# 3

# INTERNATIONAL LEGAL PERSONALITY

## 1

In the *Case Concerning a Frontier Dispute* (Burkina Faso and the Republic of Mali) the International Court of Justice noted that, given the acceptance of the principle of *uti possidetis juris* (reliance upon former colonial administrative boundaries) in the case *by both* parties it was not necessary to show that the principle was firmly established in international law where decolonization was involved. Nevertheless, the Court insisted that *uti possidetis juris* is a general principle of international law which exists to prevent the stability of new states being endangered by fratricidal struggles, themselves provoked by the challenging of frontiers following the withdrawal of the administering, colonial power. This is not just an administrative procedure in Africa but a rule of general scope.[1] One might note the oblique way the issue of self-determination of peoples is side-stepped by such turns of phrases as that African states have been induced 'judiciously to consent to the respecting of colonial frontiers and to take account of it in the interpretation of the principle of self-determination of peoples . . .'[2] This is a euphemism for the suppression of secessionist movements in African states.

This African decision has been applied by Europe's international lawyers in the context of the break-up of Yugoslavia. The Conference on Yugoslavia's Arbitration Commission, in its Opinion No. 3 (January 11, 1992), had to answer the question whether the internal boundaries between Croatia and Serbia and between Bosnia-Herzegovina and Serbia should be regarded as frontiers in terms of public international law – a question put by the Republic of Serbia. The Opinion of the Commission was that once the break-up of Yugoslavia led to the creation of one or more independent states, except where otherwise agreed, the former boundaries between the Yugoslav republics should become frontiers protected by international law. The principle of respect for the territorial status quo and

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the principle of *uti possidetis juris* meant that these boundaries were not to be altered, except by agreements freely concluded. The alteration of existing frontiers or boundaries was not capable of producing any legal effect.[3] Another intimately related question was put by the Republic of Serbia.

Does the Serbian population of Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination? The answer of the Commission, in its Opinion No. 2, was negative. It held: (1) Not all the implications of self-determination were clear under contemporary international law. Nevertheless, the right of self-determination must not involve changes to frontiers at the time of independence, except by agreement between the states concerned – the principle of *uti possidetis juris*. (2) Ethnic religious and language communities within a state had the right to recognition of their identity under international law. One possible consequence of this principle might be for the members of the Serbian population in the two republics to be recognized under agreements between all the republics as having the nationality of their choice.[4]

So it appears that the system of international law offers the general admonition that no claim to self-determination must be allowed to infringe the principle of territorial integrity of existing states. However, international law also accepts the imperative that there are limits to an insistence upon the status quo. Beyond a certain measure of endurance, people may revolt against discrimination and human rights and ethnic abuse.[5] International law attempts, as well, to insist on a right of democratic governance as a ground of legitimacy which states are supposed to accept.[6] While all of these considerations amount to interesting grounds for intellectual reflection and debate, there is no consistent and reliable institutional theoretical or practical framework for accommodating these different elements of a possible legal system.

The subject is made that much more difficult because of the unwillingness of the profession to consider theoretical questions – in this case, what minimum set of principles and institutions must an international legal order have to qualify legitimately for the title of legal order or system? For instance, it is particularly difficult within the discipline of analytical jurisprudence, which takes its inspiration from Hart's *Concept of Law,* to pose effectively the question whether international law makes up a legal system. It supposes the priority of whatever happens to be the dominant (i.e. general or community) perspective of the chief officials of a legal order as against recalcitrant

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minorities or dissident members. This community priority is inevitable given the value skepticism which underlies the analytical approach. One can only understand obligation from the internal perspective of those submitting themselves to it. One can only take language at face value, asking how it is actually used in society.[7]

So, by way of typical illustration, the present editors of Oppenheim's ninth edition of *International Law* define international law, as any other law, in social terms as rules of conduct accepted in a community by common consent and enforced by an external power (para. 3). They rely upon the classical distinction between law and morality (para. 17) in terms of the latter applying to conscience and the former being enforced by external authority. A clear weakness of international law, recognized by the editors, is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute. Yet the same editors treat the controversy about the legal nature of international law as unrealistic (para. 4) simply because states recognize that their freedom is constrained by law. This remark is accompanied by the observation, assigned to a footnote, that such a position is not inconsistent with the fact that states may differ as to precisely what rules that law prescribes. It may be that the editors are not concerned so much about the frequent resort to unilateral action by states in the form of self-help or special interpretations of the right of self-defense, etc. because it must always be possible to have judicial or Security Council review of such decisions if the idea of law is not to be eliminated from the scene (para. 127). That is, relevant officials could, conceivably, appear who would apply their internalized norms. The legal observer can, given his lack of status, add nothing. The consequences, for the so-called right of self-determination are devastating. The International Court of Justice has not clearly pronounced on the meaning of the right.

Indeed, this brings us to the larger question whether international law as a system has any answer at all concerning international legal personality, especially as it affects states. The answer is that it does have a pragmatic answer that accepts states as the primary subjects of the system, in accordance with a more or less explicit principle of effectiveness, a principle that fits perfectly into the analytical approach above outlined to the theory of law. Cassese provides an outstandingly exhaustive and authoritative exposition of this view, much more historically grounded and reflective than is usual in the profession. He has said that there is no international legislation

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setting out detailed rules, but that '*it is possible to infer* from the body of customary rules granting basic rights and duties to States that these rules presuppose certain general characteristics in the entities to which they address themselves' (author's italics).[8] These general characteristics confirm a principle of effectiveness. Cassese explains that the principle of effectiveness permeates the whole body of rules making up international law. So, 'New situations are not recognised as legally valid unless they could be seen to rest on a firm and durable display of authority. No new situation could claim international legitimacy so long as the "new men" failed to demonstrate that they had firmly supplanted the former authority. Force was the principal source of legitimation . . .'[9] Cassese says this applied essentially to the traditional setting of the international community.[10] However, it continues to provide the central structural framework, followed in practice, also by Cassese, with a ragbag of inconclusive exceptions.

It is still the case that the concept of statehood rests on the principle of effectiveness. The rules granting basic rights and duties to states suppose two elements:

> The first is a central structure capable of exercising effective control over a given territory. The bodies endowed with supreme authority must in principle be quite distinct from and independent of any other State that is to say endowed with an original (not derivative) legal order . . . The second element needed is a territory which does not belong to or no longer belongs to, any other sovereign State, with a community whose members do not owe allegiance to other outside bodies . . . [T]erritory may be large or small, but it is indispensable if an organized structure is to qualify as a State and an international subject. International law always requires *effective* possession of, and control over, a territory . . .[11]

It might be argued that the concept *international law* and the *principle of effectiveness* are splintered, absent *voices of authority* onto which an author such as Cassese projects what I would consider are the forgotten sediments/experiences of diplomatic and national constitutional history. Cassese explains (para. 16) that the word *state* marks a unitarily closed-up entity in which all authority is granted only by the state itself. Underlying it is a shift in loyalty from the family, local community, or religious organization to the state. It is such loyalty patterns, essentially a social process, which mark the legal supremacy of the state. However there is a special quality to this entity. Following Strayer, Cassese notes that it persists in time and is fixed in space, permanent and impersonal, although underlying it is

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simply agreement on the need for an authority which can give final judgments. Once again what Cassese stresses is *closure*. The concept of state excludes any authority above or below it. This excludes any possibility that there could be any interpenetration of such states, that one could set in motion a process of cultural translation from one entity to the other. As Cassese puts it, each country (his choice of word) 'increasingly regarded each other as separate and autonomous entities, and each struggled to overpower the other' (para. 16).

