

PART III

THE SUBJECTS OF  
THE INTERNATIONAL  
LEGAL ORDER



## 8

STATEHOOD,  
SELF-DETERMINATION,  
AND RECOGNITION*Matthew Craven*

## SUMMARY

The proposition that international law is largely concerned with States—what they do and how they behave in relation to one another—has long been one of the most axiomatic features of international legal thought. Yet the actual place occupied by the State in such thought and practice has always been equally elusive. In one direction, the existence of a society of independent States appears to be a necessary presupposition for the discipline—something that has to precede the identification of those rules or principles that might be regarded as forming the substance of international law. In another direction, however, statehood is also something that appears to be produced through international law following from a need to determine which political communities can rightfully claim to enjoy the prerogatives of sovereignty. Whereas in the past, this relationship between law and sovereignty could be mediated through an imperial ‘standard of civilization’ that differentiated between ‘new’ and ‘old’ States, or European and non-European forms of sovereignty, by the middle of the twentieth century such forms of discrimination were no longer tenable. The contradictions implicit in the idea of statehood (that it be both antecedent and a product of international law) were then to come to the fore demarcating debates as to the implications of self-determination (whether determining or determined) and of recognition (whether declaratory or constitutive). Intertwined within in such debates are an array of political commitments—to democracy and self-government, human rights, and the combating of violence—all of which relate thoroughly ambiguously to the role assigned to States within international legal thought in the sense that they remain both the source of the problem and the mode of emancipation.

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## 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 lifeforms); 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 may be represented cartographically by the coloured segments 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 it is one that assumes for itself the same kind of permanence and solidity in descriptions of our social and political environment that one would normally associate with geological formations in the physical world.

Of course, the world has not always existed as we know it today, and States (if we like to trace their origins to early forms of political society) have changed much over time (Tilly, 1992; Morris, 1998, chapter 2). At one stage political authority around the globe could largely be described in terms of its relative intensity: those exercising the prerogatives of rule generally enjoying high levels of loyalty and allegiance amongst the community in more densely populated urban sites, shading off in the more remote frontier zones that characterized the outer edges of the realm. In place of this disparate and localized form of social organization has emerged a global order framed in terms of a European model of the nation state marked by the possession of determinate and increasingly non-porous boundaries, centralized bureaucratic structures, categorical modes of membership, and a singular uniform system of law (Weber, 1978; Giddens, 1985). The purchase of this institution upon the political imagination has been such as to ensure not only that the daily routine of 'politics' remains firmly embedded within its frame (institutionalized, for example, in parliamentary debates, elections and campaigns for office), but that even the movements of resistance adopt it as their primary mode of emancipation. The secessionist movements active in places as diverse as Bougainville, Chechnya, Nagorno-Karabakh, Southern Sudan, Somaliland, or West Irian almost invariably seek, as their objective, the establishment of an independent State. In some ways, it is hard to think what the alternative might be.

As much as movements for independence seem, in some respects, to affirm the singularity of the state as the primary mode of political organization, they also undeniably lay down a challenge before it. Not only do they place in question the authority of the State against which they assert their independence, they also put in question the capacity of the broader international order to protect or guarantee the integrity of those States which, in some respects, constitute its rationale. Not all such initiatives turn out in the same way in practice of course. In some, claims to independence are given the definitive seal of Statehood by membership in the United Nations (eg Eritrea 1993), in others effective self-government continues yet the claim to independent statehood goes decisively unrecognized (eg Somaliland 1996–). Some, furthermore, survive in an apparent twilight zone of partial recognition (eg Kosovo 2009–, Palestine 1988–). At such moments, international lawyers are often asked for advice: is it right or proper for other States 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? International lawyers seem to have some kind of expertise here, and one that is sought not only by those concerned with the distributional consequences of any political change, but by the public at large.

The answers, for the most part, are often hesitant: 'it depends' is usually a stock phrase. It 'depends' because as much as a community might be able to ground its claims to independence in a sense of ethnic, cultural, or historic sense of self-identity, or in terms of its abuse at the hands of an 'alien' authoritarian elite, there are still broader matters of stability or security to be addressed. It depends because as much as one or two States may have seen fit to recognize the new entity, this is not usually sufficient (albeit the case that it is hard to say quite what is sufficient). It depends because whilst we used to be quite clear about the conditions under which new States might come into being, things seem to be changing and practice coalescing around new potential rules or principles. It depends because rule and practice rarely neatly align and because the law and the politics of recognition appear difficult to separate. These, and many other common concerns, are such as to make definitive pronouncement a seemingly precarious business. Yet the fact remains that the creation or disappearance of States is not something about which international lawyers are, or indeed can be, entirely neutral. There are always legal consequences attendant to forms of political change that involve the alteration of borders (see generally Craven, 2007). More than this, however, international lawyers also have an important linguistic and conceptual toolbox (which includes notions of sovereignty, territory, recognition, personality, and self-determination) that provides a language for both projecting and evaluating claims made in respect of those processes of political and social change.

In some respects, however, the place assumed by the 'State' in international law is almost too self-evident. If international law is defined, as it has traditionally, as being the law that applies as between sovereign States, then some engagement with States, what they are, how they come into being, and how they change has to be part of the disciplinary orientation. Yet, the central position assumed by States in legal doctrine is also problematic. In the introduction to his *Principles of International Law* of 1895 Lawrence suggested that '[t]he meagre proposition that the Subjects of International Law are Sovereign States is often put forward as if it contained all the information that need be given about the matter.' (Lawrence, 1895, p 55) Of course, it wasn't all the information needed in his view, and he then proceeded to set out why that was the case, and why one needed to differentiate, for example, between different kinds of States and different forms of sovereignty. But at the same time he was aware that the figure of the sovereign State occupied such a central position within the discipline of international law that its presence or absence was not something that could be adequately conceptualized internally within that same framework. Since in absence of sovereign States there was no possibility of international law, their existence or demise could only be presupposed, or appreciated at some distance from the everyday discourse of an otherwise relational conception of law. One needed, in other words, to either postulate the existence of an international society prior to the legal relations that are generated within it (in which case regulation only reflects back on the pre-existent 'fact' of a State's existence) or to conceive of the place occupied by States as being part of a much broader and diverse cosmopolitan universe that somehow attributes

legal competences to designated actors (which would include States or governments but would not necessarily be confined to them). In the event, Lawrence wanted to have it both ways—States were, for him, a presupposition in the sense that they existed as factual orders of power quite independently of their legal relations, but whose emergence and entry into the international family of nations could also be regulated.

For all the difficulties that Lawrence and other international lawyers had in grasping or conceptualizing the place of the sovereign State within their discipline, they were in no doubt as to its importance, or of the central role assumed by it in international relations. 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 largely regarded as an antiquated, if not wholly, misleading proposition. Within international law itself, the recognition given to the rights and responsibilities of international organizations, to the rights and duties of individuals and a variety of different groups or communities of one form or another (minorities, indigenous peoples, corporations), has made the language of exclusive ‘subjects’ or ‘objects’ of international law largely redundant. Non-State actors (whether non-governmental organizations 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>1</sup> Increasingly frequently, furthermore, the notion of ‘sovereignty’ has become seen as either redundant or as a dangerous fiction, and ‘Statism’ a derogatory label attached to any approach to international law that is seen to prioritize what States do or say at the expense of individuals and communities over whom they hold authority (see Marks, 2006).

Several considerations have informed this change in disciplinary orientation—some of which may be attributed to the somewhat elusive phenomenon of ‘globalization’, some to the dynamics of the post-cold war world. In an article written sometime before the attack on the World Trade Centre (which, of course, spawned several new reflections upon the role of non-State actors of one kind or another), Oscar Schachter (1998) was to reflect upon the ‘decline of the Nation state’ which he observed as being evidenced in four related developments:

- (i) The growth, and increased mobility, of capital and technology (enhanced by global communications networks), coupled with a decreasing capacity to regulate foreign direct investment or protect national producers through tariff or non-tariff barriers, has undermined the centrality of the State in the organization of the economy. The age of capital-exporting imperialism or defensive mercantilism is over, and ‘the superiority of markets over state control is almost universally accepted’ (Schachter, 1998, p 10).
- (ii) The phenomenal growth of organized non-governmental movements operating across national borders in fields such as human rights, the environment and disarmament (but also including scientific and technical bodies) have become a force for mobilization and political change ‘in areas long seen as domestic’ and have fostered ‘new social identities that cross national lines’ (Schachter, 1998,

<sup>1</sup> See eg ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001) Articles 33, 42, 48.

p 13). The enhanced role of this nascent international ‘civil society’ has also been paralleled in the emergence of a new transnational ‘uncivil society’ of drug traffickers, arms traders, terrorists, and money launderers whose power has vastly increased as a consequence of the emergence of new communication networks and the deregulation of financial markets. All of these activities underscore ‘the weakness of nation-states and of the international legal system’ (Schachter, 1998, p 15).

- (iii) The (re)emergence of a range of sub-state ‘identities’ that have increasingly challenged the central authority of the juridical State. On one side, the old anti-colonial policy of self-determination has led to the emergence of a much broader array of secessionist movements demanding forms of autonomy or self-government the claims of which are located in a sense of historical, cultural, linguistic, or religious difference (Schachter, 1998, p 16). On the other side, as Franck argued, globalization has led to the emergence of new modes of loyalty and community that are neither ‘genetic nor territorial’, but rather focused upon a range of increasingly transnational agendas such as human rights, the environment, or feminism (Franck, 1996). This ‘modern type of cosmopolitanism’, in Schachter’s view can again be seen to be an indication of the ‘decline in the authority of the State’ (Schachter, 1998, p 18).
- (iv) Finally, and for Schachter the ‘most dramatic’ example, of the decline in State authority, is identified with the emergence of a new phenomenon of ‘failed States’ (examples of which he cites as being Liberia, Somalia, and Afghanistan) in which government and civil order have virtually disappeared, and in which the survival of the State depends upon concerted international action. Thus in Cambodia a costly and elaborate ‘rescue effort’ was put in place involving UN oversight of a process of internal reconstruction that included elections, the creation of a reconciliation process and the establishment of constitutional government. For a period of two years, although Cambodia formally remained a State for international purposes, its government ‘did not have full freedom to direct the internal affairs of the country’ (Schachter, 1998, p 18).

All of these, in Schachter’s view, posed challenges to a global order of States regulated by rules of international law, but were not in themselves sufficient to warrant fundamentally changing either our ideas about international society or of the way in which international law itself was conceptualized. Despite the trends, he concludes that ‘it is 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’, 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 survive, but whether international law could adjust to such phenomena and respond to the changing demands of the environment in which it operated.

