Something to do with States

> "International law, it is generally agreed, has something to do with states" (Baty, *Canons of International Law* (1930).[1]

In the fly-leaf of the *Canons of International Law*, there is a photograph of Thomas Baty in a white linen suit. The only just corporeal Baty seems to merge into the pale background against which he stands. He is there but not-quite-there: as insubstantial and ungraspable as the state itself sometimes seems, poised between materiality and abstraction, and between solidity and fragmentation.

In this chapter, I want to suggest that the law of sovereignty and statehood tends to be practiced, organized and theorized around two sets of argument (and a sleight of hand), and that this tendency has produced certain effects on the distribution of political resources in global politics. The first argument is structured around the material and immaterial qualities of statehood. This opposition, of course, is a *leitmotif* of many standard accounts of statehood but the effects of this relation of form and substance has produced a jurisprudence of mystery, and this, in turn, has complicated life for would-be sovereigns and especially non-European political communities or states aspiring to join the family of nations. Peter Fitzpatrick has talked about the way in which non-European peoples were

> "…called to be the same yet repelled as different, bound in an infinite transition which perpetually requires it to attain what is intrinsically denied to it". [2]

This "infinite transition" is emblematic of the law of sovereignty and is produced partly by the elasticity of the doctrinal ground and partly by the remarkable stability of a very particular and idealised sovereign subject. The result is a sovereignty always just out of reach: a sovereign equality retractable even when statehood itself is acquired. This idea of sovereignty is present in the 19th Century obsessions with incomplete sovereignties (Lorimer) or "families of nations" (Oppenheim), in the post-decolonisation distinctions between negative and positive sovereignty (Robert Jackson) and in the early 21st century formulations of "earned sovereignty", "conditional sovereignty" and "sovereign responsibility".

The second argument rests on an idiom of fragmentation and unity. How stable, conceptually and historically, is the sovereign state? Here, I want to juxtapose an apparent golden age of post-Charter state sovereignty with both a 19th century in which

[1] Colin Warbrick provided the prompt to think about Baty in this way, Evans (ed.) *International Law*
[2] P. Fitzpatrick, "Nationalism as Racism" at 11.

sovereignty seemed to be decentralized or hybrid, and an early 21st Century in which sovereignty appears have become, again, more protean in order to show how, at each juncture, the claim by pre-sovereign political communities to self-determination has been administered or compromised through, alternately, the diffusion of sovereignty (into sub-sovereigns as a way of taming radical claims to self-identity) and the unification of sovereignty around a particular sort of sovereign state (to the exclusion of other forms of political organisation).

The sleight of hand, meanwhile, operates around the relationship between routine statehood and *sui generis* sovereignty.[3] Abnormality here becomes a way of addressing theoretical crises (why "constitute" here and "declare" there? Why equal sovereignty here and earned sovereignty there? Why self-determination here and not here? Or extinction there but immortality here?) while at the same time permitting the historically-situated, politically contingent deployments of the "universal" legal norm of sovereignty against some interests and for others.[4]

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End State

"The end is where we start from" (*Little Gidding*, 1942)

I want to begin, though, with a lengthy, preliminary section in which I ask – taking my prompt from Baty - whether international law might not have less to do with states than it did in 1930.[5] It can sometimes seem, after all, as if everything *but* the state is on the rise (the rise of corporations, the rise of institutions, the rise of ethnic warfare, the rise of supranationalism). It would be hard to envisage a book about contemporary political life on "The Rise of the State" (at least not quite yet). Incapacitated at the local level (states, when they are not fragmenting into warring factions, are pleading with multinational corporations to help them build roads) and marginalized at the

[3] Berman in Abeyance, 1988.

[4] Schmitt: "…this definition of sovereignty must therefore be associated with the borderline case and not the routine", *Political Theology*, 1985, 5.

[5] A word on the demarcation of topics in the handbook: Rose Parfitt's chapter is ostensibly about legal personality and recognition, mine is on statehood and sovereignty. Yet, what might this division of tasks signify? Legal personality, in its broader senses, encompasses the derivative personality of individuals, say, under the Optional Protocol of the ICCPR, or the personhood of corporations or the rights and duties of international organizations (these matters are taken up in chapters by Fleur Johns and Jan Klabbers). But the idea of "personality" may be more hospitable, too, to more "outside the box" work. Sovereignty and statehood are trapped in a philosophical and legal tradition going back at least to Bodin or late-mediaeval Europe but legal personality seems more fluid, open to "interventions" (to use one of the words from the Amsterdam conference) based on the particularity of institutional innovation: the League of Nations in Ethiopia, the UN in the Congo, NATO and the EU in Kosovo.

international level (where the action is private or institutional or sub-national), the state looks distinctly sclerotic and old-hat. To "theorize" about states, then, might be like theorizing about blacksmithing: quaint, old-fashioned, historical and, now, beside the point. For a long time, it was end-state talk that dominated. And the idea of the death of sovereignty came in the guise of a conceptual challenge to the whole vitality of the state as an organizing principle in human relations.