This would seem to grasp best the reality of the concentration of authority in the state in the seventeenth century, at least as Cassese describes it. Beyond the Church and the Empire, remembering that the Protestant Churches are purely national, all signification is concentrated in the state. This allows Cassese to say (para. 11) that the lack of strong political, ideological, and economic links between states (as Christian principles were not allowed to override national interest) resulted in self-interest holding sway. What is missing from the theory of international law is a detailed account of the significance of Hobbeseanism for the absence of international legal structures. In fact, the absolutist state has had to mean the disappearance of a universal international legal order. In the period of transition from the medieval-feudal system of public authority over land and population to the modern absolutist state in the course of the sixteenth and early seventeenth centuries, the focus of public lawyers was on the terms of submission of subjects to rulers. The tradition that the central legal concept should be jurisdiction (of a lord over his vassals in his court) gave way to the more nebulous notion of the limits of the supreme power (*potestas suprema*), in effect, of an unconstrained executive. A fatal development was that, among public lawyers and political theorists of the state, all interest in the justification of the historical legal title to territory of individual states was abandoned. Instead, attention was devoted simply to the capacity of the Prince to exercise power over subjects. For this power to have sought or found justification would have meant looking to a law of the Holy Roman Empire or of the Papacy, as this was the traditional sense given to the existence of a higher authority. The authority of the Prince was given a rationale by political theorists such as Bodin.[12]

The very idea of absolute authority had to mean its separation from any argument of legitimacy of the relationship of ruler to ruled. The legal development marked a separation of the governing power from concrete legal relations, where primary importance was given to the concept of frontier as the means of delimiting the territorial scope

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of the Prince's power.[13] Territory came to be defined merely as the areas of command of the Prince, with a supposedly unquestioning duty of the subject to owe submission to the Prince. The difficulty, from the late seventeenth century to the twentieth century, and particularly in the eighteenth century, was that the territorial Princes of Europe did not obtain thereby a convincing legal foundation for their possessions, for instance land and population. The focus was simply on the advantages of order which would follow from a generalized submission. As a result, there were ever harsher territorial conflicts, as the notion of the need for princely authority in political theory was not matched by an international-European consensus on the basis for territorial title. There had been a sacrifice of political legitimacy, for instance, based on the consent of the population, in favor of the value of public safety. This was understandable, in the context of bloody civil wars, for instance, after the wars of religion. However, safety was conceived of in purely internal, not international, terms.[14]

Cassese fully outlines further relevant material for the significance of the principle of effectivity. Where frontiers were extended outside Europe there was just as little conviction brought to bear on the legitimacy or illegitimacy of territorial expansion. There is, first (para. 19), the remarkable withdrawal of European states in the nineteenth century to a position of ethnocentric dominance, in which they treated the non-European world as, in principle, not within the international society of states in the sense (borrowing Hedley Bull's terminology) that 'a group of States, conscious of certain common interests and values, forms a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another . . .' This notion of community was based upon a sense of cultural superiority which is also reflected still in the notion of general principles of law recognized by civilized countries (see Cassese, para. 94). It is Cassese who explains that this led to two distinct classes of relations with the outside world depending upon whether they consisted of states 'proper' such as the Ottoman Empire, China, or '[were] instead made up of communities lacking any organized central authority (tribal communities or communities dominated by local rulers, in Africa or Asia).'

Detailed case studies of these two categories will reveal that the dichotomy is not accurate, that in both cases the so-called principle of effectiveness operated. The definition of a state, in terms of defined territory and a population subject to effective governmental control, provided the conceptual framework for the subordination of non-Western

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countries to the West, above all in the period 1815–1960. The so-called principle of effectiveness is, by its nature, impervious to inter-cultural *translation*, dialogue, etc. The reason is that it served an *incorporative* function. The concept of culture, in the sense which Hedley Bull has spoken of a society of states, becomes, in the hands of nineteenth-century European states, a notion of civilization which served to accommodate European perspectives on how international society should function. This is the context in which M. F. Lindley, in *The Acquisition and Government of Backward Territory in International Law* (1926), said that the requirement of a civilized state was political organization. The latter meant 'a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards'.[15]

In other words, the conditions of statehood in general international law, of which Cassese speaks, were also elaborated in a colonial context. Any entity not capable of providing security for persons and property, in terms identical to what Westerners could expect in their own countries, indeed any entity which was not able to resist penetration by Western states anxious to provide this security for themselves, could expect to be incorporated into the territory of a Western state. The two categories represented by Cassese–subjection to unequal capitulation treaties, and incorporation of supposedly *res nullius* territories–merely reflect in simplistic terms a wide variety in the measure of penetration and control of non-Western societies necessary to ensure a Western-style world order.

The discourse of civilization is one of *modernization*. Since the time of Vitoria there was a European expectation that certain inalienable rights were associated with the freedoms of trade, travel, and proselytizing.[16] The process of modernization was increasingly coercive in the course of the nineteenth century. This is the true meaning of the so-called principle of effectiveness. As Gong puts it: 'While positive international law sanctioned the selective use of force against the "uncivilized", and defined such countries as "uncivilized" – partially for the circular reason that they were unable to defend themselves against military attack – the effect of such doctrines did not depart that radically from what Vitoria's natural law philosophies had countenanced in the past'.[17] The 'need' continued for the same universal freedoms of Vitoria. Positivism itself (the philosophical foundation of 'effectiveness'), as a belief in the science of progress, physical achievement, on analogy with the natural sciences,[18] will favor effectiveness.

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A close examination of the jurisprudence usually presented as material for a law of territory shows that it concerns mainly relations with non-Western peoples. The prime example is the *Island of Palmas Case*.[19] The language of the arbitrator shows how far he was concerned with ensuring a globally *efficient* organization of territory. With respect to title by occupation, arbitrator Huber says: 'The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right . . .' He points out how effectiveness, insisted on with respect to occupation, is, in fact, already there 'with territories in which there is already an established order of things.' Indeed the concept is supposed to precede international law. For Huber alleges that 'before the rise of international law, boundaries of land were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between states.'

The reason for this perspective is quickly provided. Territorial sovereignty has a corollary: the duty to protect within the territory the rights of other states, together with the rights which each state may claim for its nationals in foreign territory. 'Territorial sovereignty serves to divide between nations the space upon which human activities are employed, in order to ensure them the minimum of protection of which international law is the guardian . . .' The analogy is drawn with abstract rights to property in municipal law, which do not need to be exercised. In the absence of a super-state the same license cannot be tolerated in international law. One might ask what evidence Huber offers for the following proposition, which seems to suppose an independent subject, *international law*, just as does Cassese with his principle of effectiveness:

> International law, in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals . . .

As for the original inhabitants of the island they are referred to in the context of the type or amount of exercise of sovereignty required.

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Indeed, Huber says that some exercise of sovereignty 'over a small and distant island, inhabited only by natives, cannot be expected to be frequent' so that one need not go back very far. Nonetheless, 'a clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible . . .' In my view there is not a hard distinction between lands inhabited by 'natives' and lands inhabited by non-Western states in the development of 'international law' in the nineteenth century. This is because states such as the Netherlands did conclude contracts with 'native chiefs' which were taken as evidence of consolidation of sovereignty in a context in which the 'natives' were not entirely without rights. Their land was not *res nullius*. At the same time Huber describes how state sovereignty evolved in the context of more complex organizations in the nineteenth century. 'It is quite natural that the establishment of sovereignty maybe the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State . . .'