Whether or not one accepts Schachter’s confidence in this respect, it is evident that there are broadly two themes that are interwoven here: one is a sociological reflection on the changing character of international society and the declining power or authority of the nation state, which has given rise to the elaboration of new schemes of legal

responsibility and control for purposes of buttressing or replacing those exercised by States themselves.<sup>2</sup> The other is an ethical variant which regards the tradition of state ‘sovereignty’ to be an archaic impediment to the pursuit of humanitarian or other cosmopolitan agendas (human rights, environmental protection, etc) and which has recommended various interventionist policies of a unilateral or multilateral character. In some ways, of course, these two forms of reflection work against each other: the first believing States to be increasingly marginalized 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, however, 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 (as Hegel would put it) has neither the ability nor competence to resist a global civil society that claims both power and justice on its own side.<sup>3</sup>

## 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, Hall was to start (much as he had in his earlier editions) with 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 was 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, beginning (as indeed seemed necessary) with a definition. International law it is not merely a language, or a way of describing certain activities or practices. It is already a thing with definite content and there to be described. The description itself, of course, is significant. The content of international law is to be found, as far as Hall is concerned, in rules of conduct which States regard as binding upon them. This demands no access to a world of natural law (whether religious or rational), or engagement with the complex of social and political relations that constitute the authority of each of the States involved. Still less is there any requirement to speak about that complex idea—sovereignty—which John Austin had placed at the heart of his description of law. International law was simply to be located in an empirical practice of consent and obligation. At the heart of it, of course, was the ‘modern civilised State’ whose actions were both the object and measure of this science. One needed a community of

<sup>2</sup> See, for example, proposals relating to the development of ‘Global Administrative Law’ (Kingsbury, Krisch, and Stewart, 2005) or other initiatives directed towards the development of the accountability of non-State actors more generally (Clapham, 2006).

<sup>3</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’.

civilized States for there to be rules of conduct. One needed also for those States to have a will, or consciousness, as to the binding force of their commitments (*opinio iuris*). One needed, furthermore, for those States to understand that they had committed themselves to a system of law warranting the enforcement ‘by appropriate means’. The figure of the State thus stood at centre stage around which an elaborate architecture of legal rules was to be described and generated.

At the time at 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 extemporized discussion of the State as the primary subject of international law (See Westlake, 1904; Twiss, 1884; Lawrence, 1895; Wheaton, 1866; Phillimore, 1871). 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, and unions as particular classes) and passing comment on difficulties of nomenclature (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.

This format was not merely a haphazard aesthetic choice, but reflected in large measure a desire to lay down in ordered manner the principle axioms or presuppositions of the discipline that might thereafter be deployed in a variety of different particular contexts. Once in other words, one had established who the subjects of law were, and the framework for determining the extent and scope of their rights and obligations (ie sources), one could go on to apply those principles 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—almost a professional *a priori* as Koskenniemi has put it—was significant in more ways than one. In one respect, it bespoke of a changing attitude towards the sources of international law reflecting the determination to identify international law so far as possible with the specific determinants of state practice and consent rather than with the inherited tradition of natural rights. In another respect however it also spoke of the central position that had come to be assumed by ‘the State’ understood as an idea quite distinct from many of its earlier designations—whether that be 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 significance to the ‘nation’ as such.

As much as Hall and others were to mark themselves out from their intellectual predecessors, they nevertheless uniformly saw themselves as working in a well-established tradition. This was a tradition understood to have its roots in the Roman Law notion of the *jus gentium* as subsequently received and modified through the work of those such as Suarez, Ayala, Gentili, Grotius, Bynkershoek, Pufendorf, Wolff, and de Vattel. In many respects what seemed to tie these classic works together as a tradition was not simply their espousal of the existence of a law that transcended the sovereign, but in the fact that the adumbrated *jus gentium* (or, in some works, the *jus inter gentes*) necessarily presupposed the existence of a plurality of sovereign subjects (whatever the particular terminology) all of which had

‘external’ relations that would be regulated by its terms. A key moment in this story, thus, was the development of a secular international society within Europe the inauguration of which was marked by the Peace of Westphalia of 1648, in which that community finally emerged from the shadow of the Holy Roman Empire and the coercive authority of the Catholic Church (Hall, 1895, pp 55–60).

This emphasis given to the Peace of Westphalia was significant at a systemic level since it sufficed for such purposes to think of international society as a society of independent sovereigns. But this of course said very little about the State itself as an idea, the meaning and significance of which certainly did not stay stable over the ensuing centuries. As Machiavelli’s account in *The Prince* suggested the archetypal sixteenth century sovereign existed, ‘in a relationship of singularity and externality’, or of ‘transcendence’, to his or her principality (Foucault, 2007, p 91). Since the Prince could receive his principality by inheritance, acquisition, conveyance, or conquest, it was clear there was nothing but a synthetic link between the two. The principality, including both its territory and population, thus stood in a quasi-feudal relation to the Prince’s authority, and international relations proceeded on the assumption that what was in issue was the rights, possessions, entitlements and obligations of the person of the sovereign.

By the time at which Grotius and Pufendorf were writing in the following century, however, two new traditions of thought had started to emerge. One of these, marked by an invocation of the idea of the social contract (partially present in the work of Grotius, but later given much more concrete form in the work of Hobbes and Locke), 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). The other tradition, which was associated with the emergence of mercantilist thought in the seventeenth century, began conceptualizing 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>4</sup> the idea developed that the exercise of sovereign rights ought to be oriented in that direction: the people should be governed and not merely ruled. Alongside, therefore, the emergence of a new ‘art of government’ defined in terms of some innate purpose (*raison d’état* as it was to become known), there also emerged the notion of the ‘State’ as an idea that framed the respective component elements of territory, population and government but yet was reducible to none of them. Both of these traditions of thought were important in the developing idea of the State. On the one hand the State internalized the idea of government (which, in Pufendorf’s terms, could be Democratic, Aristocratic, or Monarchical) and set it in relation to the people and its territory. Governments might come and go yet the State, so long as it retained the core elements, would remain the same. On the other hand, the State was not to be defined merely in terms of a relationship between its component parts, but in the idea that it also had some immanent end—whether that be simply to maintain common peace and security or further the cause of society. The State was thus to be described both in terms of its composition and its purpose.

<sup>4</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’.

Both of these strands of thought come to be neatly 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 common peace and security'. (Pufendorf, *On the Law of Nature and Nations*, Bk VII, c. 2, s. 13). A key feature of this definition, which itself had been 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', a moral or legal entity, had several obvious consequences. One was that it allowed jurists to differentiate between the interior and exterior of the State as Bodin had suggested (Bodin, *Six Books of the Commonwealth*, pp 51–77), and accordingly treat differences in the internal order or structure of states as largely irrelevant to their character as homogenous subjects of the law of nations. Another was that it allowed a separation between the location of sovereignty and the incidental exercise of sovereign powers—a distinction which later cemented itself in a firm differentiation that survives today between the idea of the State on the one hand and that of government on the other.

All of this was to pave the way for the subsequent work of Wolff and Vattel, who had, perhaps, the most profound influence on the character of international law as it was to develop in the nineteenth and twentieth centuries. Both Wolff and Vattel, whilst differing in many important respects, insisted upon the pertinence of the 'domestic analogy' for understanding international law. They re-appropriated the earlier conception of the 'state of nature' that had been deployed as a heuristic device in the work of Hobbes and Locke for purposes of elaborating their contractarian schemes of political authority, and posited it as being a principal characteristic of international society. For Wolff and Vattel, States were in a position analogous to individuals prior to the establishment of civil society seeking security and community in their relations with others. The principal objective of the State was to preserve and protect itself and be given the opportunity to promote its own ends. They thus enjoyed the same rights 'as nature gives to men for the fulfilment of their duties' (Vattel, *The Law of Nations*, p 4) and enjoyed such natural liberties as befitted their character. The law of nations provided the structure by which that freedom and equality was to be preserved 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 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, 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. Its social purchase is nothing short of astonishing. Nevertheless, for those receiving this tradition in the nineteenth 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 protection. 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.

By the end of that century, the picture had become still more complex, primarily as a consequence of a reflection upon the extent to which international law could be applied with equal ease in relation to the non-European world (a concern which had been explicitly taken up by the newly-formed Institut de Droit International in 1879<sup>5</sup>). The problem 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 ‘civilized’ 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 the work of those such as Martens (1864) and Klüber (1851) attests.

Yet for all this, international lawyers 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 ‘Protection’ or for the ‘cession’ of sovereignty was only to make 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?

In one sense the answer was obvious. Although few international lawyers at the time were to explicitly introduce into their definitions of the State an explicit requirement that they be ‘civilized’,<sup>6</sup> the existence of an implicit ‘standard of civilization’ ran through most of their work in relation to recognition or territorial title, or when describing the character of international law (Gong, 1984; Anghie, 2005). Thus, 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

<sup>5</sup> Twiss, 1879–1880, p 301. See generally Koskenniemi, 2001, pp 98–178.

<sup>6</sup> See eg Phillimore, 1871, p 94. Occasionally, the point was made more explicit. See Westlake, 1894, pp 102–103; Lawrence, 1895, p 58.

non-European States such as China or Japan, that those latter States were to be regarded as having the same rights and privileges as other 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 from 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 characterized 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, the substance of which however was to deny any such pretension.