At a seminar I gave at the University of Nottingham over a decade ago, a book I had just written on unequal sovereigns was described - a little contemptuously I thought - as "statist". My interlocutor on that occasion wanted to convey the idea that I had written a 20th Century book for the 21st Century. Why arrange states into clever little hierarchies so close to their expiry date? Globalisation, by denationalising and deterritorialising economic governance, had rendered null the whole idea of political independence. Meanwhile, new non-state actors were everywhere. Individuals could make claims at the international level (human rights), they were guilty of crimes so monstrous that their trials took place at the international level (individual responsibility) and they drew together to influence policy as part of "civil society" (NGOs) and through the application of commercial muscle (e.g. corporations).

States, meanwhile, were creating the conditions for their own withering through the establishment of more and more intrusive institutions (an international criminal court with jurisdiction over citizens or a World Bank increasingly resorting to the imposition of particular economic (and therefore political programmes on sometimes reluctant sovereigns). These critiques were tied together by a knowing historicism; states had been invented now they could be disinvented.

This was not simply a descriptive concern. At different points in the history of international law, to be radical and engaged (or utopian[6]) was to be against the state. Human rights law, for example, offered up an ongoing programme of opposition to the state (with its prisons, torturers and censors). The ecology movement told us that states had failed us (sovereignty threatened us with doom), and states were failing themselves in Somalia, in Bosnia, in the DRC. Even those that that did function were either too big (unwieldy, bullying, prone to resisting right-thinking projects of internationalisation e.g. the ICC or Rio/Kyoto) or too small (by-passed and rendered irrelevant by the sweep of global capital).[7]

Indeed, the symptoms of morbidity were all around and now we have re-discovered (via global warming and *pace* Isocrates) that individual States themselves are

[6] "I' the commonwealth would by contrivances execute all things: for no kind of traffic would I admit; no name of magistrate; No occupation; all men idle…no sovereignty" *The Tempest*, 2.1.23.
[7] This passage adapts Simpson, *The Guises of Sovereignty*,

far from immortal.[8] Plato's great lost city of Atlantis represents a model here for the dissolution of states in general. Critias describes a great polity: superbly organized, highly ordered, aesthetically perfect, and endowed with material advantage. Alas, "the divine portion in them became weakened….they ceased to be able to carry their prosperity with moderation" (at 110) Zeus decides to punish the "wretched state".

> "He accordingly summoned all the gods to his own most glorious abode…and when he had assembled them, he spoke….".[9]

These are the final elliptical words of the *Critias* dialogue. Atlantis is destroyed, cast down to the bottom of the ocean and, at the same time, combines Grotius's two end-states:

> "The extinction of a people…may be brought about in two ways either by the destruction of the body, or by the destruction of that form or spirit" (*De Jure*, Chapter 9.3, 171)

We cannot read Plato or Grotius without thinking of say, Nauru, as a representative end state. Could The Maldives or Tuvalu or Nauru and the making and unmaking of states by the international system, represent a possible trajectory for the history and future of statehood itself: imperial outpost, mandate, extraction, trust, independence, tax haven, offshore processing, submersion, extinction? Grotius, after all, begins his discussion of extinction with the "first type of destruction…the engulfing of peoples by the sea…" (9.4). [10]

Yet, international law, it is generally agreed – and in the face of a couple of decades of post-statism – still does have something to do with states. In an immediate sense, in contemporary international law, states, if they are not quite immortal, are hard to kill. There is a considerable presumption in favour of the continuation of a state even when it is experiencing severe decline:

> "Extinction is thus, within broad limits, not affected by more or less prolonged anarchy within the state" (Crawford, 1979, at 417).

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[8] Neff, 171. The state of Carpatho-Hungary was barely mortal; it lasted for less than a day (Davies, *Vanished Kingdoms*, 2013).

[9] *Critias* (2008): 109-110

[10] Or the United Kingdom: John Lanchester recently described the banks as an "existential threat" to the British polity. What does it mean for international law that all states now seem so vulnerable? A certain sort of pragmatic international law refuses to get excited about this sort of thing. Nauru may slip under the ocean but the state will sail on, the British polity may indeed disintegrate in the face of another financial crash or two but then it will simply represent state failure and not the failure of the state, Lanchester, *LRB*, 2013. See, too, Cait Storr, Unfinished PHD, Melbourne Law School (2013-).

This is so even when states stop breathing for a considerable time. Usually, this occurs as a result of annexation during war. The spirit of the state, though, remains at large, tended by a commitment to preservation on the part of other states in the system. The "illegality" of the absorption counts against the permanence of its effects.[11]

And so, the numbers increase. There are roughly between 194 (the number of UN member states as of October 1st, 2013) and 200 (depending on the status of contested cases) of them, and they continue to dominate the way many international lawyers speak, think and write. And not just international lawyers: popular and professional representations of international diplomacy and war are bound up with states, and what they might do or not do to each other. Whatever we might think about the underlying conditions of international life (political economy, culture, institutionalism), the inclination remains to write of, say, crises, in terms of what the "United States" might do to "Syria" or whether the "Democratic Republic of the Congo" might sue "Rwanda". Writing in this mode is a sort of shorthand for a whole series of more complex or less biddable categories of thought and action. So we remain trapped in states: thinking through them, living in them, seeking protection from them, indentifying ourselves with them.

