SYMPOSIUM

CHINA AND THE HISTORY OF INTERNATIONAL LAW

THE DEFORMATION OF THE LAW OF TERRITORY BETWEEN 1880 AND 1930 — WITH IMPLICATIONS FOR SELECTED PRESENT DAY CONTROVERSIES

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Abstract

The international law of territorial acquisition is firmly entrenched around the principle that evidence of state activity – effectively exclusive state control – is an essential prerequisite to a territorial claim. The stance is repeatedly reiterated in international tribunals. This historical survey argues that the present legal position was given definite form in 1928 with the Island of Palmas Case. However, a broader survey of international legal history shows that there was never unanimity of legal opinion excluding an alternative – and rather obvious – possibility that land belongs to the people traditionally inhabiting it. The concept of humanity is to be opposed to that of the state. Such a view had great resonance in the West from the 16th to the 19th century but was obscured by the rise of Western imperialism. The article considers how to recover the original humanist tradition of international law. It concludes by reviewing two contemporary issues – the Palestine-Israel conflict and the transnational boundary dispute between Cameroon and Nigeria, in order to place this concept in the wider context of the history of the international law of territorial acquisition.

I. INTRODUCTION – RELEVANCE OF THE TOPIC

It appears with the *Island of Palmas Case* (1928) that the international law of territory is well established. To claim territorial title and sovereignty, a legal subject must be a State. As such, the legal subject must show that it has exercised exclusive and effective activity in its capacity as a State over the given territory. On this basis, the activities of individual persons or groups in relation to a territory are not significant in the legal sense, however long they have continued or however intense these activities have been.

In the Island of Palmas case – the dispute between the Dutch Empire and the US Pacific Empire – the famous Swiss Arbitrator (and professor) Max Huber held that the "treaty of cession" by the Dutch with the original inhabitants could not constitute a treaty of cession regulated by international law because these inhabitants were not a State and so the "treaty" had no direct effect in international law. However, there was so little evidence of Dutch state activity, that the presence of this "treaty" was *the* significant evidence of Dutch state activity in comparison to the even less significant measure of Spanish-US

state activity.[1] In other words, the activity of the "original inhabitants" in this situation was judged decisive by Huber but only because of the magical significance conferred upon it by the Dutch Empire.

These reflections of 1928 continue to plague the jurisprudence of the ICJ and other Tribunals, particularly in the South China Sea. China was put on the defensive by arguing that these islands have partially been the homeland of southern Chinese fishermen for centuries, because this has been accompanied by little convincing evidence of Chinese state activity. Indeed, in correspondence with the French during the 1930s, Wellington Koo (顾维钧), the Chinese Minister in Paris did not present the visit of a Chinese admiral to the Paracel Islands during the last years of the Qing (1907) as the Chinese state claim, but merely as a ceremonial visit to lands already belonging to China for historical reasons – This greatly weakened the Chinese claim in French eyes, because the internal French legal advice had been that the Chinese admiral had intended to and did in fact make an valid and effective claim of sovereignty for China in 1907. So, in the French view in 1931, taking Wellington Koo at his word, there was no obstacle to the French annexation in that year. France could dismiss the Chinese claim during the early 1930s since it was based upon the use of the islands by Chinese fishermen since time immemorial. This was regarded by the French as manifestly incompetent as a legal argument.[2]

In the 1970s, the Vietnamese and Philippines used force to occupy most of the Spratlys and are now supported in their presence by the military power of the US, now with Australian, French and British support. There was constant

[1] Island of Palmas Case (Neth. v. U.S.), II R.I.A.A. 829, 867 (1928). Huber relies as evidence of Dutch sovereignty the contracts of suzerainty concluded by native States with the Netherlands and the subsequent acts characteristic of State authority exercised either by the vassal State or the suzerain Power. Yet Huber has said already (at 858) that contracts with native princes or chiefs not recognized as members of the community of nations cannot create direct effect as treaties in international law. They do not create a direct title but are merely part of the internal organization of a colony. Yet evidence of the exercise of sovereignty can include the acts of the vassals, as facts which can have indirect effects. Hence, it is the sum total of the acts of the native authorities and the colonial Power by which evidence of sovereignty is judged.

[2] *See* the letter of Wellington Koo from The Chinese Legation in Paris to the French Foreign Ministry, 744 FRENCH FOREIGN MINISTRY FILE SERIES E CARTON S13 DOSSIER 9: JUNE 11 1932 TO DEC 31 1936: JAPAN CHINA/ PARACEL ISLANDS (Sep. 29, 1932). It argues that: according to customary international law, the first condition for the possession of an island that is located far from the continent is the principle of "first effective occupation", which means that the nationals who were first installed in certain territories transfer to their respective countries the possession of these territories. The natives of Hainan who have been installed in the Paracel Islands, who have constructed dwellings and fishing boats for their needs, have been already there for a considerable period. Koo goes on to add the Qing Dynasty dispatched a naval mission in 1909 to study the conditions of these island and thus actualized an effective occupation against the other nations of the world. Yet the response of the French legal adviser Charguéraud-Hartmann in his note of 16th August 1933 remarks against Koo, to dispute the claim of the Empire of Annam: "The precarious settlement in the archipelago, also in an uncertain date, of native fishermen from Hainan does not constitute, according to international law, an occupation conferring sovereign rights to the country of origin of these fishermen. The alleged permissions and interchanges in the note of the Chinese delegation between China and its citizens do not implicate the exercise of any authority over the islands. Even the fact that the Chinese government considered necessary to take possession of the islands in 1909 demonstrates that her authority was not established over the islands before this date."

friction between Chinese and US naval forces, as China has chosen to build up scraps of rocks left to it rather than use force to recover the islands taken by the Vietnamese and Philippines. The British and French legal archives are consistent in asserting that Vietnam, not to mention the Philippines, have no claim whatever, since their people were never present on the islands. The only evidence of occupation in these European archives is of Chinese fishermen.[3]

Yet, it would appear that as a matter of international law jurisprudence and legal doctrine, the activities of these Chinese fishermen are of absolutely no legal significance. However, what if Huber did not reflect a consensus of the state of international law in the period of 1880-1930, the high point of Western colonialism and imperialism?