Yet there was also a paradoxical difficulty here. Even if such non-European States did not possess a sovereignty equivalent to that of European States, it was not convenient to deny them status of any kind, as to do so would have put in question the validity of the agreements upon which European privileges seemed to depend (Koskenniemi, 1989, pp 136–143). Some position within the broader frame of international law had to be found for them. They had to be simultaneously included yet excluded from the realm of international law.<sup>7</sup> In the event, there were several different ways in which this matter was approached. Some differentiated between legal relations as might exist between European States and non-legal, moral, or ethical, propositions that governed relations with the non-civilized world (Westlake, 1894, pp 137–140), some differentiated between States enjoying full membership and those enjoying merely partial membership in the family of nations (Wheaton, 1866; Oppenheim, 1905), some differentiated between plenary and partial recognition (Lorimer, 1883, pp 101–123). One point was clear, however, namely that in order to be admitted into the European family of nations, those aspirant States had to demonstrate their ‘civilized’ credentials. To be ‘civilized’ furthermore, largely meant the creation of institutions of government, law, and administration modelled upon those found in Western Europe (Westlake, 1894, pp 141–143). This was a message fully understood in Japan whose rapid process of ‘Westernization’ in the latter half of the nineteenth 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 could it be said to have become a full member of international society (Westlake, 1894, p 46).<sup>8</sup>

<sup>7</sup> Schmitt. 1974, p 233, examining Rivier’s *Lehrbuch des Völkerrechts* (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>8</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

These ideas, it has to be said, by no means disappeared overnight. Indeed many of them were remodelled and given institutional form in the League of Nations. Article 38(1)(c) of the statute of the Permanent Court of International Justice still referred to ‘the general principles of law recognized by *civilised* nations’, and the theme was maintained in the institutions of the Mandate system designed 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 on 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 which were ‘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’ the precise implications of which depended upon 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 an 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 intolerable. 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 began to regard the notion of sovereignty and its correlates (sovereign equality and

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.

domestic jurisdiction) not as something integral to their understanding of international law, but 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, as the will or command of the sovereign) had not only left the discipline in a condition of internal contradiction,<sup>9</sup> but ill-equipped to deal with a world of new international institutions and novel forms of governance. Writing in 1924, for example, Brierly joined the emerging chorus, dismissing the idea of sovereignty as an ‘idolon theatre’ (theatrical artifice) that bore little relation to the way in which States actually related to one another in practice (Brierly, 1924, p 13). If ‘sovereignty’ was to be retained as an idea it had, at the very least, to be re-packaged or re-shaped in some significant way.

One can turn to Hall’s *Treatise* of 1895 as an early illustration of this change. One of the most significant features of the *Treatise* is its almost total avoidance of the term ‘sovereignty’ 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 existence or authority of the State, he used the term ‘personality’. Legal personality, of course, was a term that had already acquired a prominence in municipal law with the development of the limited liability corporation, but was not a term that had been extensively employed (at that time) in the context of international law. Its significance, however, lay in the fact that the idea of ‘personality’ assumed the existence of a systemic order that attributed a range of competences to certain designated actors. Just as a corporation, if duly brought into being, would then have the legal capacity to sue and be sued, so also one might think that States could similarly be understood to have been ‘accorded’ a certain capacity in international law. Statehood in that context, was no longer something intrinsic, carrying with it certain natural rights or prerogatives (and one may think here, for example, of the idea of an ‘inherent’ right to self-defence), but descriptive of a capacity attributed or accorded to certain entities fulfilling the requisite criteria.<sup>10</sup> In contrast to the Vattelian idea of States enjoying a natural liberty in a state of nature, for Hall this liberty of action was one ‘subject to law’ (Hall, 1895, p 24).

This semantic turn was one that may be appreciated not merely in a shift in linguistic usage from sovereignty to personality (as by no means everyone took that step), but also in an active reconceptualization of the idea of sovereignty itself.<sup>11</sup> Thus, in the *Wimbledon case*, when presented with the claim by Germany that the granting of an unfettered right of passage to vessels of all nationalities through the Kiel canal would ‘imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part

<sup>9</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>10</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.’

<sup>11</sup> For a more recent account of the transformation of sovereignty into a new global form of Empire see Hardt and Negri, 2000.

of her sovereignty' the Permanent Court of International Justice responded by stating that it:

declines 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>12</sup>

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 legal obligations once entered into.<sup>13</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: territories under belligerent occupation,<sup>14</sup> subject to a treaty of Protection or placed under the administration of a Mandatory power could be conceived as being subject to the governmental authority of another 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>15</sup> It was only a short move from here to the position adopted by Kelsen, amongst others, that States were nothing but legal orders, described fully and completely in terms of propositions of law.<sup>16</sup> It was also only a short step to admitting that States were not the only legal subjects contemplated under the terms of the international legal order—there was nothing to exclude the possibility of other agents, whether that be international organizations, individuals, or other groups, from being described as having some measure of international personality even if not on a par with that enjoyed by States.

<sup>12</sup> S. S. 'Wimbledon', *Judgments*, 1923, *PCIJ*, Series A, No 1, at p 25.

<sup>13</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 259: 'A State... is sovereign for purposes of accepting a limitation of its sovereignty'.

<sup>14</sup> See Article 43 of the Hague Regulations (1907).

<sup>15</sup> One may note, in that respect, the same reconceptualization occurring in relation to the notion of 'domestic jurisdiction'. See eg. *Nationality Decrees Issued in Tunis and Morocco*, *Advisory opinion*, 1923, *PCIJ*, 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>16</sup> Kelsen, 1942, pp 64–65: '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.'

Yet for all the determination to formalize Statehood and oppose an inherited tradition that associated sovereignty with the possession of certain determinate rights and obligations, there was a strongly resistant current in the shape of the principle of national self-determination. National self-determination, in the form advanced by President Wilson in 1918 (see below) implied a substantive conception of the State rooted in ideas of community and cultural homogeneity, determined perhaps by religious or linguistic markers. The sovereignty that this idea demanded was not one that would be regulated from outside, but that inhered in a determinate people with values and interests that required protection and advancement. To the extent that the promotion of national self-determination seemed to go hand in hand with the simultaneous juridification of sovereignty meant that legal doctrine was 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) of which neither could ultimately attain ascendancy (Koskenniemi, 1989, pp 59–60, 224–233). This opposition, indeed, was to continue to infect the discourse on statehood through the period of decolonization 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 in discussions over the implications of recognition (whether it was ‘constitutive’ or ‘declaratory’).

### III. DEFINING THE STATE

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 a certain competences under international law, was one that could be described in terms of an increasing concern to identify those ‘marks’ or ‘criteria’ by which statehood could be measured. For Vattel, describing or defining the State was primarily a matter of trying to capture, in as neutral as possible terms, the plurality of different kinds of political communities existing in Europe in the middle of the eighteenth century, but for those doing the same 100 or 200 years later, the project of description had taken on a different character.

For a period of time, it wasn’t entirely clear whether what was being described in the process was a sociological fact or a legal category (one could construe a definition that merely outlined the ‘marks’ of a State in either way), but the terms of description became more explicitly exclusionary in nature 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 was constrained to point out, at the same time, its limitations. It did not include, as far as Wheaton was concerned, corporations created by the State itself, 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). 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 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’.

Yet there was clearly a difficulty associated with this move from fact to law (or, if you prefer, from description to prescription). How, and in what way, might one conceive of international law participating in the establishment of territorial political communities? The title of Crawford’s influential book on the subject—*The Creation of States in International Law*—would appear to attribute to international law an excessively grandiose role. States are surely not ‘created’ by international law in the same sense that a cabinet maker might craft a piece of furniture; rather they typically emerge through spontaneous or organized political action on the part of a community who articulate their common destiny in terms of political independence. Indeed, to the extent to which there is reliance upon the notion of ‘effectiveness’ for purposes of determining the existence or otherwise of a State would suggest that the role of law is almost entirely *ex post facto*. ‘Sovereignty’, after all, as Wade was to claim seemed to be ‘a political fact for which no purely legal authority can be constituted’ (Wade, 1955, p 196). But Crawford was not naïve in this sense. What he was arguing against was an exclusively ‘empirical’ notion of statehood. A State is not, as he puts it, ‘a fact in the sense that a chair is a fact’ it is rather ‘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 idea of the status of ‘criminality’ being generated through the institutions and structures of the criminal law, or of ‘insanity’ through the discipline of psychiatry (Foucault, 2006). Just as ‘a thief’ is a designation appropriate only once it has been determined that the person concerned has unlawfully appropriated the property of another, so also to call something a ‘State’ is to draw attention to the legal framework within which the powers and competences of a State may properly be acquired (Kelsen, 1942).

Whilst this usefully directs our attention both to the relational aspect of statehood and the idea that its meaning is constituted in a range of ideas about authority and responsibility, it still doesn’t quite deal with the problem. Crawford’s assumption that the legal order accords ‘statehood’ to those entities that possess the requisite characteristics might work so far as one may conceive of States emerging through an essentially consensual process. The emergence of 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>17</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 regime (much in the same way as Czechoslovakia, Poland or the Serb-Croat-Slovene State were ‘created’ at the Peace Conferences in the aftermath of the 1914–18 war), or perhaps as creating the necessary legal ‘space’ for the new State to then assert its rights over the territory and population concerned.<sup>18</sup> By and large, in fact, this has been the predominant means by

<sup>17</sup> Agreement Establishing the Commonwealth of Independent States (Minsk Accord), 8 December 1991, 31 ILM (1992) 143; Alma Ata Declaration, 21 December 1991, *ibid*, p 148.

<sup>18</sup> One may note here, that the answer often depends upon the stance adopted in relation to the role of recognition. See eg 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

which new States have emerged since 1945 even if many have done so under the rubric of ‘self-determination’.

Yet it is also evident that in many cases the issue is not one of the consensual devolution of sovereign authority but of the emergence of a new State out of a condition of dispute or conflict. Here the question remains as to how one might conceive of a moment in which sovereign authority is created out of the mere fact of the forcible or violent seizure of power? In a lecture entitled ‘Force of Law: the Mystical Foundation of Authority’ Jacques Derrida (1989–90, p 927) posed the following question:

How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal—or, others would quickly say, neither just nor unjust?

Taking as his starting point, Walter Benjamin’s distinction between ‘constituted’ and ‘constitutive’ force (between force authorized by law and force that originally establishes legal authority) Derrida’s essay was concerned with highlighting how these two ideas converged, and to point out the continued presence within all schemes of law and legal thought of an originary (extra-legal) violence that necessarily accompanied the establishment of that legal authority. Of course, even if the authority of an original constitution can never be thought to depend upon the law which it brings into effect, one might nevertheless look to international law for purposes of validating such authority ‘from the outside’ so to speak. Yet there are two remaining difficulties. The first is that in order to sustain the argument that other States may authorize or validate the existence of a new State, one would still have to move back to determine the basis upon which those authorities claimed that ability. How might existing States bring into existence another State with ‘law creating capacity’ without the latter being seen, in some respects, a subordinate authority? And in that respect the image of an international legal community as a closed ‘club’ of European States both territorially incomplete and politically imperial is never far in the background. The second difficulty is that, as mentioned above, in a world already fully demarcated in terms of sovereign jurisdiction (in which there is no effective space for the emergence of an entirely new State like that of Liberia in 1847 or the Congo Free State in 1885) the process of ‘creation’ can only be achieved by way of displacing in some manner or other the prior claims to sovereignty of an existing State. Unless existing claims to territorial sovereignty are lifted or suspended in some way (such as by consent), the emergence of a new State could not be achieved without some measure of illegality.