International law seems to have something to do, also, with sovereignty (or sovereign equality, of which, more later). Sometimes sovereignty is posited as the ground of international law ("the society of sovereign states") or an historical origin of international legal order ("Westphalian sovereignty" as the baptismal figure of international law). At other times, or in other places, it is thought of us an obstacle to the creation of a credible or enforceable international juridical order ("state sovereignty v the international criminal court" or sovereignty against human rights and so on). States, of course, are said to be sovereign or possess sovereignty or enjoy sovereignty. In the *Nicaragua Case* there are references to something called "sovereign statehood" (the title of a book by Alan James) but sovereign statehood, from a particular perspective, has the appearance of a tautology (Crawford, 1979; Crawford, 2012). In classical international law, states are sovereign and the sovereign is a state. Sovereigns are thought to monopolize plenary power internally (they have no formal internal competitors) and are recognized by other sovereigns as the sole authoritative representative of a territory.

But there have been – at times - claims for the sovereignty of organizations like the European Union or even the Security Council. Sometimes this is category error; at other times it is prescience. For example, there has been a debate about the "sovereignty" of the EU for as long as I have been a legal scholar. Still, most people take

[11] On the other hand, recalling Grotius, where there is total obliteration or "submersion over any considerable period of time", then extinction may well follow (Crawford. 417).

the view that Europe does not enjoy "sovereignty" but is some sort of supranational *sui generis* "entity" (to use an agnostic term of art in these sorts of discussions).

Despite calls to abandon the idioms of sovereignty as "unhelpful and misleading" (Crawford at 421), this language is likely to remain with us. To conclude this introductory section, then, and to reintroduce the overarching themes – we might consider some different associations at play when sovereignty and statehood are distinguished.

First, there is the suggestion that states possess a material existence (a seat at the UN, a territory, a passport control booth) that sovereigns (perhaps those "in abeyance" or exile) lack. Or, alternatively, sovereignty might be viewed as the inherent thing - the natural right, the immutable fact - while states are the (mere) creations of formal and reversible acts of recognition.[12] Second, and from the perspective of fragmentation and unity, the "state" might summon an image of solid presence or unified whole, while "sovereignty" is subject to fissure and instability (in 2003, Iraq's statehood remained intact while its "sovereignty" yo-yoed between its people(s), its state organs and the CPA). Or, sovereignty might be the surviving essence (Somali "sovereignty") while the state dissipates and fails. From the perspective of normality and abnormality, statehood might seem like the normal end-state of political organization (think of the way self-determination was equated with independence in the 1960 Declaration) while sovereignty is dispersed (in organizations or non-state entities or inchoate states (e.g. Kosovo)) or states might appear abnormal (the organization of community into statehood being a 500 year blip) while sovereignty is always with us so that in this way we might associate states with birth, sovereigns with death. The state is immortal but the sovereignty of the people (or particular configurations of people), or the Monarch, is subject to the laws of space, decay and time. Or, alternatively, sovereignty might mark the birth of organised political life while the configuration of that sovereign as state is a portent of its eventual demise.[13]

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Material/Abstract

"Between the Idea and the Reality…" (*The Hollow Men*, 1925)

[12] See, too, Parfitt (at 1); Craven in Evans…

[13] Wendy Brown makes an argument along these lines in relation to walls, "reappear[ing] at the moment of political sovereignty's dissipation…Thus would the walling of the nation-state be the death rattle of landed nation-state sovereignty…" in *Walled States, Waning Sovereignty* (MIT Press: 2010).

Questions of the state and sovereignty have often rotated around the formal and deformalised aspects of authority, control and power over a particular territory. In the doctrine on the acquisition of territorial sovereignty, arbitrators, scholars and lawyers have struggled to reconcile the requirements of formal title (through purchase, cession, treaty) with the facts on the ground (the effectiveness of the relevant authority, the intensity of the control). This carries over into more contemporary concerns about the extent of a state's sovereignty over a disputed territory.

In *Rasul v Bush*, for example, the U.S. Supreme Court was required to consider whether Guantanamo Bay was part of Cuban sovereign territory (and therefore not, generally, subject to federal jurisdiction) or fell under effective and long-term U.S. control and authority (and was therefore capable of conferring on district courts the jurisdiction to hear habeas claims)). The majority judges (emphasizing the effectiveness and permanence of American control over the airbase, found that the habeas claims of Rasul *et al* could be entertained by U.S. federal courts. As Justice Stevens put it in a piece of reasoning typical of this tendency:

> "…the reach of the writ depended not on formal notions of territorial sovereignty but rather on the practical question of '…the exact extent or nature of the jurisdiction or dominion exercised in fact by the Crown'" (footnote omitted).