II. THE GENERAL SENSE OF THE QUESTION WHETHER THERE IS AN INTERNATIONAL LAW OF TERRITORY

The absence of a law of territory is in my judgment the most important deficiency in international law. In the 2nd edition of *The Philosophy of International Law*, I give a full outline of Raymond Aron's critique of the deficiency. He argues that the international law of territory seems to be concerned with regulating empty spaces.[4] Yet there is no agreement on the basic point of constitutional order, the distribution of territory. The international law rules are banal as they do not address the problem of the attachment of a people to one State or another or the desire of a people to constitute an independent State of its own. These issues, notes Aron, are the "real stuff" of international society and they are rarely resolved peacefully.[5]

The three further essential conceptual elements blocking a viable law of territory set out in *The Decay of International Law* (1986) by myself are:

Firstly, the construction of the State, coming finally from the 19th century German theory of the State, treats the State's territory as an object, a pure space for the State exercise of jurisdiction over a passive population; so the State territory cannot express the idea that it is a homeland for the political expression of a people as a subject, as distinct from a population as an object;[6] it is this crucial conflation of concepts which plagues the present so-called law of territory and one will have to return to it immediately.

Secondly, throughout the post-Westphalia (1648) period, the leading European practitioner of international law (Johann J. Moser), recording

[3] Anthony Carty, *Archives on Historical Titles to South China Sea Islands: The Spratleys*, 4 JUS GENTIUM: J. INT'L LEGAL HIST. 7 (2019).

[4] *See* ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 88 (2nd ed., 2017). A point I first made in ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW: A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS 49, n. 26 (1986) [hereinafter THE DECAY]; JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 176–85 (1979). Raymond Aron is the leading 20th century French specialist of international relations, the author of PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS, with a new introduction by Daniel J. Mahony and Brian C. Anderson (2003).

[5] *See* ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 88 (2nd ed., 2017).

[6] *See* THE DECAY, *supra* note 4, at 44.

European state practice, affirmed that there was no international law of territory, because States never respected boundaries within Europe or overseas, whether or not these were legally guaranteed by treaty (*i.e.*, the War of the Austrian Succession, with the seizure of Silesia by Prussia from Austria); furthermore, the rules of occupation of territory had to do with lands outside Europe.[7]

Thirdly, and most importantly, conquest played such a role in the shaping of States that it made no sense but to regard States as creations of fact rather than law. In other words, there was, from the turn of the 20th century doctrine, an explicit rejection of the idea that there could be a law of territory at all that could provide a legal foundation for States, signifying recognition by a legitimate international community. It is important to realize, in considering the legitimacy of European claims to territory outside Europe at the end of the 19th century, how the leading and decisive European international law doctrine regarded the law of territory *generally* at this time. The expansion of Europe was the prelude to its self-destruction from 1914 to 1945. So the person to prove the first leading exponent of the right of Europeans to annex the lands of non-Europeans, whether inhabited on not, Johann Caspar Bluntschli affirms in the 5th edition of his *Le Droit International Codifié,* article 37 (in 1895) that "wars, usurpations and revolutions have contributed more to creating new states than peace treaties, voluntary concessions or the will of the people."[8] Bluntschli claims nonetheless that international law, while not creating these events, does sanction them through a doctrine of effectiveness. However, Alphonse Rivier does not even resort to this "principle" in insisting merely that Conquest justifies itself by its very existence, like war, of which it is a natural consequence. "The source of the law of nations is positive, constrained to take account of what is…Joseph Ortalan says that the territories of Europe have been appropriated to each nation after revolutions in which force, then the slow march of time and the logic of events have more influence than law."[9]

Finally, Paul Fauchille presents these conclusions in the most nihilistic terms with respect to the significance of law. Writing before the First World War, he argues that there is no legal foundation to the territorial possessions of any State:

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[7] *See id.* at 49. In 1777, Moser published his outstanding VERSUCH DES NEUESTEN EUROPÄISCHEN VÖLKERRECHT IN FRIEDENS UND KRIEGSZEITEN [EXPERIMENT OF THE LATEST EUROPEAN LAW OF NATIONS IN TIMES OF PEACE AND WAR], Book I, ch. 1, 7 (1777) (Ger.). He set himself the task of observing only what States themselves declare to be binding law and came to the conclusion that there was no general law of territory. The rules of occupation had to do with lands outside Europe. There were no general rules on European boundaries and treaties of guarantee by some powers were a sure sign that the territory was claimed by others who would not be bothered by such treaties and, in any case, there was no judge who was right. *Id.* at 18 and 24.

[8] JOHANN CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIÉ [WRITTEN INTERNATIONAL LAW] 77 (Guillaumin et C^{ie} ed., M. C. Lardy trans., 5th ed. 1895) (Fr.).

[9] ALPHONSE RIVIER, PRINCIPES DU DROIT DES GENS [PRINCIPLES OF THE LAW OF NATIONS] 181, 184 (1896) [Fr.].

> "The doctrines on territory such as population, self-determination, the balance of power, excessive population, have to be rejected because they render the territory of states essentially unstable. *They tie in an exaggerated fashion the destiny of territory to that of population*…There exists no rational principle to which one can appeal in what constitutes the territory of a State. It has its source in circumstances so diverse. A simple consequence of facts, it can have no juridical basis."[10]

These three figures dominate the field of international legal doctrine at the beginning of our period 1880 to 1930 and determine the terms of the legal argument about the occupation of territory beyond Europe, and of special note is that their disregard of the wishes and interests of peoples and acceptance of the primacy of violence is not something with which they differentiate the non-European world. It is the essence of that world itself and the foundation for the *Institut de Droit International,* which they founded in Brussels in 1873.

III. THE EVOLUTION OF THE CONCEPTUAL FRAMEWORK FOR THE ACQUISITION OF NON-EUROPEAN TERRITORIES FROM THE 1880S ONWARDS

The stages whereby international law doctrine reached the standards set out by Huber in the *Island of Palmas Case* (1928) were all bitterly contested and so it can be said that, among Western international legal writers, no consensus was ever reached. The story is described in great detail in four major works, whose main themes will be presented. These are M.F Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Ius Publicum Europaeum* (1950, translated in 2006), Jorg Fisch, *Die europäische Expansion und das Völkerrecht* (1984) and Andrew Fitzmaurice, *Sovereignty, Property and Empire 1500 - 2000* (2007). This is not to deny the importance of Charles Alexandrowicz and his work also on Africa, *The European - African Confrontation, A Study in Treaty Making* (1973), but in his critique of this practice, which it is essential to review, he does not cover the wider argument which tries to say that without sovereignty in the Western sense, overseas territories are actually ownerless.