Whatever the problems associated with this move from description to prescription, it was always evident 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, although the United Nations and the League of Nations before it were committed to a process of the codification of international law, they managed to accomplish neither of these tasks. In 1949 the International Law Commission did produce a Draft Declaration

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’.

on the Rights and Duties of States,<sup>19</sup> which went in some direction towards summarizing what the implications of Statehood might be, albeit the case that this draft was not adopted by the General Assembly. Alongside a list of ten duties the Draft Declaration included 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 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, with some qualification, seems to describe those 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 they enjoy an ‘unlimited freedom’ subject only to those constraints determined by law (the *Lotus* principle) (Crawford, 2006, pp 40–41). These, in some respects at least, might suggest why Statehood remains an attractive proposition.

Whilst drafting the Declaration, the International Law Commission also briefly discussed the merits of seeking to define the State for purposes of international law. The general reaction, at that time, was that such a project was unnecessary because it was either too self-evident or that it was too controversial (the concern being that it would only have salience as regards ‘new’ rather than ‘old’ States). In some respects at least, this caution was probably informed by the fact that the Pan American Union (the predecessor of the Organization of American States) had already drafted the Montevideo Convention on the Rights and Duties of States 1933, 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 Article 1 is still treated with a certain degree of circumspection. 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, is a little unclear. As a legal prescription, the terms of the Montevideo convention 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 Quebec. Certainly it may exclude Wheaton’s private corporation or his nomadic society, but one may ask what else? And to what end?

<sup>19</sup> GA Res 375(VI), 6 December 1949, Annex.

What appears to be needed here is one of two things. One possibility is that it requires 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. It must be large enough and effective enough to warrant being regarded as both self sufficient and, as the final qualification suggests, have the capacity to enter into relations with other States. Another possibility is that it requires some qualitative evaluation—so rather than merely expecting a claim to be made in respect of a people or a territory, it expects those claims to be justified in some way for example on the basis that they respond to a principle of self-determination or are 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 virtually impossible in the abstract—who could say in advance 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 (recognized claims over territory or 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 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.

#### A. POPULATION

As suggested above, one of the critical ideas accompanying the development of the idea of the State was that the people were not merely the accidental objects of a sovereign’s authority, but that they also partook of that sovereignty and were 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 population was not merely a means of demonstrating the wealth and power of the sovereign, or a means by which the State could ultimately secure itself in competition with others (through the drafting of troops and the cooption of labour for the production of wealth). It also provided the rationality for government itself: the purpose of government (and hence of the State) was, amongst other things, the promotion of the prosperity and happiness of the populace.

That the State was to have this immanent end was to encourage the idea that, to be politically and economically viable, it needed to be of sufficient size (Hobsbawm, 1992, 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*, pp 363–364). Unification thus became the dominant theme of nation-building in the nineteenth century and the claims of those such as the Fenians in Ireland or the Bretons in France routinely disparaged. This was an idea not entirely shaken off in the early part of the twentieth 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—the formal reason for which was its lack of independence from Austria (to whom it had ‘delegated’ certain customs and postal duties under Agreement). Underlying that, however, was an evident concern over its size and the political implications of allowing micro-States the same voting rights as other States in the organs of the League (Duursma, 1996, pp 173–174). Later practice in the context of the United Nations, however, has suggested that such a consideration is no longer quite what it used to be. Alongside Liechtenstein as members of the United Nations (for which, as article 4 of the UN Charter makes clear, being a State is a prerequisite) sit States such as Andorra, Monaco, Brunei, Kiribati, Nauru, Palau, Vanuatu, and the Marshall Islands, all of which have populations of under 1 million. As most conclude, whatever the Montevideo Convention says, there seems to be no minimum threshold population necessary in order to obtain statehood.

If the criterion of population seems not to relate to the notion of a threshold, then perhaps it refers instead to the idea that there must exist a population enjoying exclusive relations of nationality with the nascent State. Whilst it is certainly true that in the early years of the twentieth century nationality did enjoy this aura of exclusivity—and hence, in some respects, represented a way of demarcating the populations of different States—this was merely an expectation rather than an obligation. The competence to confer and withhold nationality was still regarded as a matter falling within the domain of domestic jurisdiction in the sense that international law neither required such conferral in any particular case nor prohibited its withdrawal.<sup>20</sup> The only context in which international law seemed to be relevant was where one state sought to rely upon the bond of nationality when bringing a claim against another State alleging harm to one of its nationals and in which the reality of that ‘bond’ was open to dispute.<sup>21</sup> Not only did the conferral of nationality thus seem to be a competence that ensued from having legal capacity as a State (a consequence, that is, not a precondition), but as the toleration of multiple nationality has increased (see Franck, 1999, pp 61–75) even the theoretical possibility of it being regarded as an effective condition for statehood has similarly 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>22</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 a condition of statehood, thus, the existence of a ‘population’ seems to be cast in metaphorical terms—they 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.

<sup>20</sup> *Nationality Decrees issued in Tunis and Morocco, Advisory opinion, 1923, PCIJ, Series B, No 4*, p 24.

<sup>21</sup> *Nottebohm, Second Phase, Judgment, ICJ Report 1955*, p 4.

<sup>22</sup> See also, Articles 1 and 11, ILC Draft Articles on Nationality of Natural Persons in Relation to the Succession of States (1999).

## B. TERRITORY

Much of the 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 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, p 117). At the same time, it is clear that the real issue in most cases is not the issue of size, nor indeed the mere factual possession or control over territory (as, of course, possession may always be ‘adverse’ 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>23</sup> then the existence or absence of competing claims to sovereignty would appear to be key.

There is, however, an obvious difficulty here. 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>24</sup> or territory which has been explicitly or tacitly ‘ceded’ to it, then it remains very difficult to see how any such nascent State might establish the requisite authority over territory. This indeed, seems to be the condition of most secessionist enterprises and the extent cause for most to go unfulfilled. Yet the position is not quite as straightforward as this might suggest. It is classically maintained 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>25</sup> Reflecting upon this practice, the International Court of Justice subsequently affirmed in the *North Sea Continental Shelf* case 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 delimited and defined, and often in various places and for long periods they are not...<sup>26</sup>

Of course, one can rationalize this practice to the extent that one treats the border and the territory of the State as two different things. Borders seem to be the consequence of the possession of territory—their delimitation proceeding on the basis that there are legitimate entitlements on either side. Territory, in the context of statehood, however, seems incapable of being framed purely in terms of ownership or possession for the simple reason that it concerns the prior question as to the very existence of the legal person rather than merely its spatial parameters.

This distinction between territory and its boundaries is an appealing one in the sense that it allows for the disposal of ongoing disputes over the location of borders (often by

<sup>23</sup> *Island of Palmas Case* (1928) 2 RIAA 829.

<sup>24</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>25</sup> *Monastery of Saint-Naoum, Advisory Opinion, 1924, PCIJ, Series B, No 9.*

<sup>26</sup> *North Sea Continental Shelf, Judgment, ICJ Reports 1969, p 3, para 46.*

reference to the classical ‘modes’ by which territory might be acquired such as discovery, cession, annexation, occupation or prescription<sup>27</sup>) without, at the same time, 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 was such as to affect its legal identity and therefore required it to apply afresh for membership in the UN or EU. At the same time, it is clear that radical changes to borders can have that function—as was demonstrated, in particular, in the case of Yugoslavia/Serbia (see Blum, 1992). Borders, after all, are not merely lines on the ground, or ways of delimiting spheres of public jurisdiction, but serve also to delimit the existence of a political order by means of its separation from others. The supposition, thus, that a lack of delimited borders is of no consequence is hard to maintain. 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, but the entirety of its territory which had been carved out of the defunct Mandate for Palestine. In that context no small significance can be attributed to the general atmosphere of uncertainty generated, amongst other things, by the Security Council’s failure to endorse the General Assembly’s plan for partition outlined in Resolution 181(II) of 1947 and the apparent termination of the Mandate occasioned by the withdrawal of the British administration. The lack of an effective interlocutor able to claim that recognition of the new State 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) was such as to allow a critical space for recognition of the State of Israel without the kinds of qualms associated with premature recognition that would naturally arise in other contexts. Once again, thus, the criterion of territory assumes a highly indeterminate form in the legal conception of statehood—it being a simultaneously indispensable quality, but yet one incapable of being articulated in anything other than an abstract, and once again metaphorical, way.

### C. INDEPENDENT GOVERNMENT

To a large extent, those addressing the criteria for statehood are unified on one matter above all else: that the criteria are ultimately aimed towards the recognition of ‘effective’ governmental entities. Governmental effectiveness understood as its power to assert a monopoly over the exercise of legitimate physical violence within a territory (to paraphrase Weber, 1994, pp 310–311) is taken to be central.<sup>28</sup> In a sense, the Weberian definition is somewhat tautological—to say whether an entity enjoys a monopoly over the exercise of legitimate violence assumes the prior establishment of a distinction between legitimate and illegitimate violence (between the violence of the police and that of the insurgent), and that kind of distinction as Derrida pointed out was ultimately unavailable. But what is clearly meant, here, is that the government concerned must demonstrate unrivalled possession and control of public power (whatever the specificities of that might be in any

<sup>27</sup> For a classical account of the modes of acquisition of territory see Jennings, 1963.

<sup>28</sup> See Lauterpacht, 1947, pp 340–341: ‘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.’

particular setting), and that once that unrivalled possession is established with a degree of permanence 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>29</sup> Rather, it is to suggest that this criterion of effectiveness operates as a legal principle the effect of which is conditioned by other relevant principles such as that of self-determination or the prohibition on the use of force. He is thus able to maintain that, in some contexts, relatively effective political entities such as the Turkish Republic of Northern Cyprus or Southern Rhodesia have not come to be recognized as independent States for the reason that to offer such recognition would have violated other relevant norms of international law having the status of *jus cogens*. In the same sense, but to different effect, he also maintains that the criterion of effectiveness is, in practice, of relatively less significance if the State in question is one that enjoys a right of self-determination.

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 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 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.

<sup>29</sup> LNOJ, Sp Supp 4 (1920) pp 8–9.

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 57–58)

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 jus 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 non-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 or 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, operates as a principle the parameters of which are legally determined and may interact with other relevant principles such as those of self-determination or the prohibition on the use of force, and those that putatively govern the ‘extinction’ of States.