Justice Kennedy, in a more discursive separate opinion, characterizes Guantanamo Bay as U.S. territory "in every practical respect" (Kennedy at 3); the indefinite lease, he goes on to say, suggestively, has "produced a place that belongs to the United States" (Kennedy at 3). Justice Scalia, aggressively dissenting, refused to countenance these references to effectiveness and practicality. For him, the lease conferring on Cuba "ultimate sovereignty" was sufficiently clear to dispose of the matter there and then.

This, of course, replicates the familiar debates between "declaratists" and "constituvists" in relation to statehood itself. Are states facts in the way that chairs might be regarded as facts? Are they facts in the way a treaty is a fact? [14]Or are they inter-subjective persons, whose existence is wholly dependent on the will of other persons in the relevant community? International lawyers have gone back and forth *ad nauseum* on this question. Sometimes this masquerades as a dispute between a political and a juridical approach to sovereignty. But it is never quite clear where the law and politics of this dispute lie. The declaratory theory of statehood emphasizes "facts" (the presence of territory or a permanent population) or the political realities on the ground (the effectiveness of governmental control). In this sense, it can seem to defer entirely to politics (the politics of brute strength or facticity).

[14] These are the questions that begin James Crawford's defining work on the subject.

But this approach depends on the translation of these facts into legally cognizable categories through the application of norms (*The Montevideo Convention*, say, with its list of tangible criteria for the establishment of statehood). The extra-textual adaptation and amendment of the Convention to incorporate other criteria for statehood (the requirement that new states not be brought into being through an illegal use of force or through the "effectiveness' of a racist government) has further enhanced the impression that facts are subject to normative constraint or construction, and open to the play of political preference.

The constitutive view, meanwhile, seems to give rein to a more formal, less substantive practice of recognition whereby sovereigns come into existence through an official act of inter-subjective recognition regardless of any facts or "political realities". But the constitutive approach is also criticized for being excessively "political".[15] If acts of uncontrolled recognition bring states into being then there seems to be little room for law: "full international personality is not a concession of grace on the part of existing states" (Lauterpacht, 76).

In the end, most international lawyers try to bring the two approaches into some sort of alignment. Lauterpachts's *Recognition in International Law* - attempting to bring "idea and reality" into harmony – delivers the *locus classicus* here (though not classical enough to have its central claims widely adopted). The state, fully formed and exercising rights to which it is entitled, is a product of declaration and law in one sphere, and recognition and diplomacy in another. The inter-state system can neither bear too much reality (this is "the arbitrariness of policy") nor too great a reliance on elusive legal form (this is "the disintegrating element of uncertainty and controversy").[16] But the *via media* is not a complete success either, surely. Lauterpacht, adopts Hall's reasoning:

> "Theoretically, a politically organized community enters of right….into the family of states…as 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" (Hall, *International Law* # 26)

Sovereigns are, as it were, born three times: first as organic self-identifying communities, second as rights-bearing proto-states, third as unencumbered subjects of international law. In the third part of this chapter I look at the movement from self-determination to proto-statehood (and the points in between). In the remainder of this section, I turn to the transition from proto-state to unencumbered self (and back).

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[15] For a discussion of the political consequences and historical roots of these approaches, see Parfitt.

[16] So, for example, the question of China's statehood was raised during the Manchurian crisis. No doubt things were confused within China at this point. The writ of the central government hardly extended beyond Peking. But, very few legal counsel were prepared to say that China no longer existed. Perhaps inevitably, the Legal Adviser to Japanese Government took a more robust line on extinction (see Thomas Baty, 1934, 28 *AJIL*, 444-55).

These debates about the material and abstract qualities of statehood feed into the more (obviously) doctrinal question of recognition. It would be an ultra-declarist who felt brave enough to talk about statehood without reference to some theory or practice of recognition. Most of us, most of the time, think recognition (at least some of the time) belongs with statehood.[17] Oppenheim's 1st edition in 1905 puts it pretty bluntly: 'a state is, and becomes, an international person through recognition only, and exclusively" (109).

But what is a state before it is an international person? Some 19th century writers argued that a mere state was not a member of the family of nations (e.g. Oppenheim). The family of nations was open only to states possessing certain abstract qualities recognizable only to other family members. Recognition then operates as a way of controlling membership of the core. This was the "standard of civilization", a norm never quite defined because incapable of definition. It operated as elusive cultural marker rather than achievable legal standard. Montaigne saw the meaning of these cultural markers best, three hundred years before Oppenheim, when he described speaking to a native who saw all men as "halves' and could not comprehend why the destitute halves put up with poverty while their wealthy halves were "fully bloated". One of the natives was a commander and led a highly organized mass of men. After battle he was accorded the privilege of "having paths cut for him through the thickets in forests". Montaigne was impressed: "Not at all bad, that. Ah! But they wear no breeches…." (1.31, *Of Cannibals*).