The starting point of *The Decay of International Law,* in the section *Legal Doctrine and the "Growth" of the "Law" of Territory in the 19th Century* is the hypothesis that in the course of the 19th century leading jurists "turned away" from major political and territorial issues, treating them as by their nature non-juridical, *i.e.*, not merely not regulated by law but in fact outside the province of law as such.[11] Yet they came to treat overseas territorial expansion in the language of absolute rights to property and freedom of contract, treating

[10] PAUL FAUCHILLE, TRAITÉ DU DROIT INTERNATIONAL PUBLIC [TREATISE ON PUBLIC INTERNATIONAL LAW], vol. II, 5–7 (1922) (Fr.); *see also* THE DECAY, *supra* note 4, at 52–53. There is an argument developed since Kelsen that a State is a legal fact, which is considered further in ANTHONY CARTY, PHILOSOPHY OF INTERNATIONAL LAW 80–101 (2nd ed. 2017).

[11] *See* THE DECAY, *supra* note 4, at 50–57.

States on analogy to individuals, excluding any question as non-juridical which could not be treated in these terms, at the same time extending the definition of this subject to the whole system of international law.[12]

The application of a private law analogy, especially from Roman law, changed the emphasis of legal concern, with so-called *occupatio of res nullius* so as to allow the new international law of territory to look upon the status of territory, whether "inhabited" or not, as being *res nullius*, and so susceptible of habitation if the act of occupation is carried out with respect to territory not yet submitted to the sovereignty of another State.[13]

The crucial consequence of focusing on the analogy with private law was to exclude the question of political legitimacy, the control of some people over others, from any consideration of the law of territory.[14] The key to doing this was, as Huber did in 1928, to introduce the concept of sovereignty and ask whether the "inhabitants" of the overseas territory possessed a sense of this concept. If not, their territory was *res nullius.* However, it was this step that was fiercely contested within Western legal and intellectual culture and that prevented the development of a consensus which could make law. In other words, in the history of Western legal thought, it was never accepted by consensus that a people, by inhabiting a land which they called their home, could not make good a claim to absolute ownership of that land against European powers. There was always a large body of opinion which considered the process of land acquisition as theft, a process of violent deprivation. The distinguishing factor in this legal confrontation was whether the jurist in question thought law grounded in the will of the sovereign State or in the human nature of people, in common humanity. Contrary to popular 21st century impression, this conflict raged right through the high imperial period of 1880 to 1930 and was not correctly reflected in the Huber's judgment, which could not, therefore, reflect a consensus as to international law. Instead, the way remains wide open to reconstruct an international law of territory which starts from the premise that it has to realize the right of peoples to fulfill their destiny, by inhabiting a territory, which is their homeland, and which expresses their *Nomos,* their past history and future – their common destiny. The proper foundation for an international law of territory is the mutual recognition by peoples of their common destinies in their homelands, bound together by their common human nature. The jurist who comes closest to expounding this view is Schmitt.

The first to reflect on this process of history, coming almost at its end was Lindley in 1926. He pointed to three theories of law for overseas expansion over a period of 350 years from 1550 to 1900. The first is the well-known Scholastic view of the Salamanca School of Vitoria, that the so-called non-

[12] *See id,* at 50.

[13] *See id.* at 51, quoting ALFRED CHRÉTIEN, PRINCIPES DE DROIT INTERNATIONAL PUBLIC [PRINCIPLES OF PUBLIC INTERNATIONAL LAW] 119–20 (1893) (Fr.).

[14] *See* THE DECAY, *supra* note 4, at 53.

Western heathen communities had their own political organizations which had to be respected as equal. This remained the dominant school through the 17th to the 18th century, with from Grotius and Pufendorf to Blackstone (in England) and in the 19th century, Johann Klüber, Otto Günther, August Heffter, Pasquale Fiore, Theodore Woolsey, Paul Pradier-Fodéré, Charles Salomon, Henry Bonfils and especially Gaston Jèze, Professor at the Sorbonne in Paris, to whom we will return. When territory is occupied with some political organizations, however primitive and crude, occupation cannot apply. Hence when the proposal came to the Institute of International Law in 1888 that territory inhabited, but not by a sovereign State recognized by the Family of Nations, could be occupied, this draft proposal of law was rejected by the community of prominent legal scholars at the Institute.[15]

The opposing view was held by a minority of mainly British legal scholars such as Westlake, Laurence, Oppenheim, Dudley Field and Travers Twiss, the latter being a key figure. Lindley discussed the Oregon controversy between Britain and the US, where Twiss argued that mere economic activity was not enough to generate title when there was no permanent settlement. However, the US did not accept this argument.[16] Twiss was defeated later when proposing this view to the Institute in 1888.

There was an alternative, apparently compromise view, which appears to come closer to what was decided in the *Island of Palmas Case*. The presence of inhabitants meant that the way to the acquisition of territory should be through a cession from recent inhabitants, which meant, nonetheless, that one should be able to show a clearly agreed concession, properly understood by both sides and freely concluded. Fitzmaurice devotes special attention to the development of this doctrine especially in the writings of two French authors — Charles Salomon and Gaston Jèze.[17] The supposedly progressive view is that the way for the Western States to expand their territorial reach is to conclude cession treaties. These writers, influenced by the spirit of self-determination in the French Revolution, were very anxious to argue that the very idea of political community at a global level, will be compromised, if one accepts the principle that political communities outside Europe can be absorbed without their consent. There is a universalism, albeit a protective and defensive one, that realizes the injury that colonialism can cause at home.

There is also some support for this view in James Crawford's *The Creation of States in International Law*. He considers the same evidence as Lindley and says that despite the disagreement which existed in the 19th century that if a territory was occupied by a population, this could block an acquisition through the occupation of *res nullius*. If there was some political organization, reaching recognized standards, and not mere hordes of wandering savages or nomads

[15] M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 10–16 (1926).

[16] *See id.* at 18–20 and 141–43.

[17] ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE 1500-2000, at 290–301 (2014).

lacking all regular political organizations, the way to acquisition would be through a cession of territory - although Crawford remarks that Huber's position is not clear enough since he denies the natives the power to make treaties and yet accepts that their conduct has some direct effect.[18]

Even this perspective is hotly contested by what is definitely the most thorough examination of the question in terms of study of doctrine and practice (excelled theoretically by Schmitt) Fisch in his 1984 work, published in German and never translated. His argument can be summarized here and supported by two authors. Fisch argues that even as a matter of common sense, the innumerable concessions of territory made in Africa could only have been forced. Why would any political community or natural group of human beings voluntarily hand over their territory and political communities to a completely strange foreign power? One has only to ask the question, to know what to expect when one explores what actually was happening.