These limitations imposed by the so-called principle of effectiveness, rooted in the *de facto* legitimated concentration of power in the state, still dominate analytical legal positivism in its consideration of such issues as the circumstances in which the right of self-determination might now be exercised. Concerning self-determination the general consensus among international lawyers is, as has been seen above, that there is no right of secession with respect to a part of a state which has once taken part in a decolonization process. The way they reach this conclusion shows the influence of the analytical approach. Crawford points to how state practice demonstrates the extreme reluctance of states to recognize or accept unilateral secession outside the colonial context.[20]

He points out how no new state formed since 1945 outside the colonial context has been admitted to the UN over the opposition of the predecessor state. This remarkable proposition is demonstrated by the extreme example of Bangladesh, which was not admitted to the UN until 1974 after its recognition by Pakistan.[21]

The formulation of the question by Crawford needs to be considered again. It accepts as conclusive, as a legal value, the standpoint of existing states, that international law does not require them to accept their own dismemberment without their consent. Hence Crawford defines secession as 'the process by which a particular group seeks

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to separate itself from the State to which it belongs.' The value judgement-laden character of this proposition is quite clear. Crawford could simply have spoken of existing states and changing the status quo. This he distinguishes 'from a consensual process by which a State confers independence upon a particular territory and people by legislative or other means . . .' – language which is equally value-laden.[22] Since international law is supposed to rest on the consent of states, Crawford is saying that states cannot be taken to have consented to their dismemberment without their consent because they have not consented to their dismemberment without their consent. This is obviously bound to be true because the proposition is tautological. The question remains how the professional mind reaches such an intellectual impasse.

To paraphrase an argument that has already been used in another context,[23] in the nineteenth century the German international lawyer August von Bulmerincq, in his *Praxis, Theorie und Codification des Völkerrechts* (1874), was anxious to demonstrate that the precedents of Italy, Belgium, and Greece are not enough to demonstrate the existence of a rule of international law that there is a right of peoples to self-determination. They do not provide precise evidence of who in general is a subject of the right and how it is to be exercised. Indeed, this would necessitate a congress of states which would have to assemble and decide that a particular entity enjoyed the right; these states would then have to award the right against a particular state, which of course already existed. The question would then arise whether a war to enforce this right would be justified. Law consists of a system of rights guaranteed by force. Von Bulmerincq concludes that any right to self-determination in those terms would run counter to a legal order which already guaranteed the integrity of states.

However, this reasoning conceals a hidden major premise, that there is an international legal order. If there is no such order it will still be true that international law has not evolved rules to define the scope and exercise of a right to self-determination. Yet clearly this would not mean that there remains an existing legal order to be upheld. The most that a possible legal order could mean is that states in the possession of territory claim that the principle of effectivity with respect to their territory has legal character. This is all that analytical jurisprudence can say. Those groups that wish to dismember existing states will dispute the claim. The outcome will depend upon which party is the stronger. In fact, this logical discontinuity of argument reveals the huge vacuum in the theory of legitimacy – a corpus

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of argument by lawyers about justification of territorial title–to which reference has already been made.[24]

What there is in the way of a classical or traditional international law of territory rests entirely on treaty law, particularly peace treaties and general treaties defining the European and international system. What orthodox legal analysis leaves out of account is the significance and place of treaties in the history of international relations. It is true that it is virtually impossible to find a substantial territorial change, which has the object to assure a new human grouping state autonomy, without an agreement to confirm it. However, agreement in international society has been and continues to be – notwithstanding the Kellogg–Briand Pact and the UN Charter, and their supposed effect in producing the articles on coercion in the Vienna Convention on the Law of Treaties – marked by intense levels of pressure which usually take the form of physical violence. An example close to home is marked by Anglo-Irish relations. By 1918 the UK was offering Ireland devolved government as a political settlement. Sinn Féin won a majority in elections 1918 and acted on the basis that Ireland was independent. Violent conflict ensued. In the summer of 1921 the UK offered a truce and a peace treaty granting 26 counties Dominion status. The Irish negotiators demanded complete independence for the whole island. They were met with a threat in the form of an ultimatum to renew the conflict and accepted the Dominion status which they had been offered. After 1970 political violence was renewed in Northern Ireland and with the Good Friday Agreement the UK government accepted substantial modifications to the 1921 Treaty in favor of the nationalist minority. IRA prisoners were released and their political representatives have been in government. At the same time large parts of the majority community consider this agreement was induced through terrorism and remains radically unsound because a compromise with terrorism is at the heart of the agreement. As for the consent to the agreement in a referendum, dissident majority opinion can simply interpret that as a vote for peace – which everyone wants on his own terms.

If international practice as to the significance of consent is looked at in this context Crawford's examples, which do not amount to precedents, come to look more and more like von Bulmerincq's and quite remote from how international practice usually produces consent. In other words, there is no close examination of the process whereby consent is produced. The most bizarre example is the break-up of Yugoslavia. This is characterized by international lawyers – Crawford accurately represents the orthodox view – as a dissolution

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of a state which no longer exists. The self-styled EC Arbitration Commission concluded after a review of developments including the adoption of the Serbia-Montenegro Constitution in April 1992 that the process of dissolution of Yugoslavia is now complete and that Yugoslavia no longer exists. Crawford himself claims that it should be stressed that the questions of international status in relation to Yugoslavia since 1991 have focused on the constituent republics from an early stage not as entities seceding from a functioning state, but as the product of the dissolution of a state the majority of whose territories and people, faced with violent attempts to hold the state together by one of its ethnic groups, wished to separate. This sentence has an abstract and abstruse subject, which recognizes the centrality of ethnic struggle within ex-Yugoslavia but does not focus itself on the nature of consent being given or from whom the consent is coming.[25]

Another remarkable example, which receives detailed treatment, is Eritrea. It has a special interest in view of the analysis, which will be offered later. It represents a settlement of colonial territory by colonial powers, which subsequently was disputed. The Italian and then British colony was federated with Ethiopia under UN auspices and the latter did not react when the federation was abolished in 1962. There followed thirty years of political violence until a new Ethiopian government, which received Eritrean military support in coming to power, recognized the right of the Eritreans to self-determination. While the agreement between the latter referred to the principle, no UN resolution did so.[26] It might be argued that what counted was the agreement between the parties rather than the entirely passive and irrelevant UN. It is also clear that the agreement was the outcome of a history of enormous violence.

The heart of Crawford's argument should concern the exhaustive list of instances which he gives in which the struggles for secession, whether violent or not, have not been successful. He lists twenty-nine which have actuality. They cover areas where there are most serious human rights and humanitarian concerns, such as South Sudan, Sri Lanka, Kurdistan, and Chechnya. He argues correctly that all these cases have one feature in common. Where the government of the state is opposed to secession, such attempts have gained virtually no international support or recognition, even where other humanitarian aspects of the situations have triggered widespread concern.[27] Clearly, here there has been no agreement for separation and there can be no question of attempting to give any interpretation positive or negative to such an event.