States that failed to wear breeches or come up to standard – John Westlake had said that they lacked "good breeding" – became more susceptible to intervention, discipline, and general loss of status. These are the "abnormal" cases. James Lorimer is a key figure here. Indeed, he even uses the language of abnormality as a way of ordering the *Institutes*, his book-length apology or justification for a series of recessive taxonomies of statehood. His tripartite distinction – civilised states, barbarians (the Ottomans) and savages (everywhere else) - is familiar enough. And this tripartite scheme goes back to Pufendorf who wants to draw a distinction between those entirely outside the system (towards whom "it will be necessary for other men to show them no more mercy than they do birds of prey"), and the marginal cases who are "so partial [a very Lorimer word] as to be just in the Observation of compacts with [only] some particular Allies….their Credit, it is evident, must very much sink, but it would be too severe to deny them every degree of esteem" and forward to Rawls with his ordering of states into liberal, decent and outlaw[18]

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[17] For other places in international law in which recognition is important see, for example, the recognition of belligerents and governments (and facts), and the non-recognition of unlawful situations.

[18] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford, 1999 at 161-162 (quoting Pufendorf, *The Law of Nature and Nations*, 802, Viii.4.5.). Civilisation is still there as an organising principle of international law as late as 1947 (Hyde, 2nd ed.); in order to be a state, "the

Lorimer's big idea was that uncivilised states (China, Japan, even the United States hovered around the margins of civilisation) lacked a reciprocating will and so could not enter into full relations with the civilised core. So, to quote Wheaton, a near contemporary across the Atlantic" "the public law…has always been and still is, limited to the civilized and Christian peoples of Europe and to those of European origin".[19] The effects (or source) of this were found in the capitulations created under the unequal treaties between European powers and the uncivilised margins (textualising the idea that European citizens in China required protection from barbarian local law) and the unequal sovereignty of Siam, the Ottomans, Japan and China (states that in most other respects seemed wholly sovereign). Lorimer's classifications are astonishingly ornate but perhaps not as odd as they seem on first blush. *Nonage*, of course, as we have seen, becomes a familiar idea in the mandates and in the trusteeship doctrine. The idea that some states are "crazy or sinister", as Martin Wight puts it, is reflected in Lorimer's ideas of about the *imbecility* of states. This comes in two forms: either congenital (because of some racial defect) or political (because of the nature of a particular political orientation). Communism and nihilism are given as examples. We get a sense of empire's confusions about the stability of these terms in *Heart of Darkness* where Empire begins with project and ends in hallucination. Marlow experiences these Lorimeresque categories as precarious and absurd. Africans are first described as enemies by one of the other administrators but Marlow can't quite believe in this designation: "he called them enemies!", Marlow exclaims. Later he conjures with possible definitions (natives[20], enemies[21], criminals[22]) but concludes that they are merely "unhappy savages" (indeed, they are so demoralised that they don't even find him appetising (60)). In the end, they become obscure to him: "not enemies, not criminals, not earthly…phantoms" (24), they are "incomplete, evanescent…." (65).[23] Marlow ends up exasperated "What would be the next definition I would hear?" (at 84). One gets the same feeling reading the international law of the period. [24]

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inhabitants of the territory must have attained a degree of civilisation" (at 73, quoted in Crawford)); Rawls, *Law of Peoples*. Foucault uses the same terms but describes them differently: "The savage is basically a savage who lives in a state of savagery together with other savages…the barbarian, in contrast, is someone who can be understood, characterized, and defined only in relation to a civilisation, and by the fact that he lives outside it. And the barbarian's relationship with that speck of civilisation, and which he wants – is one of hostility and permanent warfare" (Foucault, 2003: 195). See, on enemies of mankind, Roberto Yamato, *The Constitution of the Outlaw of Humanity*, 2012 (unpublished, on file with author).

[19] H. Wheaton, *Elements of International Law* (Wilson ed. 1964) (1866) at 15.

[20] To be exploited or cared for.

[21] To be fought by firing into the continent.

[22] To be punished then rehabilitated: 'The philanthropic desire to give some of the criminals something to do" (at 24).

[23] In the end, the Westerners, too, turn out to be "phantoms".

[24] This section is drawn from a forthcoming article, "James Lorimer and the Character of Sovereigns: *The Institutes* as 21st Century Treatise", *European Journal of International Law* (2014)

Of course, Lorimer's central distinction (if not his endless classifications) was a fairly standard 19th century view; Hegel, for example, knew that any equality between states (what he calls "autonomy") was merely a formality).[25] And it doesn't seem to be generated by Lorimer's apparent naturalism. As many people have pointed out, "positivism" too was implicated with its distinction between civilised and uncivilised states and its belief that actual existence or capacity was somehow anterior to recognition in international law (e.g. Anghie). Uncivilised states sat beyond international law. Relations in these cases were a matter of something other than law. James Crawford, in a footnote, compares two editions of Oppenheim: "Lauterpacht omits the sentence [found in a previous edition: gs]: 'It is discretion and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family'."[26]

Omitting this sentence has been the distinctively 20th Century project of modernising international law, and yet, the discretion remains.