Firstly, he rejects the whole idea of the right to acquire land not occupied by a Western sovereign, a position most fully developed by Westlake and Oppenheim.[19] For the classical theory of international law, going back to Vitoria, the criterion of "sovereignty" for international relations was independence of any external authority. However, Western imperialists changed this understanding in the middle of the 19th century to something quite opposite. The mark of sovereignty was a matter of its *internal* exercise, making any apparent laxity in this exercise as an excuse for a more superior State organization to intervene and occupy the territory of that people. This understanding crushed the idea of variety and plurality of political organization, in favor of an overtly imperial claim for superior religious and political civilization, giving a right to occupation by force if need be. No power could resist this historically expanding civilization. It assumed with it, an absolute right of freedom of trade, immigration and movement. It could not be resisted. There could be no tolerance of other forms of political organization, more passive and allowing more freedom for populations to manage themselves.

In this frame of historical development, what was the true role of so-called cessions made by "original" inhabitants to Europeans? The non-Europeans are under such pressure that they have no alternative to cede their independence in so-called cessions, which demonstrably, do nothing to protect their autonomy - as will be seen in the final section of this paper.[20] At the time European observers could see what was happening. Only the pressure of fearing the worst could have led communities to sign these cessions.[21] The process was simply a pure robbery and exploitation, and one has to deny Europeans the right to take away political freedom in any fashion. It rests in the natural freedom of human

[18] *See* CRAWFORD, *supra* note 4, at 260–71.

[19] JORG FISCH, DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT [EUROPEAN EXPANSION AND THE LAW OF NATIONS] 299–321 (1984) (Ger.).

[20] *See id.* at 316–21.

[21] *See id.* at 326–27.

communities that they exercise it and do not hand it over to others; it is in effect turning human beings into objects, as slaves. The proper way to see the deliberations of the Institute of International Law in 1888 was total confusion, in German *Ratlosigkeit.* The jurists could not see the obvious choice that overseas territories should be left intact, and instead they were unable to agree whether inhabited territories could still simply be occupied as *terra nullius* or whether they required cessions to legitimate the transfer. Neither was appropriate.[22] Yet the absence of any consensus showed the absence of any legal frame at all.

There is a tricky jurisprudential point here argued by Fisch and made even clearer in the work of the already mentioned Jèze and reconfirmed by J.A. Andrews, in his interpretation of the state practice in *The Concept of Statehood and Acquisition of Territory in the Nineteenth Century*,[23] an authoritative article published in the *Law Quarterly Review*, 1978. The boundary line between "what was permissible at the time" and "what is the practice now" (leading to Prof Huber invoking the so-called inter-temporal law for titles to territory at different periods of history) would not exist, if what existed at the time was legally inconceivable. Fisch has already pointed to the difference between a theory of law based on the will of the State and the one based upon humanity.[24] Andrews points out that sociologically, what happened at the end of the 19th century was a violent intolerance on the part of one civilization towards all other civilizations. It could not be the basis for a universal law. What the Europeans did was to create a vacuum of law by claiming that some parts of humanity stood outside the Family of Nations. [25]

Jèze makes the same argument for the whole Western history. The practice of conquest and extermination was of unlimited cruelty in ancient Greece and Rome. This continued with the horrors that Americans perpetrated on Indians in North America. The only exceptions were the Puritans in the American North East and the Jesuits in Paraguay. Otherwise, treaties made with Indians were merely a prelude to exterminating them. The same marked British and German expansion. These two nations would set one tribe against another, signing a treaty with one, while another tried to resist and the Europeans would divide and rule, joining one against the other. In particular, the Germans would incite rebellion when a transfer by cession was not quick enough, and, if need be, would engage in bombardments and burning of towns in Cameroon. Africans did not know that treaties of cession concerned loss of territory, and did not understand the vague terms of friendship in the treaties that they signed

[22] *See id.* at 328–32.

[23] *See* J.A. Andrews, *The Concept of Statehood and Acquisition of Territory in the Nineteenth Century*, 94 L. QUARTERLY REV. 408 (1978).

[24] *See* Fisch, *supra* note 19.

[25] *See* Andrews, *supra* note 23.

with an X signature.[26] Jèze concludes that there is no restraint of law, merely a hypocritical lip service to indigenous rights, but actually, as in the past, the liberty to take what they like from pagans, savages to be ignored.[27]

Andrews as well denied that there was any international law regulation. He said the fundamental point is the "close regulation of ownership and possessory rights over territory in private law and the absence of regulation in the ultimate face of force at the international level."[28] The ferocity of institutional intolerance lying behind the rhetoric of sovereign States within the Family of Nations was contrary to centuries of Western civilization from Cicero to Grotius and Vattel, until one comes to the behavior of Rivier excluding what he calls "hordes, nomadic tribes, the tribes of Africa" and so on. It concludes with Oppenheim's language that the language of Christian morality is essential to the membership of the Family of Nations. This leads to the difference of statehood, and those who are outside are in a legal vacuum.[29]

After a long quotation, Andrews concludes this part of his argument with words coming from Oppenheim in which the latter says that the law of nations only applies to members of the Family of Nations and "…does not contain rules concerning intercourse with and treatment of such states as are outside the circle…". Andrews comments:

> "To deny that some societies are members of the family of nations and subject to the rules of international law is either to put them into a legal vacuum or at best into other legal structures. But if societies are not related to each other by law, how do they regulate their affairs together? This condition of lawlessness in relationships is exactly what the Roman jurisconsults and natural lawyers could not accept. To them, all nations were subject to and equal before the law."[30]

IV. THE NEED TO RETHINK THE VERY FOUNDATIONS OF A LAW OF TERRITORY IN TERMS OF A COMMON DESTINY OF PEOPLES

Carl Schmitt, in *The Nomos of the Earth in the International Law of the Ius Publicum Europaeum*,[31] sees the need for renovation of the law of territory. He asks whether there is any principle of legitimacy underlying the appropriation of territory globally. Eventually, he inclines to a surprising conclusion. The primary radicalism of Schmitt is to accept the question which Fauchille rejects – under what circumstances is it possible that a people may inhabit a territory which is their homeland, such that the institutional representation they give

[26] *See* GASTON JÈZE, ÉTUDE THÉORIQUE ET PRATIQUE SUR L'OCCUPATION COMME MODE D'ACQUÉRIR LES TERRITOIRES EN DROIT INTERNATIONAL [THEORETICAL AND PRACTICAL STUDY ON OCCUPATION AS A WAY OF ACQUIRING TERRITORIES IN INTERNATIONAL LAW] 139–59 (1896) (Fr.).

