Russian troops had already seized hold of and dissolved the Crimean Supreme Council (Crimea's regional parliament) neither its pro-independence vote nor the subsequent treaty with Russia has been recognised by the international community (as the General Assembly underscored in its Resolution 68/262 of 27 March 2014). Crimea is now widely understood to have been unlawfully annexed by the Russian Federation.<sup>74</sup>

Whilst the majority of the international community has looked on at these developments with some dismay (see, for example, Resolution 382 of the NATO Parliament Assembly in respect of Georgia, General Assembly Resolution 68/262 in respect of Ukraine, and the European Parliament's resolution in support of Moldovan sovereignty),<sup>75</sup> the shadow cast by the Kosovo case is unmistakable. Not only does it appear to have given impetus to the holding of unauthorised/ illegal referenda (an issue, at the time of writing, being confronted both by Spain in respect of Catalonia and Iraq in respect of its Kurdistan Region) but has clearly opened the door to a new form of 'interventionist self-determination' that arguably finds its origins in a melding of the doctrine of humanitarian intervention on the one hand, and that of remedial self-determination on the other.

## VII. CONCLUSION

In an article written in the early 1990s, Martti Koskenniemi reflected upon the contemporary resonance of Engel's notion of the 'withering away' of the state. In Koskenniemi's view, there were two versions of this thesis in circulation. One was a 'sociological' version that, on observing the recent globalisation of politics, argues that 'states are no longer able to handle problems such as massive poverty, pollution of the atmosphere, or even their own security' without entering into forms of

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<sup>74</sup> One should also note continued Russian presence/involvement in a number of the other entities in question which ranges from the issuing of Russian passports to (ethnically Abkhazian, Ossetian and Russian) Georgian and Ukrainian citizens in these areas to the outright seizure by Russian soldiers of institutional control and state territory.

<sup>75</sup> 'The Situation in Georgia', 2010 NATO Parliament Assembly, Resolution 382 refers to 'Georgia's occupied territories of Abkhazia and South Ossetia', while the in 'Territorial integrity of Ukraine', A/RES/68/262 of 27 Mar. 2014, the General Assembly called upon 'all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine' and upon 'all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol' arising from the flawed referendum of 2016 (paras. 2 and 6); European Parliament resolution on Moldova (Transnistria), 25 Oct.20-6, 'denounc[ing] the attempt in the Moldovan region of Transnistria to establish its independence in a unilateral way by organising a so-called referendum'.

cooperation that entail the 'gradual dissolution of sovereignty' (Koskenniemi, 1994b, p. 22). The other was an 'ethical' version that regards statehood as a form of 'morally indefensible egotism' that either serves to create and perpetuate 'artificial distinctions among members of the human community' or to justify the use of state apparatus for oppression. Each of these critiques stresses the artificiality of the state as an idea or institution; each also sees its withering away as essentially beneficial. As we have seen, these two standpoints are not external to the state, but rather run through the discourses on sovereignty, self-determination, legitimacy and recognition that constitute it. There is a constant equivocation, in all such discussions, as to whether the world is to be taken 'as it is' (in which we might be inclined to treat statehood as a question of fact, effectiveness as the primary condition, recognition as declaratory and sovereignty as innate), or as something which must be engineered to correspond to those values which we take to be universal and necessary (in which case, we might treat statehood as being a matter of law, self-determination or democratic legitimacy as primary conditions, recognition as quasi-constitutive, and sovereignty as delegated or conditional). To note the equivocation, here, however is to underscore what Koskenniemi sees as the untenable character of either position. On the one hand the ethics in question will always be situational, a product of certain social conditions arising at a particular point in time; on the other hand, what we call social reality itself 'is in the last resort an ethical construction' dependent upon our willingness to act 'as if' the world were really like that. In his view, therefore, the state 'as a pure form' is valuable as a 'location' or 'language' within which 'we can examine the consequences and acceptability of the various jargons of authenticity', as he calls them, which seek to challenge the state's normative universality and 'set them in a specific relationship so as to enable political action' (Koskenniemi, 1994b, p. 28).

One of themes developed in this chapter, however, has been to explain how many of these seemingly abstract theoretical arguments about recognition, statehood or sovereignty arose in a specific historical, geographical and cultural context. However much these phenomena may have been 'globalised' over the past five centuries, the fact remains that the sovereign state is a Western European invention, whose universality came to be theorised in and through Europe's encounter with the non-European world from the late-16<sup>th</sup> century onwards. As we saw above, the difficulties involved - in 19<sup>th</sup> century jurisprudence in particular - in seeking to delimit the scope of international law by reference to the pre-existence of (European) nation-states, while simultaneously employing a prescriptive notion of statehood to supervise

‘entry’ into the family of nations, conditioned many of the theoretical puzzles that subsequently emerged.

Yet for those located in the non-European world – perhaps for Indigenous peoples most acutely – as well as for those groups who continue to find themselves on the margins of the state, the problem is not merely a theoretical one. On the contrary, the assumptions about land (‘territory’), subjectivity (‘population’), order (‘government’) and community (‘independence’) that comprise the state are not only conceptually incompatible with alternatives; they are also destructive, in a material sense, of the societies and environments to which those alternatives refer (Black, 2011; Borrows, 2002; Rivera, 1984; Simpson, 2014; Watson, 2015). The language of statehood is *itself* a ‘jargon of authenticity’ from this perspective. For Marxist, ‘Third World’, feminist, queer, Indigenous and many other ‘situated’ observers of international law (Haraway, 1988, p. 590), it was and remains difficult to accept the idea that the state is simply normatively indeterminate, whether as a concept or as a practice (Miéville, 2005; Chimni, 2017; Charlesworth & Chinkin, 2000; Ruskola, 2010; Coulthard, 2014). All refer, in one form or another, to the presence of what might be called a ‘structural bias’ (Koskenniemi, 2005, pp. 606-615) in the language and practice of statehood that, in practice, privileges certain kinds of politics, certain ways of being in the world, and certain orders of power and wealth (Scott, 1998). This, undoubtedly, provides part of the rationale behind the establishment of an entity like the Democratic Federation of Northern Syria or ‘Rojava’, an avowedly non-state region governed on the basis of ‘a new social contract’ led by principles of gender equality, environmental sustainability and ‘democratic autonomy’.<sup>76</sup>

As to why, elsewhere in the world, statehood continues to hold out the ultimate promise of collective emancipation, one answer may be found in the way in which the old imperial language of hierarchy, civilisation and progress has come to be translated into the (supposedly) more technical language of economics and, in particular, of development (Pahuja, 2011). The nation-state, in this sense, continues to be presented as an object of work, that has to be sustained, supported, performed and ‘perfected’ (to invoke Wolff) through initiatives, for example, to promote good governance, the rule of law, economic growth and human rights. This new articulation of the state’s objectives have, in turn, legitimated a ‘muscular

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<sup>76</sup> *Self-Rule in Rojava, Charter of the Social Contract*, 29 January 2014, available at <https://peaceinkurdistancampaign.com/charter-of-the-social-contract/> [accessed 28 Oct. 2017].



humanitarianism' (Orford 2003), legitimating intervention not because of a state's egregious pathologies but perhaps because it is not pathological enough. As the pressure on the world's physical 'resources' continues to mount, however, the 'perfectability' of the state is thrown increasingly into doubt. In this context, the 'turn to secession' – the flight from the disappointments of an existing state towards the promises held out by a new one – may turn out to be one of this century's greatest ironies.

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