And so the abstractions of "Christianity" "civilization", "family membership" and "savagery" became the substance of "effectiveness" and "territory" and "statehood". International society was opened up to hitherto under-civilised peoples (the Japanese, the Koreans, the Thais), and this was followed, as we shall see in the next section, by a radical expansion in the membership of the family of nations. The move from abstraction to material reality promised emancipation, and it would be odd not to register that in some respects international law *was* formally de-racialised. After all, Japan became a "Great Power" at Versailles, China (or a version of China) became one in 1945. But familiar hierarchies were quickly re-staged. Colonial peoples were catalogued in A, B and C mandates; an arrangement that recalls Pufendorf and Lorimer); new European states were subject to the regulatory effects of minority treaties (a form of administration not deemed necessary in the case of the core European states with their minorities) and the post-war era explosion of new sovereigns was managed through a system of, what one scholar called, "negative sovereignty".[27] These new states were not quite fully members of society. These were quasi-sovereigns or conditional sovereigns. They fell short of the standard set by the archetypal European sovereign.[28]

And now, in a later move, we see the way in which the abstractions of good governance, earned sovereignty and responsibility to protect are again disciplining

[25] For a discussion of the Hegelian provenance of international legal personality see Parfitt (at 2). For a discussion of the way in which sovereignty was both territorial (and thus excluded nomadic peoples and pirates) and social (and thus excluded incompletely socialised territorial states and civilisations), see Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law, 40 *Harvard Journal of International Law* (1999) 1 at 25-34.

[26] Crawford, *The Creation of States*, (1979) at 13.

[27] See Parfitt. See, too, Jackson.

[28] This early 20th century story is told in Parfitt, Chapter…

peripheral but materially effective states. The contemporary version of the standard of civilization has bled into other areas of international norm development from the responsibility to protect (after all, Tony Blair called outlaws "irresponsible states") to the idea of a failed and therefore permeable state to the concept of crimes against humanity, with the claims of humanity used as a way of wedging open the sovereignty of malefactors.[29]

These shifts back and forth between materiality and abstraction, shifts linked together by social and juridical practices of recognition, have managed and consolidated a tenacious division between states that were put on earth by God and others that are here quite by chance.[30] But this distinction reflects an even deeper and more salient division in world politics: that between the poor and rich states.[31] International lawyers still speak of sovereign equality but in the face of both sharp material differences and the formal mechanics of privilege this was to risk absurdity. An international law founded on "sovereign equality" and an international legal practice of making distinctions, might be understood, then, as a way of both reinforcing *and* not talking about a persistent state of affairs. Statehood moves back and forth between the two poles of functional requirement and grand passion, between states as things-in-the-world conforming to some juristic template and recognizable to and by each other, and states as political projects worth defending, dying for, living one's life in. This resembles the relationship between formal sovereignty and substantive sovereignty; or the relationship between a legal order committed to defending sovereignty in the abstract and an order committed to defending substantive conceptions of the good pursued by some sovereigns.

[29] On the persistence of these "imperial legal practices" see Anghie, 2009; Bartelson, 2013.

[30] I am paraphrasing Gorbachev. At times, international law has enacted this distinction through an under-articulated theory about abnormality and normality that lies in the background of most discussions of statehood. It often seems as if there are normal cases where there is the routine application of legal norms alongside strongly constrained acts of recognition, and then there are the cases we actually study. For example, in the case of self-determination, there are states arising out of the process of decolonisation and therefore not subject to the usual rules about government or independence. They become states because it is morally imperative that they achieve independence. But the process, a serious departure from the existing practice, and outcome, the creation of quasi-sovereigns and the liberation of a billion people from imperial rule, does not seem to tell us much in general about statehood and sovereignty. The there are states established after the liquidation of pseudo-empires, in Yugoslavia or the Soviet Union, but the formation of these states is atypical because of special historical circumstances (Lithuania) or the presence of nuclear weapons (Ukraine) or the, perhaps, brutal behaviour of the parent state (Bosnia) or because Europeans have imposed special settlements in these areas. No matter where we look, then, there is the spectre of the *sui generis*: Bangladesh is a geographical quirk, Eritrea an entity with prior treaty rights to autonomy, Kosovo a special case.

[31] I am not suggesting that this distinction maps exactly on to the division of rich and poor human beings though there is substantial overlap.

Fragmentation/Unity

"…neither division nor unity…" (*Ash Wednesday*, 1930)

Most atlases contain two maps of the world. In one, the world is depicted through its rivers, mountains, tectonic plates and oceans. As a child, I rarely consulted this map. The imagery seemed too messy, the earth too disorganised; it wasn't clear where anything was. In the other map, the world is arranged around territorially-sovereign states. Each parcel of territory is demarcated and, often, the borders possessed an almost geometric neatness.[32] This was the world of states, each allocated its own colour but functionally identical – there was very little on the map that suggested doubt or prevarication. But, it turned out this map of sovereignties represented a world idealized through sovereign statehood. There was, most of all, an absence of a sense that sovereignty was contestable or that this contest has been staged partly as a relationship between the idea of sovereignty as a unified, secular, field (sovereigns as stable, unitary, equal) and sovereignty as a way of organising political space hierarchically (sovereigns as partial, whole or incomplete, or super-sovereign, or aspirant).