[27] *See id.* at 128, 139, 155 &160.

[28] Andrews, *supra* note 23, at 409.

[29] *See id.* at 410–12.

[30] *Id.* at 412.

[31] CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE IUS PUBLICUM EUROPAEUM* (G.L.Ulmen trans., Telos Press Publishing 2006). Obviously, this was written in German as DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM (Duncker &Humblot 1950).

themselves will be expressed in a Nomos. It is then possible to imagine that all peoples come to recognize one another, so that the whole of the earth possesses a Nomos, that is, the earth is entirely inhabited by peoples in lands they recognize as homelands?[32] In that case, the way is open for the peoples of mankind to enjoy a common destiny.

Schmitt thinks one can distinguish between where a people truly belongs and where a population is merely dominated in a particular place by a Caesar. He considers that where people belong it is possible to have a Nomos, meaning a pasturing, a division and a measure of order in a concrete spatial unity, where people become settled and where they provide a force-field of a particular order. He contrasts this with the sophist view of Nomos as mere law. This is what prevails in late 19th century German legal positivism. Post-1870 German public law has no Nomos. The latter is an aggressive, destructive use of law as a weapon by those legislating against those who are excluded from legislation.[33] Instead, it has to be recognized that the legitimacy of the Nomos comes from a process of apportioning space, essential to every historical epoch, which determines the convergence of order and orientation in the cohabitation of peoples.[34]

At the conclusion of the Part I of *Nomos* Schmitt says that the late 19th century positivists consider only the given order and not how it came about. They look only to what is established firmly. The processes whereby this order came to be established are rejected as a study which is "unjuridical". A modern State is concerned only with the functioning of its own legality and not with the origins of its legality. But there is and has to be a law that precedes the State, external to it and existing among States.[35] For Schmitt a basic separation of order as power and orientation as Nomos spells nihilism. [36]

Schmitt makes a meaningful land appropriation the starting point for any Nomos-infused legal order. So, he says that:

> "A land appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire. Not only logically (as Kant admits) but also historically land appropriation precedes the order that follows from it. . .It is the reproductive root in the normative order of history…All further property relations are derived from this radical title."[37]

Schmitt has already quoted Kant as saying "the law of mine and thine that distributes the land to each man" is not positive law but somehow "remains the real core of a wholly concrete, historical and political event, a land appropriation."[38]

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[32] This makes up Part I of the book. *See id.* at 42–83.
[33] *See id.* at 78.
[34] *See id.*
[35] *See id.* at 82.
[36] *See id.* at 66.
[37] *Id.* at 48.
[38] *Id.*

There are many aspects of Schmitt's ambitious quest to demonstrate the existence of a global territorial Nomos. Schmitt praises Vitoria, the theologian, in contrast to Grotius and Pufendorf, the lawyers, for recognizing that there is a problem of legitimacy with one people or civilization ruling over another. Grotius and Pufendorf could not see or did not clearly distinguish that gaining *imperium* over human beings was distinct from the acquisition of *dominium* over things, as private property. Says Schmitt, "[w]hereas Vitoria still has the central problem in view- the legitimacy of land appropriation of American territory as a process *jure gentium,* – these ostensible founders of modern international law speak only of the acquisition of things in general."[39] Schmitt here confirms the argument in *The Decay* about the inappropriateness of municipal law analogy used for the acquisition of territory and the inevitable blocking of the idea of self-determination of peoples.[40] As Schmitt points out the so-called lawyers, Grotius *et al.*, had from the start lost sight of the central question – of human destiny,

> "[T]he first question in international law was whether the lands of non-Christian, non-European peoples and princes were "free" and without authority, whether non-European peoples were at such a low stage of civilization that they could become objects of organization by peoples at a higher stage. This was the question Vitoria posed so clearly and answered so negatively. For 17th and 18th century international law, this was no longer an essential question; its practical interest was directed to the struggle among European states on European soil that had been ignited by the land appropriation of the New World."[41]

When Schmitt returns to this question for the period 1884-1914, he draws a very dark picture of a European civilization which has completely lost its identity in its imperialist quest. He remarks that by the late 19th century, there was a great muddle and confusion about the title to non-Western territory. Treaties with native chiefs, acquisitions by Western private colonial societies, etc., produced

> "[a] complete muddle of international legal titles: scientific discoveries and explorations; cartographical surveys; symbolic and factual, if also still scarcely effective occupations; and thousands of treaties of often obscure types that the private and colonial societies concluded with indigenous chiefs."[42]

This led to the Congo Act of 1884-85. Its various provisions tended towards European international law increasingly tending to consider all areas under State sovereignty – motherland as well as colonies – as *state territory*.[43] The effect was that the spatial structure of European international law had to be abandoned and

[39] *Id.* at 137.
[40] *See* THE DECAY, *supra* note 4, at 51–57.
[41] SCHMITT, *supra* note 31, at 137–38.
[42] *Id.* at 215–16.
[43] *See id.* at 220.

> "[a]fter 1890, the onset of a jurisprudence of purely positivist, *i.e.*, purely intrastate laws and interstate contractual norms, turned the concrete order of a truly European international law into a collection of somehow valid norms."[44]

Schmitt seems to see this first legal globalization as having a nihilistic effect on Europe's legal identity. An increasingly more superficial universalizing process mistook "the removal of Europe from the center of the earth in international law for Europe's rise to the center."[45] What Schmitt called this empty normativism concealed the fact that one concrete order of previously recognized powers had been destroyed and none had taken its place. Rather oddly, Schmitt attributes the death blow to Belgium which claimed its title to the Congo in its sole occupation and not in a mutual recognition of the European Powers any more than to native treaties. Such a claim to title by occupation, for Schmitt, really meant

> "[t]he rejection of the legal title of "recognition" grounded in the community and solidarity of international law, and the shattering of the comprehensive spatial order that such a legal title embraced."[46]

State-centered legal positivism proved unable to provide any guidance in the face of this general disorientation. "Externally, the positivism of international treaties failed to have any historical consciousness of its own situation".[47] Schmitt saw that there could have been a role for jurists to grapple with the medley of concrete legal traditions and issues. However, as we have seen with Rivier and Fauchille respectively,[48] they preferred to use such language as that States owe their existence to "the logic of events [which] have more influence than law"[49] and that there "exists no rational principle to which one can appeal in what constitutes the territory of a state…A simple consequence of facts, it could have no juridical basis."[50]

Leading up to 1914, the creative spirit of international lawyers was utterly bankrupt, concerning the exercise of legal imagination about peoples and their relationships to territories which are their homelands.[51] Schmitt deplored how they declared substantive discussion of these topics to be unjuridical, even characterizing their refusal to discuss them as required by legal positivism.[52] His response is a radical cry. Just as the humanist legal scholars of the 16th century told the theologians to be silent, so now three hundred years later,

> "jurisprudence in the name of legal positivism chose to remain silent with respect to all the great contemporary legal issues…With this rejection of international law,

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[44] *Id.*

[45] *Id.* at 226.