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However, they also have another common feature. They involve ethnic conflict within and across existing state boundaries. This feature unites these conflicts with others which do affect and concern state identity even if the issue cannot be characterized as one of secession. The Palestinian–Israeli conflict may be the most striking. However, in Africa the Congolese civil war involving most neighboring African states has ethnic implications. The Great Lakes Region encompasses the stalemate between Rwanda and Uganda in Eastern Congo. So also the conflicts in Senegal and Sierra Leone threaten to dissolve West African boundaries. As the *New York Times* (January 29, 2001) put it, with particular respect to the Congo conflict: 'No Western government likes to admit that Africa's awkward colonial borders are finally dissolving . . .' In this context it is probably too optimistic to expect that classical-style peace treaties will be concluded. There may not be firm parties to conclude them. Yet it is even more irrelevant to ask what the international community wishes – the reference to the so-called international legal order or the UN – because these, however characterized, are simply not active players. This is the correct interpretation to give to failure of the UN (or whatever) to recognize the legitimacy of this or that territorial change, forceful occupation, or attempted secession.

Instead, what appears to be at stake is the weakening of the state in relation to the ethnic allegiances of its populations. In Western Europe alone Crawford gives ten examples of ethnic unrest involving every existing state, except the Netherlands and Portugal. If one notes as well that, since 1989, about fifteen new ethnic states have replaced two previous multi-ethnic states one might wonder whether the issue of consent of the parties and international recognition might not be as important elements to discuss as the nature of political organization of community as such. Here apparently the conflict between the classical state based on the principle of effectivity, and the more recent, if not proven to be permanently viable entity, the ethnic nation-state.

## 2

So international law is confronted with incommensurate epistemologies concerning its collective communities, whether characterized as sovereign states or nation-states – the absolutist language of security and the ethnic language of sympathy. It has to be appreciated that, despite the domination, in international legal opinion, jurisprudence, and doctrine of state sovereignty against the principle

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of self-determination, the two approaches are in international practice left as irreconcilable and unresolved. State, territorial integrity, etc. is supposed to dominate over against self-determination. The principle of effectiveness, linked to order and security, dominates, above all, the system and technique of international law. However, the doctrines of the failed state, the experience of contemporary Africa, and numerous other acutely unresolved conflicts (e.g. Chechnya, Kashmir, Palestine, Tibet, etc.) show that while international law provides a ***legal*** answer, it does so by relying upon historical legal traditions that have become anachronistic and incomplete. The international law tradition actually opposes two fairly equally defective explanations or solutions to international society, the language of absolute order and the anarchy of particularist emotions of belonging to kin and land.

The language of order is rooted in the Renaissance state, and as such is unable to ground territorial legitimacy and, as a consequence, international order. While Cassese correctly alludes to the significance of the Renaissance state for international law, Bartelson describes the rupture with the past more systematically. The late medieval tradition, which included Vitoria and especially Grotius, started from the premise that man is still embedded in a universal society and in the Cosmos. As Bartelson puts it: 'the question was not how to solve a conflict between conflicting sovereigns over the foundation of a legal order, but how to relate concentric circles of *resembling* laws, ranging from the divine law down to a natural and positive law . . .'[28] Whether Vitoria or Grotius, they would look to the resemblance of episodes and events by drawing upon an almost infinite corpus of political learning recovered from antiquity, whether legendary or documented, 'because it is assumed that they (modern rulers) share the same reality, and occupy the same space of possible political experience . . .'[29] Neither Grotius nor Vitoria would countenance any opposition between the kind of law that applies between states and within states, since this would imply an absence of law.[30]

The break with the medieval–Renaissance picture comes with the modern state, arising out of the wars of religion of the sixteenth and seventeenth centuries. This broke with any attempt to ground its existence in a transcendent order. The new state had to ground itself in the absolute, unquestionable value of its own security, as defined and understood by itself. The science of this state was the Hobbesean sovereign who obliges, but is not obliged, to whom everyone is bound, but who is itself not bound. Territorial integrity is an aspect

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of the security, which rests in the already established territorial control. This control of territory comes to be what the so-called law of territory has to authenticate and validate. The extent of the territory of one sovereign is marked by the boundary of the territory of other sovereigns. The actual population of each sovereign territory is limited to the extent of power of the sovereign, measured geopolitically. The populations of other sovereigns are not unknown 'others' in the modern anthropological sense, but simply people beyond the geopolitical boundary of the state.

The purpose of law is no longer to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information about the limits, as boundaries, of the sovereign state, whose security rests precisely upon the success with which it has guaranteed territorial order within its boundaries, regardless of whatever is happening beyond these boundaries. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely an analytical recognition of factual, territorial separation, which, as long as it lasts, serves to guarantee some measure of security. However, as Bartelson puts it, the primary definition of state interest is not a search for resemblances, affinities of religion, or dynastic family. Instead, interest is a concept resting upon detachment and separation. The rhetoric of mutual empathy or sympathy between peoples is, in a logical or categorical sense, inconceivable. International society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.[31]

This structure of sovereign relations remains the basic problematic, which international lawyers face today. The origin of the state is a question of fact rather than law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. Fundamentally, the problem is that while there is plenty of what all the state parties are willing to identify as law, there is auto-interpretation of the extent of legal obligation. Kant, as a critic of international law, has been disturbed by the character of this idea of legal order coming from early modernity. He writes of the tradition:

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> For while Hugo Grotius, Pufendorf, Vattel and others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force (since nations do not and cannot stand under any common external constraints) are always piously cited in justification of a war of aggression (and who therefore provide only cold comfort), no example can be given of a nation having forgotten its intention (of going to war) based upon the arguments provided by such important men . . .[32]

The dominant, alternative way of understanding the state is as an institutional framework, which cultural or national, historically grounded communities give themselves for the conduct of their affairs.[33] As we have seen in chapter 1, Bartelson stresses a sea-change, again of an epistemological nature, which this new institutional understanding of the state merely reflects. In the classical period, law was defined unilaterally by the sovereign (of Descartes and Hobbes). The meaning of legal obligation had no communal sense. It merely attached spatially to a geopolitically limited population. Now it is recognized that the invention of meaning – of which legal meaning, the acceptance of obligation, is merely a part – is directly related to language and the history of the nation. It is no longer the case that sovereigns, detached and separate from society, can determine meanings by legal fiat, by using words to reflect their exclusive monopoly of physical power and the capacity to coerce.

Instead, communities of people related to one another by history and linguistic origin become the sovereign creators of their representations and concepts. Bartelson shows how words are not given to people, to represent factually something external to the subject. It is the activity of the community itself, which creates its own world of experience and gives words to it. Language reflects the experience of an individual but also of the tradition of a collective political being. Therefore language becomes subject to interpretation. Language in its dense reality is able to tell us the history of the institutions signified by the words. This serves to delegitimize state structures, which rest only on geopolitical boundaries. Language worlds cross them with impunity. The world of institutions, as Bartelson has succinctly explained, is made by men and therefore can be reached as a mode of self-knowledge.[34]

This escape of meaning from the incorporating power of the state is what creates the entire agenda for which the international lawyer needs an interdisciplinary method. The reason is that s/he is faced with two opposing paradigms of the state/nation in international law that lead to conflicting answers to the major questions of statehood,

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recognition, territory, and self-determination of peoples. This can be seen from a comparison of certain contemporary French and German approaches to statehood in standard textbooks of international law.