There are two great divides, then, in the law and politics of sovereignty. The first is between sovereign equals and unequal sovereigns (see the discussion above). The second is between sovereigns and would-be sovereigns. In this section I want to talk about the transition from non-sovereignty to sovereignty, and the way in which this transition has been managed through a combination of fragmentation (the sub-division of sovereignty) and unity (the refusal to countenance non-sovereign expressions of political community).

By the middle of the last century, the centralised territorially sovereign state had become the paradigm form of political organisation. The idea of territorially discrete, uniform sovereigns had been around since at least Westphalia but it enjoyed a peak of sorts in the 1960s when many "peoples" became sovereign through acts of self-determination. This latter principle was the portal though which communities stepped in order to acquire the magic of sovereignty. But the principle of self-determination, as I will discuss in a moment, was also a regulative norm, governing, neutralising, preventing and forestalling acts of self-realisation (discouraging (many) peoples from choosing to form their own state and (often) refusing to recognise non-state formations

[32] See, too, Knop, "Statehood, Territory, People, Government" at 95.

as such). This marks a contrast with two other periods, bookending the Charter era, when what we might think of (anachronistically, in the earlier case) as self-determination was managed through the fragmentation of sovereignty.

The late 19th and early 20th century was a period in which sovereignty was reformulated (Leopold's privatisation of sovereignty in the Congo), dispersed (the Ottoman experiments in local sovereignties), graded (the civilised/uncivilised distinction (see Section Two)), divided (the Turkish suzerainty over Bosnia, Bulgaria's complicated status under the Treaty of Berlin 1878) and dispersed in all sorts of plural ways. 19th century text-books on international law describe a highly variegated sovereignty. John Westlake, for example, devotes nearly half of his *Chapters on International Law* (1894) on the different manifestations of sovereignty in the international legal order, teasing out the distinctions between semi-sovereigns, protectorates, vassals and so on. These sub-categories were established largely as a way of organising relations among the large European powers (the disposition of European territories often depended on a treaty of some sort amongst those powers) but they also acted to control and govern the expression of sovereign desire.[33] In this way, early claims to self-determination (not yet on the scene as a legal norm) were sublimated in a series of pseudo-sovereignties (Benton, 2010).[34] If these 19th century models of sub-sovereignty were deployed in the administration of the colonial project, by the early 20th century, then the fragments of sovereignty were necessary to shore up the ruins of empire. And so, at Versailles, the claims to unitary statehood on the part of Syrians or Bohemians were either redirected (minority rights guarantees) or displaced into forms of indirect colonial administration (mandate, trusteeship). In this way, self-determination was defanged and empire was reformulated.

It was not until the heights of the decolonisation period are reached that sovereign statehood settles into a position of market dominance. At this point Europe had not yet taken off as an alternative quasi-supranational model, at the UN conference in San Francisco the idea of distinguishing states formally on the basis of material capacity or ideological predilection had been rejected, and experiments in sovereignty (Danzig, the mandates, the trusts) were deeply unpopular and, in many instances, tainted.[35]

What happened next was decolonisation through self-determination. At one time, this was one of the most fashionable subjects in international law. If the *Oxford Handbook* had been produced twenty years ago it would surely have featured in the chapter listing. Indeed, I wrote my first ever paper at law school on self-determination. I had read Kurt Vonnegut's essay on the 1967 Biafran secession, war and famine (in his

[33] Or to facilitate exchange between sovereigns. In this way, sovereignty was recognised in order that it be alienated. See Bartelson, *International Theory*, 122-123.
[34] Benton, *Search for Sovereignty*,
[35] *Admission of a State to the United Nations (Charter, Article 4*), Advisory Opinion: (1948) ICJ Rep. At 57.

essay collection, *Wampeters, Foma and Grandfalon*) more or less just as I encountered international law for the first time. Vonnegut describes appalling atrocities committed by the Nigerian military but he ends his essay by asking us not to hate the Nigerian state. I was enraged by his polemic, and felt that international law must have a relevant repertoire of solutions or responses, or at least a language of regret.

I discovered that there was a principle with (apparently) direct application to the Biafran case. The right to self-determination already had generated a substantial normative literature, and there had been two periods of transformative state-creating during which the principle of self-determination seemed to have played a constitutive role. In 1919, the remnants of the dissolved Austro-Hungarian and Ottoman Empires were reorganised (in the Hapsburg case) into new nation-states (e.g. Yugoslavia and Czechoslovakia, to name two that themselves disintegrated in the face of later self-determination claims) and (in the Ottoman case) into mandates to be held in trust by the victorious Great Powers (e.g. Syria and Iraq, to name two currently undergoing processes of dissolution as a result of fresh Great Power intervention and internal claims to self-rule).[36]