[46] *Id.* at 223.

[47] *Id.* at 237.

[48] *See* THE DECAY, *supra* note 4, at 52–53.

[49] RIVIER, *supra* note 9, at 184.

[50] FAUCHILLE, *supra* note 10, at 5-7.

[51] *See supra* note 19. Western international lawyers could only conceive or imagine the State and not at all peoples in relation to territories.

[52] *See* SCHMITT, *supra* note 31, at 239.

> Europe stumbled into a world war that dethroned the old world from the center of the earth…"[53]

In other words, Schmitt's stunning historical overview has illustrated how the so-called development of the international law of territory in the late 19th and early 20th century consumed the whole of European legal civilization in a nihilistic fire which caused its eclipse from the planet through two world wars.

V. CONTINUED CONSEQUENCES OF BASIC CONTRADICTIONS IN THE ABSENCE OF A LAW OF TERRITORY

It is essential to appreciate that the absence of a law of territory is a world-wide phenomenon, which causes acute instability in many different geographical zones. This is usually attributable to contests about the status of lands inhabited by so-called natives, but it is more fundamentally attributable to the readiness of more powerful States to use force or the threat of force to maintain either territorial distribution or even territorial uncertainty to their advantage.

There was a lack of consensus around the idea that territory not occupied by a recognized State could be *res nullius* and therefore susceptible to occupation by a recognized State. However, the idea was nonetheless strongly held by some States and not effectively resisted by others. Indeed, it is even argued that inhabited land which is not recognized as a State does not enjoy the protection of the UN Charter because article 2/4 and article 51 only guarantee the integrity of States.

A. The Israel Palestine Question[54]

There are very many serious territorial disputes at present, which threaten world peace. The most long-standing are probably the Palestine-Israel conflict and the Kashmir conflict. Contemporary conflicts, causing acute international instability, are the Russia-Ukraine border disputes and the issue of ownership of the South China Sea Islands. This is quite apart from the many unresolved conflicts surrounding former colonial boundaries. In this concluding section it is intended only to illustrate briefly the Palestine-Israel question and one colonial dispute in order to illustrate the difficulties to do with the absence of a conceptually convincing law of territory.

Roger O'Keefe offers an unusually reflective account of territorial aspects of the Palestine-Israel dispute. It is crucial that he resolves the 19th century doctrinal controversy about the relationship between the Western style State and the already present 'indigenous' or 'native' population entirely in favor of the former. He appeals to the so-called inter-temporal rule - that one judge matters by the standards of the time, not by today's standards – without

[53] *Id.*

[54] *See* Anthony Carty, *Israel's Legal Right to Exist and the Right to Self Determination of the Palestinian People,* 76 MOD. L. REV. 158 (2013).

reference to the doctrinal controversy described above. Effectively, the Island of Palmas Case is assumed to be gospel. So, when Britain abandoned the mandate, the key legal fact for O'Keefe was that it was not substituted by a geographically coextensive independent State. This meant, for O'Keefe, that whatever rules there may have been on the use of force in 1948, they could not be applied within the former Mandate territory, now an entity without legal status. This is a reiteration of the argument that populations not organized already into recognizable States, in the Western colonial sense, did not have any existence in international law. O'Keefe goes further than most of the classical practice – except maybe in Australia and South West Africa, in giving a license for the obliteration of the so-called "indigenous peoples." He says that the situation facing the Jews of Palestine in 1947-48 was completely outside any framework of possible legal restraint.[55]

For those who might have some sympathy with "indigenous" or "native" peoples – the other side of the unresolved 19th century doctrinal controversy – they might want to appeal to the 1931 resolution of the *Institut de Droit International* on the legal significance of mandates,[56] which said:

> "6. The communities under Mandate are subjects of international law…
>
> 7. The functions of the mandatory end by renunciation or revocation of the Mandate …by the recognition of the independence of the community which has been under Mandate…
>
> 8. The rights and duties of the communities under Mandate are not affected by the expiration of the mandate or the change of the Mandatory."

O'Keefe is not saying that a Western colonizing State may absorb the territory and population of a non-Western people. He speaks of the "Jewish population of the territory" in contradistinction to the State of Israel. The former, the Jewish population of the territory of the defunct mandate, could act as if in a legal vacuum. At a second stage, where this Jewish population becomes the State of Israel, there was no rule of international law that protected any territory of the former Mandate from being incorporated into the State of Israel.[57] O'Keefe is referring to the limits of the international law on the use of force, whereas the argument here is that it is the absence of coherent and comprehensive rules relating to a law of territory which makes the so-called UN Charter law on the use of force inoperable as law.

So, to return to the Institute resolution, in the contemporary discourse of international law, this resolution would be regarded as soft law at most. Indeed, in the view of the present writer, there is no international legal order which has been able to resolve the controversies of the 19th century. That is to say, the

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[55] *See* Roger O'Keefe, *Israel/Palestine Sixty years On*, *in* KRISENHERDE IM FOKUS DES VÖLKERRECHTS — TROUBLE SPOTS IN THE FOCUS OF INTERNATIONAL LAW 18-24 (Thomas Giegerich & Alexander Proelß eds, Dunker-Humblot, 2010).

[56] *See* VICTOR KATTAN, FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT 1891-1949 312 (2009).

[57] *See* O'Keefe, *supra* note 55.

question whether and when the so-called right to self-determination of peoples came to be recognized as a principle of customary law is a badly posed question. There are many "peoples" claiming this so-called right who are left "whistling in the wind" by the so-called international legal community. The continued absence of a legal right to self-determination is part and parcel of the absence of an international law of territory.