Combacau and Sur offer a very strong contrast to German visions.[35] The question arises: Why this work? The answer has to do with the appropriateness of the book for the general spirit of French foreign policy and the dominant place of the French state in thinking about both law and foreign affairs. Maintaining the grandeur of the French state as a world power is a cornerstone of French thinking. This position has two aspects, which make it very complex. The primary aim is to assert the independence of the French State (with a capital S) but in France's reduced postwar situation this is best achieved by harnessing a strong European Union to French ends, a fundamental aspect of which includes opposition to American, and, if need be, American-British hegemony. Binding associations are necessary and law, especially treaty law, has a part to play in creating them, but their aim is to augment national strength and profile. By their nature they can claim no universal or absolute normative value. They are competitive and retain their individualistic character, even at a collective level. So it is recognized that beyond a European Union, which is driven forward under French impetus, international society is dominated by conflicts of interest which can easily become threatening to national security and which are not effectively mediated by international organizations such as the UN or ICJ.[36] The textbook by Combacau and Sur provides a consistent and penetrating analysis of law, the state, and international affairs, which appears rather close to this vision of France in international society.

In their view the problem of the self-determination of peoples does not receive prominent or direct treatment. The primary concern is to emphasize the importance, and indeed the priority, of the state to the international legal order. In the view of these authors (pp. 28–9), if a state commits itself to a rule it is because it needs a regulated conduct, on the part of others, which it can have only by allowing itself to be regulated. The risk of deregulation is a powerful restraint on its emancipating itself from the rules which it consents to have imposed. Reciprocity means that one qualifies one's own act as a response to another act. This thereby follows a logic of subjectivity which underlies the whole system. Because of the lack of hierarchy of norms (p. 28) states recognize that no act can be declared invalid objectively, as each state can literally camp on its own position. It can pretend to

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its own representation of acts and situations, and this representation remains subjective as far as any third person is concerned.

The definitions of the objective and the subjective which Combacau and Sur use are taken from their understanding of French public law. That is (p. 19), the objectivity of internal or domestic law rests on the distance of the power of the state from the individuals who are equal before it. A law has been made objectively because it has been made without the consent of the individuals who are equal before it (pp. 20–2). Hence international law (p. 23), by its very nature, ignores the phenomenon of power. The individual interests of states do not (p. 24) represent a public interest. Objective law, that is, constitutional law, does not exist at the international level. There is no equivalent to the state as a guarantor of law, which can designate (determine) the significance of juridical acts or facts (situations).

*International law must*, if it to be a legal order, create an order of persons with competences which can then modify existing things. Yet, it is still the case (p. 28) that there is no centralization of (legal) disposition at the international level. Law functions as the notaire who 'constate et officialise . . . tout en permettant qu'il en soit tiré certaines consequences . . .' Indeed, even collective guarantees by states remain an aggregate of subjective individual representations. Combacau and Sur stress (pp. 49–50) that the struggle for law as a collection of positive rules has to be seen as a compromise of interests, animated by a power struggle of perceptions and ideologies. The language of universal values (p. 74), etc. has little influence on the politics of states, closed to their own interests, for whom international law is not so much a system of norms as 'une partie de chasse.'

This entire analysis makes little sense unless one explores further the concept of the state, and hence of law, which underlies it. While both are firmly rooted in a European tradition which is not exclusively French, viz., Hobbeseanism, nonetheless Hobbeseanism is receiving at present its most explicit, and maybe lucid, exposition among these French authors. In virtually 100 pages Combacau sets out the implications of his understanding of the state for international law. His starting point is that the history of the state is not a legally justiciable matter. There is an almost mysterious character about the origins of the state. The fact of the state is taken to have come before the theory of the state, in the history of the sixteenth and seventeenth centuries (pp. 265–8). He says of those who have originally founded the state 'ce sont eux qui . . . ont fait dériver de leur propre idée de l'État des règles légales concernant son mode de formation; leur

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propre naissance n'est donc pas justiciable . . .' (p. 265). According to international law, the elements which define a state are government, territory, or population. However, it is necessary not to confound the conditions for the emergence of the state with the institutions which are proper for the functioning of a state once effectively constituted. This means, effectively, that the elements are necessary to determine whether a state has come into existence, but international law need not concern itself with them afterwards. To confuse the two dimensions of the state just mentioned, 'C'est prendre son avoir pour son être . . .'

It is the actual corporate character of the state which counts. A state as a structure is inconceivable (p. 268) if it does not have a constitution which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity (les agissements du fait du corps social), constitutes already, can be imputed to the legal corporative body (corps de droit) which it claims to become (p. 268). What is missing from this analysis is a clear statement of why and in what senses it does not matter to international law how the 'corps social' becomes a 'corps de droit.'

However, the reasoning can be pieced together from other parts of the work by both authors. Sur says of the relation of state and nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. The law prefers the stability of frontiers to their being put in question and it prefers to guarantee the rights of minorities to allowing secession (p. 73). Sovereignty itself signifies a power to command. As Combacau says (p. 226), sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginning of the institutions of the state are a matter of fact because, by definition, the state does not pre-exist them – that is, the institutions have not come into being by a constitutional procedure. They may claim a legitimacy from a struggle which the collectivity has led against a state which it judges oppressive, but international law is indifferent to the internal organization of collectivities. Nothing requires that organs be representative, but merely that they have power 'de quelques moyens qu'ils aient usé pour le prendre et qu'ils usent pour l'exercer . . .' (p. 269).[37]

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Once so constituted the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements which compose it. It is this reasoning which allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the consequence that the greater or lesser modification of the spatial basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognized (pp. 219–20).

In conclusion, it might be said that, for these authors, it is still possible to speak of the original and primitive liberty of states rather than of an international constitution which bestows legal identity on states and thereby integrates them into a legal community which they do not pre-date – the position, as will be seen, of Verdross and Simma. Combacau argues that international law consists of the limits on this primitive liberty. The law of the state (le droit étatique) is still unilateral, resting upon an exclusive and discretionary power (p. 226). It is hardly surprising that Combacau can point to and accept the consistent rejection by states of a right to secession as part of the right to self-determination of peoples (p. 262). In the same spirit of 'legal subjectivity and relativity,' as has already been seen, Sur returns to his point of departure. The primary concern is whatever is required for the security of the state, in the judgement of that state. So definitions of security are subjective. He believes it useful to say that it is international law that recognizes each state's right to security. Thus the state remains free to decide what this requires. The UN Charter cannot exclude individual traditions of security (pp. 620–1).

Both the roots and the implications of the French perspective need to be understood. Combacau appears to say (p. 265) that the fundamental feature of the development of the state can be traced to the eighteenth and nineteenth centuries when it came to be accepted that the state was a moral person in the sense of a corporate entity somehow separate in every way, that is from those who govern and those who are governed, and indeed from the territory governed.[38] This formal, immaterialist concept of the state represents well how the Combacau and Sur manual understands the state as a moral person, that is a corporate body, somehow as a company might be defined under national legislation. Obviously, shareholders, managers, and assets can change, probably infinitely, without affecting the

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identity of the company. Legal significance is determined by legally valid acts of the state, which is completely independent of the identity of its members. The primary difficulty with this approach is what it conceals. Law can only be a matter of what states agree in dealing directly with one another. Yet conflicts in contemporary international society are recognized, or considered, by Combacau and Sur, to come with great frequency from the Hobbesean nature of international society.[39] Order exists only within states. Hence objective legal meaning can only be that defined by the state in relation to its own citizens. In the anarchy of relations with other states all is subjective.