By 1960, the second of these ideas had itself been expanded and deepened to accommodate or promote the decolonisation of much of Africa and Asia. In both these periods, "statehood" seemed to be the answer to a number of recurring problems: state failure, claims to national self-government, European empire and racism, territorial demarcation and so on. Statehood was, by far, the preferred outcome of national liberation struggle. In 1960 at the General Assembly meeting in New York two resolutions were passed within twenty-four hours of one another, which articulated a change in the essential character of the principle. In the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, the "Magna Carta"[37] of decolonization, the pattern of meticulous preparation for independence favoured by the Charter and central to the mandate scheme was abandoned in favour of "a speedy *and unconditional* end to colonialism". In Principle 3 of the Declaration, it was stated that, "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence". The next day, *GA Res 1541*, with its references to free association and, even integration, gestured back to the 19th century but it was made very clear that full independence and statehood were the preferred results of a process of decolonisation. Effectiveness no longer mattered; what mattered were anti-colonial results. The paradox in all of this, of course, was that acts of self-determination were restricted to already existing colonial administrative borders. Decolonisation set the European imperial project in international legal stone.

Accordingly, self-determination, during this period was defined as the right held by the majority within a colonially-defined territory to external independence from colonial domination by metropolitan powers alien to the continent or pseudo-European

[36] For a discussion of this history as a series of refurbishments of the constitutive doctrine see Parfitt 7-8.
[37] See e.g. H. Gros Espiell, *The Right to Self-determination*, (1980) at 8.

colonial rule. It applied neither to ethnic groups within these territories nor to majorities who were being oppressed by indigenous "alien" elites. Neither secession nor democratic representation were regarded as part of this novel right of self-determination. Resolving self-determination into full statehood was more important than any expression of self-determination on the part of a people. And so, Biafra, was unlucky to be the wrong sort of ethnically and territorial identifiable nation (i.e. one that was part neither of a dead state-empire (say, an Austro-Hungary) nor a demoralised metropolitan coloniser (say, a Portugal).

A post-Charter solution to problem of self-determination offered the possibility of a return to the more fluid forms of sovereignty found in the 19th century. I have written elsewhere about these multiple or plural sovereignties: metaphysical sovereignty, extraterritorial sovereignty, deferred sovereignty, internationalised sovereignty, incipient sovereignty and deterritorialised sovereignty.[38] The most obvious institutional manifestation of this is found in "state-building" (repeating such exercises at Versailles (the mandates) and Potsdam (the Control Council in Germany) where the "international community" governs a particular territory as its people prepare either for independence or are punished for the wrong-doing of the state or as part of the interminable deferral of political claims. In the end, these renewed forms may indeed represent "the creation of an international juridico-political space that, without doing away with every reference to sovereignty, never stops innovating and inventing new distributions and forms of sharing, new divisions of sovereignty" (Derrida) or they may simply be a return to a 19th century model of controlling the appetites of non-state peoples.

All of this presents a particular problem for peoples seeking self-realisation of some sort. They find themselves trapped in a legal discourse that switched back and forth between unity (a model of statehood that was sometimes culturally alien or organised around unified colonial boundaries (this was *uti posseditis juris*) or administered by unfamiliar, often repressive, elites) and fragmentation (novel formations of quasi-sovereignty as a method of colonial control and then. later, limited forms of autonomy, devolution, federalism when statehood was sought).[39] In the end, this movement often helped defuse revolutionary desire, tame rebellious instinct or, more latterly merely changed the arrangements of extraction.

This operated at a conceptual level where the international law of self-determination has been largely about reconfiguring state boundaries rather than political community; at the level of nationalist politics where the practice of self-determination seems to have often found itself on the wrong side of progressive futures

[38] "The Guises of Sovereignty" in *The End of Westphalia* (eds. Ramesh Thakur and Charles Sampford) Ashgate, (2008) pp 51-69.

[39] The formations are novel but the idea of novel formations is not: "Every new age and every new epoch in the coexistence of peoples, empires an countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, and new spatial orders of the earth", Carl Schmitt, *Nomos of the Earth*.

(Biafra, Croatia, and so on); and in the relationship between political economy and representation where self-determination (from neo-colonialism through development to neo-liberalism) sometimes seems to be beside the point. Self-determination – organized around a schism between normality and abnormality - has been reduced to a principle that will accommodate the birth of states (of highly specialized form) in "extraordinary circumstances" (dissolution of states, end of European empire) but in other cases simply offers false hope of authentic self-rule.

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In the end, then, international lawyers perhaps ought to understand their work on statehood and self-determination as being connected to a relationship between, on one hand, the historical situatedness of sovereignty and empire, the advantages (or disadvantages) it has bestowed on people, the damage it has done (and averted) in international society, the fact that we might like some states and dislike others and, on the other, the formal-egalitarian legal ideal of treating statehood and sovereignty agnostically as international legal concepts capable of being understood, isolated and applied as such. This might in the end simply be part of a broader relationship between sovereignty's diplomatic, tactical face and its legal-rational-universal face but I have argued here that this relationship is constituted by a deeper structure of argument in which sovereignty is managed through the dialectics of form and function, and unity and fragmentation.

Gerry Simpson, Melbourne, May, 2014