This legal fact is evidenced by a much stronger part of O'Keefe's argument. He says that, in the absence of centralized international institutions, what is the authoritative legal characterization of a fact is "a function as much of discerning how other states have adjudged these matters legally as they are of abstract juridical reasoning."[58] Highly relevant in O'Keefe's view is "the absence at the time of protests by third states, with the notable exception of the Arab bloc, at the incorporation into the state of Israel of the territories within the borders of the former Mandate…"[59] However, he also remarks: "At the same time, states generally refrained from explicitly recognizing Israel's asserted title to these lands."[60] He continues to say: "While formal recognition of Israel's right to the territory claimed by it in 1949 remains rare, there nonetheless appears today to be general acquiescence in Israel's assertion".[61]

O'Keefe's way of describing the so-called state practice depends upon his purported distinction between how States "adjudged these matters" and what he calls "abstract juridical reasoning." The present argument is that it is O'Keefe who is engaging in "abstract juridical reasoning" by attributed legal significance to the non-committal indifference of the so-called international legal community to what is happening in the Israel-Palestine conflict. While States may express opinions and preferences, they are not interested to act as a legal community, simply because, there is no such community outside the imaginations of abstract juridical reasoners like O'Keefe. For instance, O'Keefe refers to the Security Council in 1949, which, having declined to enforce the GA Partition Resolution, expressed hope for the early achievement of "agreement on the final settlement of all questions outstanding between ['the Governments and authorities concerned.']"[62] In others words, the Security Council is indifferent to the matter and does not intend to resolve it.

There must be huge force in the contention that the rapid recognition of Israel by most States indicated an indifference to the circumstances of its birth. This may be characterized by O'Keefe and his colleagues as the "Juridical Power of the Factual", but that is mere "abstract juridical reasoning." As Abba Eban argued in 1948, "[t]he existence of a State is a question of fact and not of law. The criterion of statehood is not legitimacy but effectiveness."[63]

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[58] *Id.* at 14–15.
[59] *Id.* at 20.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 21, citing S.C. Res. 73, ¶ 1 (Aug. 11, 1949).
[63] CRAWFORD, *supra* note 4, at 3.

B. Further Significant Disputes Arising out of Colonial Acquisitions of Territory

There are several more very severe instances which show the confusion surrounding the so-called international law of territory at the moment. The writings of Fisch and Andrews were provoked by the *Western Sahara Case*.[64] This accorded some significance to the allegiance which 19th century tribes gave to the Kings of Morocco and Mauritania. The territory was not *res nullius.* However, these ties were not enough to constitute the territory the tribes covered to be part of the states of these kings. Instead, the Court advised that the people of the Sahara had a right to self-determination. This was not accepted especially by Morocco and the dispute remains unresolved. The root of the problem may be characterized as the blindness of the colonial principles for acquiring territory in the face of the issue of political legitimacy implied in one political authority acquiring "possession" of another political authority. The ICJ, reasonably enough, claimed that the principle of self-determination should apply to the people of the Western Sahara. This attempt to reintroduce the principle of legitimacy, which goes back to Vitoria, fails to come to terms conceptually, with the history of the law of territory. The view of the latter, which usually prevails in Court jurisprudence is that only State activity in the Western sense could constitute a proof of effective exercise of sovereignty and hence an effective block on a minority population's claim to self-determination. It is not surprising that Morocco and Mauritania would not accept a principle of self-determination based on a denigration of their own concept of their historical, institutional identity. Morocco has not accepted it and the so-called Family of Nations, now the UN, has not been able to compel it to submit to the ICJ Advisory opinion.

In another case between Nigeria and Cameroon[65], there was a typical Treaty of Protection between Great Britain and the Kings and Chiefs of Old Calabar of 1884. In spite of the promise of protection and the absence of any mention of transfer of territorial sovereignty to Britain, the British transferred the Bakassi Peninsula to Germany by a Treaty of 11 March 1913. The ICJ held that, notwithstanding the first treaty it did not constitute a protectorate of a continuing State and that the 1913 transfer was the only source of title to the Bakassi Peninsula. The dissenting opinion of Judge Koroma[66] objected that such was a clear violation of the international law principle that treaties had to be respected, *i.e.*, the treaty of 1884. A further equally significant fact, in his view, was that from 1913 to the 1970s none of the new "sovereigns" actually exercised any state authority in the territory transferred, whether the Germans, the French or the post-independence Cameroons, whose communities

[64] *See* Western Sahara Case, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16).

[65] *See* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 2002 I.C.J 303 (Oct. 10).

[66] *See id.* at 474–87.

continued to be part of the same communities on the other side of the Nigeria-Cameroon border, for purposes of education, location administration and economic life etc. These real historical ties were what mattered, alongside the original treaty. However, the Court stuck to the "title" of the 1913 Treaty. In the words of Crawford again, what counts is the "position which the parties themselves took and which were applied in practice." He concludes that "even if, after 1884, a party existed that might have espoused such a claim (to sovereignty), no claim to the contrary to Britain's own claim appears to have been made, and at the international level the Kings and Chiefs of Old Calabar… disappeared from view." So, the terms of the Treaty itself did not really matter.[67] This was in spite of a formal visit of these disappeared Kings etc. to London, but more importantly, the continued unbroken ties which have left the inhabitants of the Bakassi Peninsula resistant to Cameroon, disaffected and in a state of resistance. The Court's disregard of the "treaty of protectorate" has not led to a mutually satisfactory solution of the problem - that the territory was inhabited by a political community recognized at the time in a formal treaty, whose significance receives confused treatment by the Court.

VI. CONCLUSION

The fundamental difficulty with the idea of a law of territory is that the everyday world of international law is one in which States, as the primary institutional form of international law, create, consensually among themselves, the rules for their conduct. Since all of the territory of the world is already assigned to these States, as a matter of fact or *de facto*, the issue of the relationship of peoples, or nations to states, is a meta-legal question. Whatever the talk of the right of self-determination of peoples, there is no institutional framework to realize any such right, except, possibly, in the case of a situation which can be characterized as an incomplete decolonization for which the UN General Assembly is responsible. Yet even here a recalcitrant would-be decolonizer cannot be forced.

Carl Schmitt does address this question directly in *The Nomos of the Earth.* To repeat his basic ideas again, Schmitt accepts the question which Fauchille (as the cardinal representative of the mainstream) rejects – under what circumstances it is possible that a people may inhabit a territory which is their homeland, such that the State they form will express their spirit, their imagination, their dream, their Nomos. Since it is obvious that all individuals and families ideally have the possibility of being part of a community in a homeland, it is then possible to imagine that all peoples come to recognize one another as neighbors, so that the whole of the earth possesses a Nomos. That is, the earth can be imagined, or dreamed as entirely inhabited by peoples in lands they recognize as homelands.[68] In that case the way is open for the peoples of

[67] *See* CRAWFORD, *supra* note 4, at 314.
[68] *See* SCHMITT, *supra* note 31, at 42-83.

mankind to have a shared future and a common destiny, settled collectively in their respective homelands.