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 the recognition of new aspirant entities once they have become legal ‘facts’ so to speak, and one that prohibits any such recognition as being a violation of the territorial sovereignty of the State from which that entity is to emerge. In the nineteenth 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 it had fully established itself, that recognition would constitute ‘a wrong done to the parent state’ and, indeed, ‘an act of intervention’ (Hall, 1895, p 89).<sup>30</sup> European powers were, thus, very cautious when addressing the recognition of the new States in South America, frequently modulating their response by reference to what seemed to be happening on the ground. Usually the insurgent communities were initially recognized *de facto*, *de iure* recognition coming once it was clear that Spain had effectively given up the fight. The importance of effectiveness, in such a context, was found in the way in which it served to definitively mark the moment at which the rights of the parent State gave way in face of those of the secessionist movement, much in the same way as it served to mark the point at which territory was acquired by way of annexation or occupation. This also meant that effectiveness was something of a movable feast: it never really meant quite the same thing in every place.<sup>31</sup> What was required in

<sup>30</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>31</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

order to establish territorial sovereignty depended upon the nature and strength of rival claims such that a relatively ineffective Congo Free State could garner recognition in 1885 simply because of the apparent absence of any other recognized sovereign whose rights would be impeded in the process, yet considerably more was required for the recognition of the new Republics in Latin America. For all the subtle modulations of this early practice, however, such arguments clearly became more problematic in the course of the twentieth century once it came to be accepted that the use of force was no longer a legitimate means of acquiring title to territory.<sup>32</sup>

If the general prohibition on the use of force implies the illegality of 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 jus non oritur*). The now classic case of Manchukuo—cited mainly as an exemplar of the doctrine of non-recognition—is perhaps an example. When Japan engineered the establishment of the State of Manchukuo in China in 1931, the Lytton Commission, which had been dispatched by the League of Nations on a fact-finding mission, concluded that the Japanese action was inconsistent with both the Covenant and the Kellogg-Briand Pact and that Manchukuo itself remained largely under Japanese control. Its 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’ that had been brought about by means contrary to the Pact of Paris.<sup>33</sup> Several League of Nations resolutions were adopted on this basis calling for non-recognition and the ‘State’ was finally dismantled in 1945. More recently than this, the establishment of the Turkish Republic in Northern Cyprus following the Turkish intervention in 1974 was denied recognition, principally again on the basis that its creation was the product of an unlawful military intervention.<sup>34</sup> Similar arguments were also put forward by Bosnia in its memorial in 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>35</sup>

It is worth noting, in this context, that the prohibition on the use of force has also been an idea instrumental not merely in resisting the establishment of puppet regimes, but of 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 within the Union. A good many States refused to recognize the legality of the incorporation (Ziemele, 2005, 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

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.’

<sup>32</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 Res. 2625(XXV), (24 October 1970), Principle 1. See generally Korman, 1996.

<sup>33</sup> 1 Hackworth 334.

<sup>34</sup> See *Cyprus v Turkey* [GC], no 2571/94, ECHR 2001-IV, 120 ILR 10.

<sup>35</sup> *Memorial of the Government of the Republic of Bosnia and Herzegovina*, 15 April 1994, p 264.

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>36</sup> The prohibition on the use of force, in other words, seems to work not only as a way of denying the recognition of what might otherwise be regarded as effective entities, but 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’. In some respects at least, this seems to be unavoidable: one may recall 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 continued existence of which had to be presupposed for purposes of authorizing international action despite the fact that its government had been effectively displaced by that of Iraq.

If this analysis is accurate, however, it does pose the question as to whether the principle of governmental effectiveness has any real meaning other than as a form of historical retrospection. If it is an idea that is systematically displaced by rules relating to the use of force or otherwise modulated by the principle of self-determination, its significance as a way of marking out the moment at which a State may be said to have come into legal existence seems to have significantly diminished. 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 governments concerned had effective control over only a portion of the territory in question (Rich, 1993). On the other side, it is also hard to think of many examples of new States being recognized simply because they have managed to secure their independence as a matter of fact. There are clearly several that have not (Katanga, Abkhazia, and the Republika Srpska for example) and for those that seem to be plausible cases, some other explanatory framework is usually deployed (such as consent, self-determination or disintegration) as a means of displacing the claims of the territorial sovereign. The most problematic cases are those of Bangladesh and Eritrea, the recognition of which could not easily be framed in terms of the standard understanding 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).

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 those such as Jackson and Kreijen. For Jackson (1990, pp 21–31), decolonization 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’: States which, because of their precipitous independence, were given the imprimatur of statehood before developing the necessary internal capacity for political self-government and economic independence. Rather than be developed prior to

<sup>36</sup> 7/8 Bull EC (1991) 1423.

independence, such States (mainly those in Africa it seems) have had to develop themselves after it. 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 such as through the recognition of a right to development or the reintroduction of the notion of trusteeship into international law.

Such reflections draw upon themes that are common to recent debates over ‘failed’ or ‘fragile’ States, the significance of which goes somewhat beyond the narrow confines of a discussion as to the conditions under which a new State should be recognized, but nevertheless have resonance for an understanding of what the implications of statehood might be. In an influential article, Helman and Ratner (1992) commented upon what they saw to be a new phenomenon in international relations: the emergence of ‘failed’ or ‘failing States’. Failed States were those such as Somalia, Sudan, Liberia, and Cambodia in which civil conflict, government breakdown and economic privation imperilled their own citizens and threatened their neighbours ‘through refugee flows, political instability, and random warfare’ (Helman and Ratner, 1992, p 3). 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 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 notion was one that recommended reconstructive activity, in other hands, State failure 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 even, the notion has been employed as the basis for a refusal to recognize or implement treaty obligations.<sup>37</sup> As Simpson points out, such ideas are redolent of those abounding at the end of the nineteenth century in which critical differentiations were made between different kinds of State (such as, between civilized and uncivilized States) for purposes 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 nineteenth century imperialism (Gordon, 1997). Yet it is also run through with many of the same kinds of contradictions. Just as nineteenth century international lawyers struggled with the problem of having to both recognize and deny the status of political communities in the extra-European world, so also those invoking the notion of State failure seem to maintain the idea that these are indeed still States for purposes of attributing responsibility for their condition, but 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).

<sup>37</sup> See Yoo, Memorandum, 9 January 2002 explaining that the Geneva Conventions did not apply because Afghanistan was a failed State.

#### IV. SELF-DETERMINATION

As observed above, 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 State embraced, simultaneously, the idea of a nation or a society in relation to which governmental authority was related. It is no accident, thus, that international law acquired the designation attributed to it by Bentham—it was always seen as the law between nations or societies as much as that 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—one being what might be termed a tradition of civic republicanism that conceived of sovereign authority as being 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 a ‘communitarian’ tradition that emphasized the corporate character of the society or nation the institutional expression of which would be the State (exemplified in Pufendorf’s characterization of the State as a ‘moral person’). In both cases, the ‘nation’ remained an important idea—on one side as the social frame within which the contract of sovereignty would be formed, on the other side as a natural community endowed with certain innate ends and prerogatives (and, indeed, perhaps an independent ‘will’)—but in either case, the nation was never entirely reducible to the State itself.

In the course of the nineteenth century these two themes came to be summarized in a single verbal expression—that of ‘national self-determination’—but which nevertheless merely internalized the two traditions within a single frame. One form of self-determination, associated with emergent ‘nationalist’ thought in Germany and Italy (sustained in the work of Herder, Fichte, and Mazzini amongst others), conceived of the idea that nation and State should be made congruent. It was the perfection of national society (understood variously as a society determined by reference to racial, ethnic, religious, linguistic or historic homogeneity) that was to be sought in the promotion of its self-determination. Another form of self-determination, associated with the tradition of civic republicanism (with roots in the work of those such as Kant), conceived of the idea of self-determination in terms of representative self-governance: it being the promotion of individual liberty through the technique of self-rule that was to be sought. Here, as Mill was to suggest, the frame of the ‘nation’ remained important if only because social uniformity and national homogeneity were necessary productive conditions for self-governance.<sup>38</sup> These two concepts of self-determination presented very different challenges to the existing order of sovereign States—the first as 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; the second presenting a challenge to the authority of governments to represent externally the will of a people to whom they were not internally

<sup>38</sup> Mill, *Considerations on Representative Government*, Chapter XVI: ‘it is in general a necessary condition of the institutions, that the boundaries of governments should coincide in the main with those of nationalities’.

responsible. These were not identical claims by any means: the latter appeared to confront the sovereign's authority with a criterion of legitimacy founded upon a rationalistic conception of representation, whereas the former appeared to challenge authority (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).

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 impossible, not simply because of the difficulties of determining which 'nation' deserved a State, but also because of their dispersed character. This recommended two expedients—one being the forcible transfer of certain populations (such as between Greece and Turkey<sup>39</sup>), the other being the institution of minority agreements within the Peace Treaties in order to protect those residual national communities cut adrift from the 'kin State' to which they were naturally thought to belong (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 (eg for the Flemish, Irish, or Basques), nor was it regarded as applicable to territories outside Europe which, in the terms of the time, had yet to discover their national consciousness (Hobsbawm, 1992, pp 131–141).

If national self-determination was merely the implicit premise behind the reorganization of Europe after the First World War, it became a very much more explicit part of the settlement after the Second World War, but in some ways 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), Chapter XI of which made clear that the primary concern was 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'. That this was to be interpreted as meaning 'decolonization' was later made clear by the General Assembly in a series of Resolutions beginning with the Declaration on the Granting of Independence to Colonial Territories of 1960.<sup>40</sup> Over the course of the next 30 years most of those territories identified as 'non-self-governing' by the United Nations were to acquire their independence and become, as an important marker of their new status, members of the Organization.

<sup>39</sup> Convention Concerning the Exchange of Greek and Turkish Populations, Lausanne, January 30, 1923.

<sup>40</sup> GA Res 1514 (14 December 1960). See also GA Res 1541 (15 December 1960).

Whilst decolonization was obviously to transform the membership of the UN, and radically re-shape the character and nature of its activities, its implications as an instance of the application of the principle of self-determination were somewhat less clear. In one direction, of course, it posed the question whether self-determination was a principle applicable only the context of decolonization, or whether it might also legitimate secession in other cases. UN practice seemed limited in that sense (Bangladesh remaining a problematic exception), 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,<sup>41</sup> then on what grounds might one want to restrict it only to those overseas territories that 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? But of course the practice was not one of 'national' self-determination in the sense that President Wilson had understood it at all. It was self-determination for those 'selves' that had been specifically designated as being entitled to determine their own political future through the plebiscite and ballot box. It did not extend to those other, self-selecting communities, such as the Ibo in Biafra or the Katangese in the Congo who demanded independence on their own initiative and whose claims to independence largely fell on deaf ears.