This is the theoretical French position which Agnès Lejbowicz identifies as Hobbesean, quite simply in the sense that, as she puts it, in its relations with its own citizens the state functions as a corporate entity, a moral person, while in its relations with others it ceases to have this character and becomes simply an individual facing other individuals in a state of nature. It will be useful to present the critical explanations of Hobbeseanism by Lejbowicz in her *Philosophie du droit international*.[40] Lejbowicz analyzes the French position graphically.[41] The state which passes the frontier of its internal (i.e. national) law thereby de-juridicizes its fictive construction so as to make itself once again a natural person. The sovereign remains sovereign, not by virtue of any law, but by virtue of the power that it imposes on other states. At the international level the state ceases to be a fictive person, that is it ceases to represent; it simply is. Its proper aim is to preserve its being and to increase its power, a power which it exercises with violence, deception, economic wealth, no matter how. Lejbowicz insists particularly on the absence of a contract for international society.[42] That states are, as it were, placed equal to one another means that they are transformed from public persons inside their frontier to private persons at the level of international civil society, where the Hobbesean struggles prevail. This is precisely why Lejbowicz's calls for a reversal of Hobbes's decision to dispense with classical (i.e. medieval) natural law. Standards are needed which cross state frontiers and stress a natural state of fraternity, inspired by a return to a recognition of the other as the same, where all persons are accepted as having a common nature, and where inequality and difference promote sentiments of affection, rather than fear and the desire to coerce.[43]

The second, crucially Hobbesean, aspect of the French theory of the corporate body of the state is that, again following Lejbowicz,[44] it removes the distinction between the representative and the represented, so as to make it appear that they are unified. The mask of the

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state causes to disappear the multiplicity of persons who have rendered possible the artifice of the state. The wills of all its members form only one will in the sense that the state can be considered to have only one head. No one citizen nor even all the citizens together can be taken to be the body of the state. It is Hobbes who makes his own the geometric representation of political space, a representation defined 'par le partes extra partes de la géometrie cartésienne . . .'

This is precisely how Combacau defines the state as an institution. He offers also a Hobbesean picture of the relationship of state power *with its own citizens*. The response of Combacau and Sur to claims of ethnic or other minorities to secession from their oppressors can only be to deny and reject them. Legal definition, in the sense of meaning and obligation, can only come from the state, and the state has to have an overwhelming capacity to suppress. It is only other states which can and sometimes do limit this power, but they will do so driven by a logic which is essentially similar.

The textbook *Universelles Völkerrecht* (1984 edition) by Alfred Verdross and Bruno Simma is widely regarded as a most authoritative statement of German/Austrian international law doctrine during the Federal Republic of Germany of 1949–89. It is at present not a dominant textbook in use in German law faculties, partially because as a source of reference it is sharply dated. Much greater place is given to two important collective works, *Völkerrecht,* edited by Ipsen, and *Völkerrecht*, edited by Vitzthum.[45] In the text by Verdross and Simma there is a commitment to the distinctively German view of the nature of the nation/*Volk* and its relationship to the state. This is an ethnic nation, which, at the time, did not enjoy full self-determination because of the partition of the country. The discussion of the relationship between state and nation is distinctive in European terms. Verdross and Simma argue (para. 380) that a state is not simply an association of people for individual goals, but is, once again, a *civitas perfecta* of those belonging to it, which provide the state the primary basis of its authority, a personal rather than a territorial jurisdiction. A population of a state must be a permanent association of people tied together by blood.[46] The state territory is not simply the spatial dimension of the jurisdiction of the state, but the secured space (*den gesicherten Raum*) of the people, which has organized itself into a state (para. 380). The root of the authority of the state is the *personality principle* of Germanic law, whereby every member of the tribe (*Stamme*) is under the authority of the legal order of its community. The authority of the state over everyone on its territory is becoming

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more important but *it cannot push into the background* the personal dimension, which is the most important to the state, an association of persons based upon personal loyalty between the state and the nation (*Staatsvolk*) (para. 389). The authors stress sharply exactly what they are saying. Naturally, it would be possible to have a purely territorial view of the drawing of the boundaries of the world, but then there would be no *Heimatstaaten* and no *Staatsangehörige*, both concepts which suppose attachment of particular people to one another and to a place. Without this dimension the state would not be the organization of a people but an administrative region of a world state.[47]

This concept has profound implications for the detail of principles and rules of international law. A direct consequence is that a change of government does not touch the identity of the state. It is 'in der Geschlechterfolge fortlebende Bevölkerung,' which provides the material element of the state, that the continuity of the state is grounded. While Grotius is cited, the authors are really thinking of the German situation. They have also in mind the continuity of the German state between 1937 and 1990. This analysis leads into the most difficult subjects of contemporary international law. A discussion of associations without territorial authority (para. 404) focuses especially on movements of national liberation (para. 410). In the case where a power does not recognize its duty to allow a people which it dominates illegally to go free, this people has the right to realize its freedom through the use of force. This is affirmed in the 1974 General Assembly Resolution on the Definition of Aggression (Res. 3314/29). How can one justify this argument in the light of Article 2/4 of the Charter, and the objects of the Charter itself? It is a question of an international war and not a civil war as the majority of Western jurists believe. One can no longer suppress a revolt on the part of national liberation groups.

Much later in the manual (para. 509) there is an extensive consideration of the principles of respect and promotion of the right of self-determination of peoples. In terms of a common European history the oppression of one people by another begins with the Dutch and the Spanish in the early seventeenth century. Oppression by one people of another leads to the latter insisting on withdrawing from the political community which it constitutes with the former. When India claimed in its ratification of the Covenant of Civil and Political Rights, with respect to Article 1 which refers to the right of self-determination of peoples, that it applied only to people under a foreign jurisdiction and not to countries already independent, the Federal Republic replied

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formally in August 1980 that the right of self-determination is valid 'für alle Völker und nicht nur für Völker unter Fremdherrschaft . . .' Any restriction is contrary to the clear expression of the Covenant (para. 510). The central idea is that where a people (*Volksgruppe*) suffers discrimination, with the result that the people is no longer represented fully, the sense also of the 1970 Declaration of Friendly Relations Among States applies. There no longer exists a government which represents the entire people in an equal manner. Examples are Bangladesh and Northern Ireland. Article 1/4 of the 1977 1st Protocol to the Geneva Conventions of 1949 reaffirms the right of military resistance on the part of discriminated peoples. The only restriction the authors seem to allow in their argument is that it can happen that certain peoples are so small that they will, in any case, only seek autonomy (para. 512). They accept that the UN practice opposes what they are saying. Once exercised, the right of self-determination is exhausted in the UN view. However, such a perspective ignores the well-known history of how the post-colonial states were constructed in disregard of ethnic distinctions. More fundamentally, the notion of the exhaustion of a right, once exercised, has no scientific basis.[48]

Remaining within the contemporary German context, it is proposed to present Karl Döhring's views of the right of self-determination of peoples in his *Völkerrecht*.[49] While the latter text, written by an international lawyer, takes the form of a manual it provides a much more exhaustive and penetrating analysis of the implications of an ethnic grounding of the state. The central aim of the work is to provide a systematic account of the legal implications of the self-determination of ethnic peoples.