Schmitt thinks one can distinguish between instances where a people truly belong and where a population is merely dominated in a particular place by a Caesar. He considers that where people belong it is possible to have a Nomos, meaning a pasturing, a division and a measure of order in a concrete spatial unity, where people become settled and where they provide a force-field of a particular order. He contrasts this with the sophist view of Nomos as mere law. This is what prevails in late 19th century German and European legal positivism. Post 1871[69] German public law has no Nomos. The latter is an aggressive, destructive use of law as a weapon by those legislating against others who are excluded from legislation.[70]

Of course, nations or peoples are not ready-made entities, and it is a notorious feature of the modern world that indeed nations are fictional or imaginative constructs to compensate for the lack of intimacy or even the most threadbare social cohesion. None of this is to reject the conceptual framework that Schmitt has used to deconstruct completely the whole mainstream, so-called legal professional construction of the international law of territory. However, as a philosophical task, the elaboration of the meaning of such concepts as people, nation and states is an ongoing task, just as there are many nations on the planet whose transition to statehood has been obstructed.

Max Scheler, a German thinker and contemporary of Schmitt, has developed certain ideas in context of the same fevered environment of injured national feelings in 1920s Weimar Germany. His concern was, of course, the exclusiveness of national feeling and its tendency to submerge the individual into the nation. His response was very complex and can only be touched upon by way of conclusion. The most important point to highlight is his belief that the State has a purely formal character as the institutional expression of the nation, the means by which it, the nation, can express its will. However, without the state, the nation is an informal mass which cannot express itself coherently and, precisely for that reason, threatens to be a source of extreme instability in the existing international territorial order.

So, it is easy enough for Scheler to define the state, while the idea of nation, and especially its relation to other nations is much more complex and indeed, an ongoing task. What is proposed is to set out, once again, the views of Max Scheler in terms of a phenomenology of collective consciousness,[71] in his *Wesen und Formen der Sympathie* (1926). For Scheler, the final aim is to understand the trinity of state, nation and culture. Personality is a matter of

[69] This date marks the foundation of the new German Empire, but it also marked the vigorous expansion of European colonialism, especially the French – the key figures for the South China Sea – who wished to compensate for their defeat by the Germans in the 1870 war.

[70] *See* SCHMITT, *supra* note 31, at 78.

[71] *See* Anthony Carty, *Interwar German Theories of International Law: The Psychoanalytical and Phenomenologicial Perspectives of Hans Kelsen and Carl Schmitt*, 16 CARDOZO L. REV. 1235 (1995).

intuiting the unique quality of the individual with each intentional act expressing that individuality. The other's relation to this individuality is maintained through a mixture of intuition and understanding, based on benevolence, and not an objectification of the other as a bundle of psychological processes. A collectivity is not an objective essence, but rather a network or *ethos* of interacting, self-differentiating intentionality. Rather than the concept of identity, Scheler uses that of transcendence. An individual is always part of a society, which itself is a part of world society. The individual is always both part of a society and beyond it.

The possibility of transcendence is crucial to explain promissory obligation at an international level. Individuals who enter into social relations must, at some time, have entered into accord to form a community. The nations of Europe form a cultural circle with the nations of Asia, but between themselves they form separate cultural circles. Obligation supposes not the unit of the State itself, but that individuals and groups entering into contracts "always presuppose a further communal whole to which they simultaneously belong".[72] The obligation of one treaty does not derive from another but from the fact that, for instance, European nations are not automatically bound as members of their own community-circle. They become so bound precisely because they can transcend themselves in a global perspective.

For Scheler's concept of transcendence, there must be a plurality of collective cultures in the sense of both simultaneous and successive plurality. The latter does not attach to factors of race, milieu or nationality, but culture. Culture – not the State – is sovereign. Sovereignty means a collective unity or hierarchy which brings together a network of values but remains autonomous. So, an act center of a collective person cannot be simply a territory or blood because a collective person is always part of another wider collective person. It may be a nation but also it may be a church. However, it is *not* the State. "…The state, as seen by itself, is simply the highest center of the spiritual collective *will*, *i.e.*, the will of *control*".[73] As a spiritual subject of will, the State is completely dependent upon an ethos which stems not from it, but rather from the spiritual collective as the persons behind it (*i.e.*, the cultural personality of the nation or the cultural circle which stands behind it).[74]

The State has no positive task in the realization of cultural values. Its importance is merely that, as an organizational principle, its freedom and independence in relation to other States is the condition required for the cultural person situated behind the State to produce – according to its own proper spirit - a world of cultural goods.[75] What is essential to the State is a defined territory

[72] MAX SCHELER, WESEN UND FORMEN DER SYMPATHIE [NATURE AND FORMS OF SYMPATHY] 533 (2013).
[73] *Id.* at 545.
[74] *See id.* at 546.
[75] *See id.* at 552.

which is its field of domination. As such, it is exclusive because territories cannot overlap. However cultural collective persons do not require a territory:

> "[nation] essentially possesses a certain field of effectiveness that is at every moment spatial, but in such a way that the fields of a plurality of nations can intersect in the same objective segments of space (and their content). They do not exclude each other as territories do; nor do they necessarily change along with the migrations of the lived bodies of their members, i.e., through the migrations."[76]

Hence communities are self-differentiating, mutually experiencing and, based upon intuition and understanding, value both the universal and the individual. So, everything comes back to the person, who is a unity of action-centered intentions, and the implicit or background practices which make up the previous actions of the person. These are what make up the ethos or culture of the person. A hermeneutic of state practice, including institutionalized, contractual treaty practice and the embedded, implicit customs, will always refer to the interconnecting networks of collective cultural persons and/or nations which lie behind the States.

However, it has to be repeated, as the final note in this article, that there is no international law or regulation on the relationship between what Scheler calls collective cultural persons and the State. In the 19th century there was, as has been seen above, some doctrinal awareness of this conceptual deficiency in the context of European territorial expansion into non-European spaces - the forced submission of non-European cultures to the European. Such awareness has considerably dimmed since then, with the result that, for virtually all States, their so-called territorial integrity has become a fetish which is, in many parts of the globe, except maybe the Americas, a constant threat to world peace. Given the fossilized nature of the so-called law of territory and of the doctrine of international law generally, there is no creative or imaginative debate on this subject within the self-styled "profession" of international lawyers.

[76] *Id.* at 558.