It was soon to become apparent that the primary means for this process of designation, or prior determination, was worked out through the medium of colonial administration. 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, it 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). The principle, in this second case, came to be expressed in the phrase *uti possidetis*—which referred to a concept having its origins in the somewhat hazy practice of boundary delimitation in South America, but which subsequently came to be affirmed as 'a general principle...logically connected with the phenomenon of obtaining independence, wherever it occurs'<sup>42</sup> (see generally Shaw, 1986). Precisely what 'logic' strictly required obedience to the inherited parameters of colonial administration was not clear, but there did at least seem to be a need to determine who the people were before they were asked to decide upon their political future.

All of this, however, seems to be a long way away from the radical notion of self-determination as an idea which, as Berman puts it, challenges 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). The more the principle could be described in terms of 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. Yet, fundamentally, there was still an inevitable tension between, on the one hand, the lofty proclamation of self-determination with its open-ended demand for self-government, and the simultaneous commitment to the principle of territorial integrity (which was almost invariably mentioned in General Assembly resolutions in the same

<sup>41</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>42</sup> *Frontier Dispute, Judgment, ICJ Reports 1986*, p 554, para 20.

breath as that of self-determination). Of course, preserving intact all external and internal administrative boundaries nodded in the direction of this idea of territorial integrity, and certainly served to secure the political integrity of the newly emergent States once they had become established. It is no great surprise, in that sense, that the member States of the Organization of African Unity pledged in Resolution 16(1) of 1964 to respect colonial frontiers as they existed at the moment of independence (Shaw, 1996, pp 97–105). But at the same time, it still evaded the larger question as to how, and on what basis, the colonies may have enjoyed a right of self-determination, rather than the different peoples that comprised those colonies or, as Belgium cynically insisted, other non-self-governing communities elsewhere in the world. Part of the answer must be found in the gradual prioritization during this period of the idea of self-determination as a principle associated with the republican notion of self-governance rather than as a vehicle for aligning the boundaries of the polis with that of the nation. In one direction, for example, one may note that the principle of self-determination had, by this stage, lost its prefix; ‘peoples’ had replaced ‘nations’ as the relevant subjects of the right, and the identification of a community as ethnically or linguistically homogenous increasingly became a marker of its status as a minority rather than as a people entitled to political independence. In another direction, this new alignment was also evident in the increased emphasis placed upon the intrinsic relationship between ‘internal’ self-determination and the protection of individual and collective human rights (Cassese, 1995, pp 101–140; McCorquodale, 1994).

Nevertheless, this still only answers half of the question: it may explain, for example, why self-determination took the shape it did, and why it was a right denied to other ‘minority’ communities, but still doesn’t answer how it was that decolonization could be squared with the principle of territorial integrity. For some colonial powers, after all, the colony was still largely regarded as part of the Metropolitan State (very much more so for Portugal and France than for Britain) the separation of which necessarily implied some diminution of the sovereign claims of the colonial powers. The right of self-determination, furthermore, seemed to speak of a process of determining future status, rather than a status in its own right. This, as Berman was put it, posed the question as to how international law was able to ‘recognize a right accruing to an entity which, by its own admission, lacks international legal existence?’ (Berman, 1988–89, p 52). The answer to both questions 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 Protectorates (such as Morocco)<sup>43</sup> and Mandate territories. In the latter context, as McNair was to suggest, the question of sovereignty seemed to lie in ‘abeyance’.<sup>44</sup> The rights of the colonial power were not those of a sovereign, but rather those enjoyed in virtue of agreement, to be exercised by way of sacred trust. Independence thus in no way implied a loss of sovereignty, or a violation of the principle of territorial integrity, rather

<sup>43</sup> *Rights of Nationals of the United States of America in Morocco, Judgment, ICJ Reports 1952*, p 176 at p 188 where, despite the French Protectorate, Morocco was declared to be ‘a sovereign State’.

<sup>44</sup> *International Status of South West Africa, Advisory Opinion, ICJ Reports 1950*, p 128, Separate Opinion of Judge Mc Nair, p 150.

the fruition of a status temporarily subordinated by the fact of colonial administration. In that respect, the most remarkable feature of process of decolonization was the generalized, and quasi-legislative, statement found in the General Assembly's Declaration on Friendly Relations<sup>45</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'. In virtue of this, any apparent tension that existed between its espousal of the principle of self-determination and simultaneous reaffirmation of the principle of territorial integrity largely evaporated.

If the principle of self-determination seemed to imply a suspension of claims to sovereignty on the part of the Metropolitan State and a commitment to the positive promotion of self-government on the part of 'dependent' peoples, it also seemed to imply 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>46</sup> and the Security Council which called upon States not to recognize the 'illegal racist minority regime', and provided for a regime of sanctions to be imposed.<sup>47</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>48</sup> Only in cases in which the subversion of self-determination came at the hands of another 'newly independent State' (Goa, West Irian, East Timor, and Western Sahara) was the reaction somewhat more muted or equivocal, and one may sense that this was probably informed by the idea that the rubric of colonialism had somewhat less purchase in such cases.

Yet, for all its continuing associations with the process of decolonization, the story of self-determination does not end there. After the fall of the Berlin Wall in 1989 and the collapse of the Soviet rule, the principle of national self-determination was once again to acquire a prominence in international legal thought and practice. Of the new States that were to emerge in the 1990s, most did so on a platform of national self-determination, most also held plebiscites or national polls by way of authorization, some also sought to make as a determinant of subsequent citizenship a facility with the national language (Cassese, 1995, pp 257–277). Not all such cases, however, posed problems as far as the question of statehood was concerned. In some cases the change could be conceived as little more than a change of government (Hungary, Romania, Ukraine, Poland, Belarus, and Bulgaria for example), in some as the emergence from a condition of unlawful annexation (the Baltic Republics), in some as a basis for consensual re-unification (Germany), or of separation (the Czech and Slovak Republics). In the cases of the former USSR and Socialist Federal Republic of Yugoslavia, however, the role to be played by the principle of self-determination was to assume considerably more significance.

<sup>45</sup> GA Res 2625 (XXV) (24 October 1970).

<sup>46</sup> GA Res 2379 (SSVI) (28 October 1968).

<sup>47</sup> SC Res 232 (16 December 1966); SC Res 253 (29 May 1968).

<sup>48</sup> GA Res 31/6A (26 October 1976); SC Res 402 (22 December 1976).

In the case of the Soviet Union, the problem was effectively resolved at two meetings in Minsk and Alma Ata (see above) which, whilst by no means wholly consistently, put in place the idea that the independence of the new Republics in Central Asia and elsewhere had come about through the consensual secession of the administrative units of the Union leaving Russia as the rump State. If the language of national self-determination was relevant, here, it was not such as to challenge or disrupt the principle of sovereignty or territorial integrity in any profound way. The case of Yugoslavia, by contrast, was far more difficult (see Radan, 2002). Prior to 1989, Yugoslavia had been a Federal State comprising of 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 recalling, in their terms, the principle of national self-determination (which itself had some recognition in the Federal Constitution). These initiatives, however, were forcibly resisted and the subsequent outbreak of violence was then to engulf Bosnia-Herzegovina, the severity of which led ultimately 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 European 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 characterization of the ongoing conflict (as international rather than merely internal (see Gray, 1996)) and as to the justification for the arms embargo. It also, and more significantly for present purposes, would seem to bring into play the possibility that there might exist a ‘post-colonial’ right of secessionary self-determination, 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 participating in the Conference on Yugoslavia 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 (see Craven, 1995; Terrett, 2000). In the Autumn of 1991 the Badinter Commission issued two significant Opinions that set the stage for the subsequent recognition of Croatia, Slovenia, Bosnia-Herzegovina 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 (it being hinted that those Federal organs such as the Yugoslav National Army that continued to operate had been effectively co-opted by the Serbian government). The significance of this should not be lost. What the Commission signally refused to say was that the ‘nationalities’ within the federation had a right of secessionary self-determination. They could plausibly have linked such a claim to the provisions of the Constitution that spoke of self-determination, to the emerging idea that self-determination is legitimate in cases of abusive or totalitarian exercises of power, or indeed, more simply to the proclamations of independence on the part of the various Republics. Doing the latter would obviously have been a little awkward given the claims to independence on the part of the Serbian

community in Bosnia,<sup>49</sup> but its general reluctance here, no doubt, was informed by the sense that the recrudescing ethnic nationalism that underpinned the claims to independence were a throwback to a pre-modern primitivism the function of which had merely been to exacerbate the conflict in the first place. 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 (in whose name the government of Serbia and Montenegro continued to act), nor wanting to provide 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 an extraordinarily dextrous act. Its effect was to provide a necessary analytical space for the recognition of the emergent Republics (whether or not on the basis of the principle of self-determination<sup>50</sup>) without running the risk of undermining respect for the principle of territorial integrity. Indeed, on the latter score, the Badinter Commission reaffirmed, in its second Opinion, the principle of *uti possidetis*, 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. That this was always to leave a certain ambiguity as to the status of Kosovo, which of course had a degree of administrative independence within the Federal structure albeit not as a constitutive nationality, and perhaps goes some way to explain the ease by which the UN administration over the territory was established (the question always being in the air as to whether this was, indeed, 'Serbian' territory). Nevertheless, what appears from this, yet again, is the idea that the principle of self-determination is not something that rubs directly against the grain of statehood, nor that it necessarily stands in competition with the principle of territorial integrity. Rather it is an idea that has been allowed to flourish in the interstices of the existing order, occupying those spaces which have been opened up for it through the prior displacement of arguments about territorial sovereignty—whether that be through the idea that colonial territories had a status distinct from that of the metropolitan States, that independence was 'granted' rather than acquired, or that conflict had led to the dissolution of State from which the republics were to emerge.

## V. DEMOCRACY AND HUMAN RIGHTS

For all the normalizing characteristics of much of this practice, there has remained a stand in much international legal thought that has resisted the implication that self-determination is nothing other than a process of describing how new States emerge. If 'national' self-determination understood in its ethnic, cultural, religious, or linguistic sense has been carefully avoided (or perhaps subsumed within the discourse of minority rights), self-determination in its civic republican sense has not. Indeed events in the 1990s have, if nothing else, given considerable impetus to the idea that there exists an emerging right to democratic governance in international law (Franck, 1996; Fox and Roth, 2000) the

<sup>49</sup> In Opinion No 2, the Commission addressed the claim to self-determination on the part of the Serbs in Bosnia and decided that, as a minority, they were not entitled to independence. It did suggest, however, that self-determination might be reinterpreted as implying a right of each individual to the nationality of their choice.