Döhring offers a rigorous logic to his defense of the right to self-determination of peoples as a human right. It is possible for a majority within a state to coerce into submission a minority, as a matter of empirical fact. However, this power brings with it no compelling authority. There is no force in the argument that every life in common requires acceptance of rules because this leaves open the question whether any particular life in common is necessary. That is, the presence of two ethnic groups in one state does not have to persist. Contemporary revolutions and wars show that continuing to live in peace together is not always desired. The people of a state (*Staatsvolk*) does not have to be homogeneous, but if it is not, the state must be able to postulate values which can hold together the cultural differences of its peoples. Those states which are not able to will not endure (they are *nicht überlebensfähig*).[50]

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The starting point of this analysis is that the greatest threat to security of a state is from within, not from other states. The greatest cause of this threat is the unrepresentative, coercive state which oppresses its large ethnic minorities. Döhring treats the UN, a framework of collective security, as largely irrelevant to the types of problems caused by internal repression of one ethnic group by another. Döhring defines ethnic groups as distinguished by language, religion, race, and culture and as situating themselves on a distinct territory. Döhring, like Verdross and Simma, has already defined the population element of a state as a *Schicksalsgemeinschaft* and he treats the right of self-determination of peoples as a fundamental principle of *ius cogens*. Since the people are the essential substrate of a state, it is not surprising that it can survive the collapse of the state (e.g. the Somalis and Somalia). The right of self determination of peoples is not confined to the colonial world and it is clear both that a right must bring with it the means to defend it – or it is not a right – and that collective self-defense must mean the right of another to come to one's assistance, whether it is an individual or group right that it violated.[51]

If one returns to Döhring's starting point, he has placed the active obligation on a multinational state to ensure a value framework to bridge cultural difference. He recognizes the dangers of his approach in considering the defensive right of self-determination in the context of the definition of aggression. In 1974 the relevant UN resolution makes an exception to the illegality of the use of force which effectively exempts the typical conflicts of the time.[52] Equally, a state which suffers a revolt by a minority claiming a right to self-determination will resist its dissolution by making the same claim. There will be a collision of norms as in constitutional law and the principle of *ius cogens* will give no direction.[53] Nonetheless, for Döhring the starting point remains that the empirical coercive power of the majority within an existing state is merely that. The democratic aspect of self-determination means, in Döhring's view, that the state has a duty to give a minority the institutional possibility to express itself, in order to be able to determine the will of the minority group.[54]

One cannot escape from ethnic conflict and violence into the illusion that the fiat of the state, as a matter of legal epistemology, can resolve such conflict. As Bartelson has brilliantly explained,[55] Hobbesean, statist thinking has its roots in a Renaissance politics of conspiracy and espionage of sovereign princes. States, in this model, do not approach one another as comparable institutions retaining their character as moral persons, in the municipal law

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sense. Bartelson has explained how the modern state, born of the wars of religion, wants to forget the birth that has traumatized it. This is the real meaning of the desire of Combacau to argue that one need not look to a theoretical origin of the state because its concrete foundation preceded the emergence of the concept of the state, the birth of which remains non-justiciable (p. 265). The state has become, as a subject of French public law, the subject of the distinction made by Descartes between the immaterial subject and the material reality, which it observes and analyzes. In this scheme knowledge supposes a subject and the subject is the Hobbesean state which names but is not named, observes but is not observed, a mystery for whom all has to be transparent. It is the first problem of this theory of knowledge to find security, which lies, in a one-way rational control and analysis of others by itself.

In other words, the violent Hobbesean state of nature is self-justifying, made inevitable by its own theory of knowledge. There is no place for a reflexive knowledge of self, save for an analysis of the extension (spatial) of the power of the sovereign (i.e. geopolitically) up to the frontier. Other sovereigns are not unknown in an anthropological sense, but they are enemies with interests in contradiction, whose behavior has to be measured and calculated. The mutual recognition of sovereigns does not imply the acceptance of an international order in common, but simply a recognition of what is similar but territorially separated, an according of reputation and a limited security.

Lejbowicz tries to deconstruct and reconstruct this French Hobbesean perspective. The state as such has to be left behind. It is because states confront one another as *facts*, and not as corporate bodies or *moral persons*, that the identities of the persons who compose them are fundamental. So Lejbowicz argues that where these brute facts confront one another, one must return to the natural state of fraternity, which makes it impossible for humanity to be captured by one person alone. The inspiration of the *ius naturale* is that we return to recognize the other as similar, as reflections of the self, images of the self to be found in others because we have a common origin. It is the forces of exclusion which found state particularism, the opposite of mutual comprehension. The enemy is not on the outside but within the self, an evil which each has to rework. State law creates frontiers but without a human space between them. It is the confusion of languages which God has created which ensures an inevitable anthropological distance among peoples and engages them in a perpetual quest for mutual understanding. 'L'imaginaire du relationnel se

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construit avec le *ius* naturalisme de la *societas amicorum* sur le présupposé d'un milieu de communication déjà ouvert . . .'[56]

Lejbowicz thereby provides a wider context of the Western humanist tradition in which the arguments of Bartelson need not appear so alarming. Bartelson suggests the inevitability of accepting peoples, not states, as a starting point for the definition of international society. Since the revolution of linguistic nationalism of Herder and Vico there is no point of return. The exercise of giving a name, of which juridical recognition is only a part, refers directly to language and with it, to the history of the nation. As we have seen, Bartelson has argued that there are no mysterious powers, detached from society, which can determine a signification by decree, by the employment of words which reflect their monopoly of power and their capacity to coerce. In this sense Döhring is stating the obvious in distinguishing the power from the authority of the majority controlling a state apparatus. Instead of the state it is man who emerges from the subordination to the Prince to become the sovereign of his own representations and of his concepts. The words are not *there*, as they were for Descartes, to represent passively, functioning as a mirror to reflect something external to the subject. It is the activity of the subject itself which creates its own world of experience and which gives itself the words with which to express itself. So language is a reflection of the experience of the individual and of the collectivity to which it belongs. Thus it is language which becomes the subject of interpretation. Language in its dense reality can explain the history of the institutions, which are rooted in that language. The world of institutions is made by men and thus one can arrive at a comprehension of them *through a knowledge of the self*.[57]

**Notes**

1 *ICJ Reports* (1986) 554 and especially para. 20.
2 Ibid.
3 *International Law Reports* 92 (1994) 170.
4 Ibid., 167–8.
5 UNGA Declaration on the Principles of Friendly Relations among States GA Res 2625, 25 UNOR (1970).
6 See a review of the debate in *Democratic Governance and International Law* ed. G. Fox and B. Roth (2000).
7 The seminal study of the influence of this approach on international law is Glanville L. Williams, 'International Law and the Controversy Concerning the Word Law' in the *BYBIL* (1945) 146 ff.