<sup>50</sup> See on this Koskenniemi, 1994a.

source of which is often traced to the linkage between the principle of self-determination and the individual rights of political participation (Article 25 International Covenant on Civil and Political Rights) and evidenced in the emerging practice of multilateral election monitoring and other initiatives designed to promote democracy and human rights. At first glance of course, the idea of a right to democratic governance has little obvious resonance for questions of statehood. Since it is concerned primarily with the issue of governmental rather than State legitimacy it may thus be thought to have salience in relation to a range of discretionary relations (diplomatic, financial and trade relations for example), but not so in relation to the qualities of statehood itself. Yet it is clear that those advocates of the 'emerging' right to democratic government do not see it as so confined.

There are two plausible ways in which a 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. In respect of the first issue, as Murphy points out, elements of recent State practice seem to point towards a development in that direction. 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 emerging from the Soviet Union and Yugoslavia. In the guidelines they were to produce, 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>51</sup> Further to this, they set out several 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) to guarantee the rights of ethnic and national groups and minorities; (3) to respect the inviolability of existing borders; (4) to accept all relevant arms control commitments; and (5) to commit to settle all questions of State succession and regional disputes by agreement. Whilst clearly evidence of a potential shift in practice, these guidelines were nevertheless very loosely applied in the subsequent process by which the EC member States came to recognize the new Yugoslav Republics. The recognition of Croatia proceeded in early 1992 despite the fact that the Badinter Commission had found that it had not fully complied with the relevant conditions, whereas the recognition of Macedonia was held up as a consequence of an ongoing dispute with Greece over its name. The guidelines, it seems, were simply what they declared themselves to be: merely guidelines. Commentators were thus doubtful as to whether such criteria had yet been definitively established (Murphy, 2000, p 139) even if there was considerable enthusiasm 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).

To some extent, however, this idea has been given a further lease of life in the form of the recent regimes for international territorial administration (East Timor, Bosnia-Herzegovina, and Kosovo) put in place, amongst other things, for purposes of securing the

<sup>51</sup> Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (1992) 31 ILM 1486.

rule of law and the protection of human rights (Wilde, 2008). As some have argued, such regimes have 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 that independence will often be phased, conditional and perhaps constrained (Williams, Scharf, and Hooper, 2002–3). On the face of it, such arguments seem to promote a radical revision of the standard approach to statehood—forefronting the requirement of compliance with human rights and democratic conditions, and relativizing the notion of sovereignty. Yet, whatever the intrinsic 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 is anything other than a highly selective reinstitution, under UN auspices, of the old Mandate/Trusteeship arrangement in which territories were ‘prepared’ for independence under the tutelage of colonial masters.

Just as there might be hesitancy about the role that considerations of democracy and human rights might play in the recognition of new States, so also there is equivocation over the extent to which those considerations might serve as a basis for legitimating secession. In its advisory opinion concerning the secessionist claims of Quebec, the Canadian Supreme Court summarized what it saw to be the contemporary position:

the international law right to self-determination [gives rise to]... a right to external self-determination 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. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.<sup>52</sup>

Since 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’ the Court concluded that 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.

The most interesting feature of this opinion, however, was the attempt by the Court to run a thread through the three instances of secessionary self-determination outlined in its Opinion by linking each one to a violation of ‘internal self-determination’. There are two ideas in play here: one is a three-fold association being forged between the fact of alien rule, the denial of human rights (oppression) and the lack of access to government, each of which is taken as expressive of the same denial of self-determination. The other, associated, idea is one that effectively makes conditional any claim to sovereignty (or territorial integrity) upon the preservation and promotion of individual and collective rights and the maintenance of a system of government by consent. One might conclude from this that in cases where a determinate people have been oppressed, abused, or routinely denied their rights (treated, in some respects, as a non-self-governing territory), a claim for secessionary self-determination might be sustained simply by reason of the fact that the parent state is no longer in the position of being able to justify its claim to

<sup>52</sup> *Reference Re Secession of Quebec*, Canadian Supreme Court (1998) 37 ILM 1340, para 138.

sovereignty. This ‘remedial’ notion of self-determination, on some accounts at least, goes some way to explain practice in the case of Eritrea, Bangladesh, and perhaps even Kosovo (Crawford, 2006, p 126).

In the case of Kosovo, one may certainly appreciate that, in some instances, recognition of its independence has been explicitly linked to the violence and abuse directed against the Kosovo Albanian population prior to the establishment of UNMIK, and to the consequential impossibility of it being ‘returned’ to Serbia. Yet one may also note that many other of the recognizing States (of which there are 62) were deeply equivocal on this score, making great play of the *sui generis* character of the situation, the ‘suspensory’ character of SC Resolution 1244 (1999) which authorized the establishment of an international civil administration in the territory, and the ‘special role’ played by the UN Special Envoy within the political process that had culminated in the development of the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan). The apparently exceptional character of the position of Kosovo had two obvious implications. The first was that it spoke of a determination to make clear that, whatever the outcome, the case of Kosovo should not set any kind of precedent for other aspirant communities. Far from reinforcing, therefore, the idea of a right to remedial secession, it appears to do the opposite. The second implication is that the asserted non-exemplary character of the Kosovan situation was such as to allow recognition to proceed unimpeded. Its apparent ‘uniqueness’ made it perfectly feasible for recognizing States to take a completely independent view on the matter, attuning their policies not to generic concerns about sovereignty or territorial integrity, but to an appreciation as to what might seem politically viable.

Needless to say, it is evident that the kind of reasoning that tends to underpin this idea of remedial secession is not confined to that particular discourse. Precisely the same structure of argument is to be found in the debates over humanitarian intervention (and, more recently, the Responsibility to Protect<sup>53</sup>). In the view of those such as Reisman, for example, the abusive, totalitarian government is one that should no longer be allowed to enjoy the privilege of sovereignty as a defence against external intervention. Sovereignty, for him, is a relic of an absolutist past that has been profoundly reconfigured by the emergent law of human rights. And recent State practice—such as that exemplified in the interventions in Haiti (1994), Panama (1989), and Sierra Leone (1997)—were evidence of a beneficial shift in thought and practice (Reisman, 1990). Others, following this theme, have been cautious of its unilateralist bent, recommending in contrast, collective intervention under auspices of the United Nations in such circumstances (Franck, 2000). Yet for all the well-intentioned bravura associated with such ‘muscular humanitarianism’ (Orford, 2003), it poses all too many questions regarding the opacity of the conditions warranting intervention, the selective character of practice that underpins it and, if nothing else, its evidently imperial (and gendered) overtones. One may recall, after all, that the nineteenth century Scramble for Africa was justified, in part at least, upon the basis that it was necessary in order to combat the slave trade—a claim that was almost immediately shown to be the merest figment given the subsequent violence that accompanied colonial rule in the Congo Free State and South West Africa.

<sup>53</sup> See 2005 World Summit Outcome, GA doc. A/60/L.1, (2005) paras 138–139. See also Ch 17 below.

## VI. STATEHOOD AND RECOGNITION

As has been suggested above, a key feature of the development of international law at the end of the nineteenth century was a certain critical ambivalence as to the process by which new states might come to acquire rights and obligations under international law. The Vattelian image of States existing in a state of nature in their relations with one another, subject only to such obligations as might have been voluntarily accepted (through treaty or adherence to custom) seemed to place States in some respect prior to law. This, of course, had some enduring resonance: international law itself did not create States by way of some legislative fiat, rather they emerged through the spontaneous and concerted action of a community or society organizing itself internally as a sovereign political community. International law merely had a role in acknowledging the reality of something which already been put in place. A State 'is a State', as Wheaton put it, simply 'because it exists' (Wheaton, 1866, p 28).

In so far as the society of States remained entirely stable this might have sufficed, yet by the beginning of the nineteenth century the emergence of new States in South America and the establishment of Belgium and Greece within Europe, brought to prominence the practice of recognition, which had previously been employed largely for purposes of identifying a condition of belligerency or insurgency. This immediately posed a question as to the relationship between that practice of diplomatic recognition and the general status of the communities being thereby recognized. Even if the existence of States was merely a question of fact, their claims to sovereignty often had to be judged by reference to the competing claims of other States. In case of secession, for example, it was understood that to recognize 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 also constituted an act of unlawful intervention. This was to subtly change, even if not to radically transform, the initial hypothesis. One could still think of the existence of States primarily in terms of their internal effectiveness, but the function of recognition came to determine the question of participation or membership in the wider international community. Wheaton (1866, s 21, p 28) thus distinguished 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 immediately put on the table was a distinction between the existence of States on the one hand, and their participation in the international community on the other. Questions of status and relations thus seemed separable: diplomatic recognition being relevant to the latter not the former. Of course, this only really made sense in a context in which international law was understood as occupying a specific geographical space. The hypothesis that there might be States possessing 'internal sovereignty' yet not participating in the 'great society of nations' had its concrete expression in the postulated divide

between the European and non-European worlds at the time. This was precisely the way in which one could rationalize, in some degree at least, knowledge of the existence of the Ottoman Empire, China, and Japan as independent political communities yet not assume they were, as a consequence, subjects of international law in the fullest sense.

Nevertheless, the division between internal and external sovereignty, or between the existence of States and their participation in the international community was cause for a certain amount of ambivalence. To begin with, there were two possible constructions of the position. One was that the State existed for legal purposes from the moment of its existence *de facto*, and that recognition and ‘participation’ were merely complementary benefits (see eg Heffter, 1857, p 43). Another was that its existence for purposes of international law was determined by the moment of participation since it was only through recognition that legal relations with other members of the international community would be definitively established.<sup>54</sup> In some respects it seemed to be necessary to maintain both of these positions. On the one hand, in order for the society of nations to have determinate content, there needed to be a proximate relation between the subjects of law and the boundaries of that society understood as a legal order. On the other hand, it seemed equally necessary to admit the legal existence of unrecognized States in order to give legal effect to treaty relations with non-European States and societies. Colonization of the non-European world thus depended upon a simultaneous process of exclusion and inclusion: the native sovereign being excluded from the European legal order in order to justify the claims of the latter to be a society of civilized sovereigns, yet simultaneously included within the legal order in order to rationalize the treaty relations upon which colonization depended. The maintenance of an ambivalent relationship between recognition and statehood was the means by which that could be achieved.

Although by the beginning of the twentieth century, the project of ‘land appropriation’ in Africa had largely run its course, international lawyers were no clearer as to the nature or character of the process of recognition. In a remarkably obtuse passage Hall (1895, p 87) summarizes the position as follows:

Theoretically a politically organized community enters of right... into the family of states and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state. The commencement of a state dates nevertheless from its recognition by other powers; that is to say from the time at which they accredit ministers to it, or conclude treaties with it, or in some other way enter into such relations with it as exist between states alone. For though no state has a right to withhold recognition when it has been earned, states must be allowed to judge for themselves whether a community claiming to be recognised does really possess all the necessary marks, and especially whether it is likely to live. Thus although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Whilst overtly assuming what was to become known as a ‘declaratory’ approach to recognition (the essence of which insists that a state exists as a subject of international law at the

<sup>54</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, 1883, 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’.

moment at which it ‘possesses the marks of a state’ as defined by international law), this is immediately qualified in two ways. First, since international law is fundamentally relational, the ‘theoretical’ existence of the State remains precisely that—theoretical—until placed in a social context, and recognition thus marks the commencement of the State for practical purposes. Secondly, the fulfilment of the criteria for statehood (which, of course, included such notions as to whether the State was sufficiently civilized) was in no circumstances either self-evident or self-expressive but something that had to be subject to the judgment and appreciation. In absence of any other determining mechanism, the judgment and appreciation had to be that of existing States. Hall veers, at this point, towards the idea that recognition is, in fact, ‘constitutive’ in the sense that the legal existence of a State is thus dependent upon its recognition by others. But appreciating perhaps that this would fatally cut the ground from underneath his first assertion, Hall finally tries to regain his initial standpoint by insisting that this recognition is ultimately merely ‘evidential’ and that the ‘right to be treated as a state’ is independent of, such recognition. In a single paragraph, Hall thus seems to occupy all conceivable positions: recognition is both declaratory and constitutive; States exist prior to recognition but commence on recognition; recognition is a duty but also a privilege.

Hall’s equivocation here summarizes in short form much of the ensuing debate over the character of recognition in the following century. For the most part those adopting a constitutive approach to recognition point to the speciousness of Hall’s theoretical position—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 one can say with any assurance that it has. It is meaningless to assert that Abkhazia, North Ossetia, or Taiwan *are* States if no one is prepared to accept them as such. Those, by contrast, adopting a 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>55</sup> The determinants of statehood must, therefore, must be posited as anterior to the practice of recognition even if the latter may be thought to provide evidence for the former.

To a large extent the 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

<sup>55</sup> *Tinoco Arbitration (Costa Rica v Great Britain)* (1923) 1 RIAA 369; (1924) 18 AJIL 147 at p 154.

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, 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’ (support for which is found, once again, in the Montevideo Convention),<sup>56</sup> doctrine on recognition remains fundamentally ambivalent on most of these key questions.<sup>57</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). The difficulty, however, is that it is frequently impossible to entirely dissociate the fact of recognition from the idea of political approval. This was typically a problem of particular acuteness in the context of governmental recognition (relevant primarily in case of those governments establishing their authority by unconstitutional means) and 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). That this never quite avoided the problem (given that there would still be questions of interpretation in cases in which there were two rival governments competing for power) recommended a general abandonment of the policy of formally recognizing any governments at all (a policy which the British Government belatedly adopted in 1980) (for a critique of this position see Talmon, 1998, pp 3–14).

The difficulty of separating law from policy, however, was not confined to governmental recognition, but also influenced practice in relation to the recognition of States. Whilst non-recognition, as observed above, has 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 choosing’,<sup>58</sup> is such as to make it a somewhat haphazard semeiotic device. In an enlightening typology, Warbrick (1997, pp 10–11) explains

<sup>56</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>57</sup> See Brownlie, 1982: ‘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’.

<sup>58</sup> Badinter Commission, Opinion No 10 of 1992, 92 ILR 206, p 208.

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 recognizing State would characterize or understand its own actions. Only by looking behind the refusal to recognize might one determine a difference in stance, for example, between the refusal to recognize the Turkish Republic of Northern Cyprus (informed, it seems, by a reflection upon the illegality of the Turkish intervention in Cyprus) 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 did not exist as a State (and hence was not bound by the various treaty obligations to which it was a party), or merely desired to make clear that it *should* not exist even if it did so in fact. This poses a particular problem since just as it seems necessary to read recognition policy symptomatically (as being fundamentally an expression of something else), so also the result of such an enquiry might actually make it more, rather than less, difficult to disentangle those considerations that bear upon the question of legal status and those that apparently do not.

This relates to a second difficulty with the practice of recognition namely that even in cases in which States have taken a firm position in seeking to avoid recognition of a State (and hence avoid any sense of condoning its existence) they are not infrequently unable or unwilling to live with the consequences. As pointed out, it seemed unlikely that the Arab States, in refusing to recognize Israel, also believed that Israel was not therefore 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. Once again, their position was one of simultaneous inclusion and exclusion. In a more explicit sense, however, 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 recognize the German Democratic Republic by treating

the legislative acts of the GDR as essentially those of the USSR.<sup>59</sup> Similarly, in *Hesperides Hotels*, Lord Denning adopted a policy, already well established in the United States, to allow 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>60</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 recognize ‘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.

More often than not, this dual commitment to admitting the reality of a situation whilst not accepting its ‘legality’ is spoken of in terms of ‘pragmatism’. A pragmatist, in this sense, seems to be one who is not willing to commit to legal principle to the point at which it is disadvantageous either to the recognizing State or, as suggested above, to the population concerned. It bespeaks of an opposition to either a rigid commitment to the formal rule, or of a refusal to recognize the need to accept, in an imperfect world, imperfect solutions. Yet what this characterization of the situation misses is that the counterpoint is not between ‘law’ and ‘reality’ (or indeed any other alternative to ‘law’) but a counterpoint that has always existed within international law itself. Just as, in the past, the distinction between recognition *de jure* 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 (see Baty, 1936, p 378), so also the practice of recognizing the acts of certain governments whilst not recognizing their claims to statehood itself is one that really just goes to the point that legal doctrine has consistently sought to embed both law and fact within itself (however contradictory that might seem).

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 (Crawford, 2006, pp 198–221). Having formerly been recognized as the government of China until 1971, Taiwan then was removed from the United Nations and replaced by the Government of the People’s Republic of China. Since then, it has never entirely renounced its claim to be the government of China, nor unequivocally asserted its existence as an independent State. 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

<sup>59</sup> *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853.

<sup>60</sup> *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205 at p 218.

Foreign Corporations Act ‘as if’ Taiwan was a recognized State, and in the US relations have largely been ‘normalized’ under the terms of the Taiwan Relations Act 1979 which seeks to implement the policy of maintaining ‘unofficial relations’. As Crawford observes ‘[i]t is surprising it does not suffer from schizophrenia’ (Crawford, 2006, p 220). The same might be said of international lawyers more generally.

## 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 his view, there were two versions of this thesis in circulation. One was a ‘sociological’ version that, on observing the recent globalization 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 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.

The point of Koskenniemi’s article was not so much to defend the State as an institution as against these two critiques, but rather to defend the *idea* of the State as a place (or a language) in which various conceptions of justice, right or economic efficiency might be worked out on an ongoing basis. What informs his argument here is that both versions of the thesis tend to take as ‘given’ that which they are using as the point of critique:

The problem with the critiques of the state is their inability to reach into what is authentic and agree on what it requires in terms of political action. In suggesting that we must realize something that is already there—and in consequently de-emphasizing the decision processes needed to get there—the critiques function as political ideologies, and their claim to spontaneity, following Adorno, is ‘a jargon of authenticity’ instead of an expression of some hidden truth.’ [footnotes omitted] (Koskenniemi, 1994b, p 22)

To posit, in other words, the withering away of the State on the basis that it is either a sociological necessity or ethically desirable omits to reflect upon the unstable, or at the very least contestable, character of either the sociology or ethics that underpin them. The ‘fact’ of globalization or the ‘justice’ of certain rights claims may, after all, look very different in different parts of the world.

The resonance of Koskenniemi’s observations here, however, relate to more than merely a reflection upon the debates over globalization, human rights or the survival of the State as an institution, but more generally to the question surrounding the relationship between international law and the condition of statehood. The two key standpoints that Koskenniemi highlights—the ethical and the sociological—operate not merely as standpoints external to the State, but rather run through the discourses on sovereignty, self-determination, legitimacy, and recognition that constitute the very idea of the State in the first place. 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 and conditional). To note the equivocation, here, however is to advert to the untenable character of either position. We can no more rely upon the assumption that States simply exist independently of the relations they have with others (the supposed ‘authenticity of the real’) than we can upon the assumption that justice always lies in the hands of those who have the capacity to speak its name (the supposed ‘authenticity of the ethical’).

One of the purposes of this chapter, however, has been to explain how many of these seemingly abstract theoretical arguments about recognition, statehood or sovereignty had a definitive context, namely that which arose as a consequence of the European engagement with the non-European world in the late nineteenth century. The difficulties associated with both seeking to delimit, in a descriptive sense, the geographical orientation of international law by reference to the pre-existence of European nation states, but simultaneously employ a prescriptive of notion of statehood as a way of supervising the ‘entry’ of new States into the family of nations, have largely conditioned many of the theoretical puzzles that subsequently emerged. Statehood is both presumed and regulated, recognition both constitutive and declaratory, sovereignty both a source of right and a product of law, self-determination both an expression of autonomy and a product of prior-regulation. Running through those debates has always been a dynamic of inclusion and exclusion which, in the past, served as a way of negotiating in a complex way the relationship with the non-European world, but in more recent times has come to mark the various projects and proposals associated with the identification of new categories: failed States, rogue States, illiberal or illegitimate States. In many cases such projects have been initiated on the premise that they are seeking to avoid or cast aside the authoritarian characteristics of what they take to be a nineteenth century ‘positivist’ international law, but have strangely re-appropriated precisely the same structures of thought or argument.

In all of this, however, what may be remarked upon is the relative strength within international legal thought of what might be called a civic republican tradition that, recalling Kant’s project of perpetual peace, forges a rough alignment between the idea of the State as a civic enterprise the object of which is to guarantee individual human rights and freedoms, of sovereignty as a set of entitlements conditioned by the government’s democratic credentials (or ability to fulfil its mandate), of international law as a cosmopolitan order that supervises and regulates the relationship between those largely arbitrary collections of individuals and agencies, and of international organizations as the nascent institutional expression of the values and interests of the international community writ large. In this account, the place of community, culture or tradition is assigned no direct role and may merely occupy the spaces left available to it within that framework—as that which marks participation within a minority or indigenous community, or as that which is engendered by the State through the institutional apparatus of government (nationalism as a political agenda). In the same sense, the State as an institution becomes ultimately vulnerable to an essentially instrumental critique: either it does its job and can be justified on that basis, or it doesn’t and can’t. This, in many ways, does seem to represent

the key shift in legal thought that has occurred over the course of the last century, but it is one that is strangely quiet on the key questions Koskenniemi poses for it: how does it claim authenticity for the values that it proclaims and what kind of political action does it entail?

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