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8 A. Cassese, *International Law* (2001) 47.
9 Ibid., 13.
10 Ibid.
11 Ibid., 48.
12 Dietmar Willoweit, *Rechtsgrundlagen der Territorialgewalt* (1975), esp. 123–5, 126, 129–31.
13 Ibid., 275–6.
14 Ibid., 306–7, 349–50, 360–1.
15 G. W. Gong, *The Standard of Civilisation in International Society*, (1984), 16.
16 Ibid., 36.
17 Ibid., 43.
18 Ibid., 47.
19 (Perm. cf. Arb 1928) 2 UN Rep. Intl. Arb. Awards, 829.
20 James Crawford, 'State Practice and International Law in Relation to Secession,' *BYBIL* (1998) 85 at 114.
21 Ibid., 95 and 113.
22 Ibid., 85–6.
23 Ibid. A. Carty, *The Decay of International Law* (1996) 55–6.
24 See references 12–14 above, and the work of Willoweit. The outcome rests on the exclusive option for Hobbes over the natural law tradition and one will have to come back to it again in this chapter and also in the next.
25 Crawford, 'State Practice and International Law in Relation to Secession,' 102–3.
26 Ibid., 107.
27 Ibid., 107–8.
28 J. Bartelson, *A Genealogy of Sovereignty* (1995) 128.
29 Ibid., 110.
30 Ibid., 130–1. Bartelson applies these remarks to Vitoria.
31 Ibid., a summary of the whole of Bartelson's chapter 5, 'How Policy Became Foreign,' 137–85.
32 Immanuel Kant, *Perpetual Peace and Other Essays*, trans. T. Humphrey (1982) 355.
33 A. Carty, 'Why Theory, Implications for International Law Teaching,' *Theory and International Law, An Introduction* (1990) 73 at 97–9.
34 Bartelson, *A Genealogy of Sovereignty*, 188–201.
35 Jean Combacau and Serge Sur, *Droit international public*, 1st edition (1993, the edition used here unless otherwise stated: there is now a 4th edition, 1999).
36 These perspectives of French foreign policy elites are culled from two volumes: Marie-Christine Kessler, *La Politique étrangère de la France, acteurs et processus* (1999), esp. 153–65; and Maxime Lefebvre, *Le Jeu du droit et de la puissance: Précis de relations internationales* (1997)

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esp. 68, 72, 105, 123–30, 151, 158–60 and 192–205. Both authors retain close links with the Institut des Sciences Politiques, Paris, the pathway for students, through their examinations, to the École National d'Administration and the Ministry of Foreign Affairs. I have also explored the impact of these themes on French international law doctrine in numerous articles, and, in particular, 'L'Union européenne à la recherche d'un droit des relations extérieures,' in *Union Européene: Intégration et Coopération*, ed. Alain Fenet and Anne Sinay-Cytermann (1995) 245–56.

37 This theory of the state, it will be argued in the next section, is, in terms of the history of the theory of the state, early modern, absolutist in character. As it is the lynchpin of the whole presentation of a French position, in the sense that both an epistemology of law and particular rules on the use of force are seen to follow from it, it is essential to consider whether the views of these authors are unrepresentative of their international law colleagues in France. In Nguyen Quoc Dinh, Patrick Daillier, and Alain Pellet, *Droit International Public*, 6th edition (1999), the authors say that for the definition of the elements of a state, among the terms population, nation, and people, only the first is accepted. Disagreement is total on the meaning of the term 'nation.' The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination, would be unlimited territorial claims. Once a state is created it confiscates the rights of peoples (para. 267, pp. 407–8). In the recent collective volume directed by Denis Alland, *Droit International Public* (2000) Hervé Ascensio provides a very lucid third chapter on the state as a subject of international law. Using virtually identical metaphors to Daillier and Pellet he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, after which the people effaces itself once again behind the state (para. 91). He draws a distinction between the sociological and juridical definition of the state, one which Kelsen had tried to overcome, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law (paras 73–5). The drive for self-determination may be one fact contributing to the appearance of new states. In his *Droit International Public*, 4th edition, Pierre-Marie Dupuy gives extensive attention to the relationship between the classical definition of the state and the right of self-determination of peoples, saying that the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts (para. 133). He looks to international recognition as a solution, with the qualification that there are no clearly objective criteria to identify what is a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be

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a question whether the traditional elements of the state, which express effectivity, are reunited in a particular case (paras 30–4, 130–2). Dominique Carreau's *Droit International*, 5th edition (1997) treats the state in the juridical (Kelsen) sense as a sphere of jurisdictional competence accorded by an international legal order and does not look any further into any of the issues examined here.

38 An argument which has been developed by his student E. Jouannet in her doctoral thesis 'L'Emergence doctrinale du droit international classique, Emer de Vattel et l'école du droit de la nature et des gens' (1993).

39 Jouannet provides an interesting link between the corporate nature of the state and the shaping of rules by states in their relations with one another as corporate bodies. She attributes this development to Vattel. The difficulty is that Vattel is a follower of Locke and did not have a 'realist' view of international society. For reasons of space it is not possible to discuss here more fully Jouannet's views, and, anyway, there is no spirit of Locke in Combacau and Sur. However, the criticisms made here of their approach do not have the same force as applied to Vattel. For another history of Vattel tracing Locke's influence, see Francis Ruddy, 'The Origins of the Ideas of Vattel,' PhD thesis, University Of Cambridge (1969).

40 Presse Universitaire de France: Paris, 1999.

41 Lejbowicz, *Philosophie*, 143ff.

42 Ibid., 405ff.

43 This theme will be pursued further in the final section.

44 Ibid., p. 141ff.

45 *Völkerrecht* ed. Knut Ipsen, 4th edition (1999), and *Völkerrecht*, ed. Wolfgang Graf Vitzthum (1997), with a second edition in preparation. Throughout the paper, account will be taken of the positions presented in these works, bearing in mind, at the same time, both their collective and reference (informational) character.

46 'Bei einem Staatsvolk muss es sich um einen dauerhaften Personenverbund handeln, der in der Geschlechterfolge fortlebt . . .' Different from standard British and French definitions. The authors cite a German court case which refers to the celebrated strong concept of the population as a *Schicksalsgemeinschaft* (a community of destiny).

47 It is here that the collective and reference character of the other textbooks present problems. In Ipsen's work, chapter 2, on the state as the normal subject of international law, stresses the unity of a state not in terms of language, culture, or religion, etc., but simply their living together under a common legal system (para. 5). However, the long chapter 6 on peoples (*Völker im Völkerrecht*) by Hans-Joachim Heintze is much closer to the main text, especially para. 27.4.

48 This has remained a virtually standard German position if one considers the whole chapter by Heintze *Völker im Völkerrecht* cited above,

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which is a systematic forty plus-page treatment. While Heintze regards appeal to an external right of self-determination as exceptional, compared to the preservation of the territorial integrity of states, he gives general grounds for the exercise of the right. In contrast in Vitzthum's work in chapter 3, Kay Hailbronner in *Der Staat und der Einzelne als Völkerrechtssubjekte* dismisses the legal character of a right to self-determination in less than a page (3.24–5). At the same time, he recommends a practical conflict-prevention strategy in the face of demands of collective groups. Appropriate autonomy measures can anticipate conflict between a state and its minorities (3.26–9). This approach is grounded in a functionalist assumption that stable state structures should ensure a Law of International Relations which guarantees individual and, where appropriate, minority group rights (3.4–6).

49 Muller Verlag: Heidelberg, 1998.
50 Döhring, *Volkerrecht*, 3–4.
51 Ibid., 28–9, 71–3, 197–8, 242–6, 330–7.
52 Ibid., 240–2.
53 Ibid., 324.
54 Ibid., 335.
55 Bartelson, *A Genealogy of Sovereignty*.
56 Lejbowicz, *Philosophie*, 407–16, quotation at 416.
57 Bartelson, *A Genealogy of Sovereignty*, 188–201.

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