GENEVA GRADUATE INSTITUTE

INSTITUT DE HAUTES ÉTUDES INTERNATIONALES ET DU DÉVELOPPEMENT

GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

Specters of Man:
Sovereignty and Anthropomorphism of the State

THESIS
submitted at the Graduate Institute
of International and Development Studies
in fulfilment of the requirements of the
PhD degree in International Law

by

Adam STROBEYKO

Thesis N° 1457

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Sur le préavis de Fuad ZARBIYEV professeur adjoint à l'Institut et co-directeur de thèse, de Anna LEANDER, professeure à l'Institut et co-directrice de thèse, de Janne NIJMAN, professeure à l'Institut et membre interne du jury, et de Sarah NOUWEN, Professor, Department of Law, European University Institute (EUI), Italy et experte externe, la directrice de l'Institut de hautes études internationales et du développement autorise l'impression de la présente thèse sans exprimer par là d'opinion sur son contenu.

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ABSTRACT / RÉSUMÉ

English summary: Anthropomorphism, understood as the attribution of human qualities to collective entities, has played an important role in the historical conceptualizations of the State and of its sovereignty. In this doctoral dissertation, I trace the patterns, purposes and paradoxes of anthropomorphic thinking about the State as the subject of international legal obligations. Hobbes described the State as a person 'by fiction,' that needed to be represented by actors who act on its behalf. The theorists of the law of nations, such as Pufendorf, Wolff and Vattel, proposed to view the State as a 'moral person' characterized by the 'will' and 'intellect' of its own. The anthropomorphism of the State has reached its extreme manifestation in the organic theories of law. Bluntschli and Gierke saw the State as a living organism, a metaphysical and divine 'person' that subsumed the identities of individuals. This view of the State has been criticized by jurists such as Hans Kelsen, who proposed to view the State as a 'legal fiction' instead. The rich history of debate about personhood and sovereignty of the anthropomorphic State testifies to the importance of the topic to our conceptualizations of the State as the subject of international law. The dissertation ends with a section dedicated to the dispersion of sovereignty of the State, brought about by new epistemic and technological developments. New technologies force us to rethink sovereignty and personality of the State. I therefore propose the model of law as a 'network' and infrastructural approaches to law as more suitable alternatives for thinking about the law in times of globalization and technological change.

Résumé en français : L'anthropomorphisme, compris ici comme l'attribution des qualités humaines aux entités collectives, a joué un rôle important dans les conceptualisations historiques de l'État et de sa souveraineté. Dans cette thèse de doctorat, l'auteur propose d'étudier les formes, objectifs et paradoxes de la pensée anthropomorphique concernant l'État en droit international. Hobbes a décrit l'État comme une personne « fictive » qui devait être représentée par les acteurs agissant en son nom. Les théoriciens de droit des gens, Pufendorf, Wolff et Vattel, ont vu l'État comme une « personne morale » avec ses propres facultés de « l'intellect » et de la « volonté ». L'anthropomorphisme d'État a atteint son apogée dans les théories organiques du droit. Bluntschli et Gierke ont perçu l'État comme organisme vivant et personne métaphysique et divine du droit. Cette vision de l'État a été critiquée par les juristes comme Hans Kelsen, qui ont proposé de remplacer l'État dit organique par la notion d'une « fiction juridique. » La richesse du débat sur la personnalité et la souveraineté de l'Etat anthropomorphe confirme son importance au sein de notre discipline. La thèse se termine par un chapitre consacré au problème de la « dispersion » de la souveraineté engendrée par les changements technologiques et épistémologiques de la modernité. Les nouvelles technologies nous obligent à repenser la souveraineté et la personnalité de l'État, ainsi que la structure de l'ordre juridique international. On propose le modèle du « réseau » et la théorie des infrastructures comme les alternatives qui peuvent nous aider à repenser le droit à l'ère de la mondialisation et des changement technologiques.

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When I started my PhD at the Graduate Institute, little did I know what lay ahead. Four years seemed like an eerily distant and yet stressfully short amount of time. Looking back, these four years proved to be a time of intellectual adventure and exploration which transformed me in many ways. This would never have been possible without the people who provided me with the sources of inspiration, critical reflection and the feeling of safety throughout this journey. This section is dedicated to them.

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Introduction: Political Theology of the State

What a piece of work is a man,
how noble in reason, how infinite in faculties,
in form and moving how express and admirable;
in action how like an angel,
in apprehension how like a god.

– William Shakespeare, *Hamlet*, Act II, Scene II.

What then is truth? A mobile army of metaphors, metonyms, and anthropomorphisms —in short, a sum of human relations which have been enhanced, transposed, and embellished poetically and rhetorically, and which after long use seem firm, canonical, and obligatory to a people: truths are illusions about which one has forgotten that this is what they are; metaphors which are worn out and without sensuous power; coins which have lost their pictures and now matter only as metal, no longer as coins.

– Friedrich Nietzsche, *On Truth and Lie in an Extra-Moral Sense.*

Introduction

A specter of 'Man' is haunting international legal theory. The State, understood as the traditional subject of international rights and duties, has been created in the image of a hypothetical human being at the foundation of legal hierarchy.[1] The seemingly technical concept of the 'State' continues to be informed by anthropomorphic imagination: the State *consents* to legal obligations, it displays *knowledge, intention* and even certain bodily characteristics of its own. While the vocabularies used to describe the collective entity are in flux, as they change and adapt to the necessities of the time, the many incarnations of the anthropomorphic subject continue to permeate international legal

[1] For the secularization of anthropomorphic vocabularies, see: E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1957). For the linkage between body politic and the mystical foundation of law's authority, see: G. Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," *Law & Society Review* 31, no. 4 (1997): 763–88.

discourses. In this dissertation, I offer a genealogy of the anthropomorphism of the sovereign State.

For a discipline so thoroughly concerned with the existence and interactions of States, international law offers surprisingly little in terms of a coherent theory of its subjects.[2] Orford writes: 'European jurists had in large part abandoned questions of the proper subject or author of law as being somehow extra-legal – either too metaphysical or too political.'[3] In the discipline of international law, the question of whether an entity qualifies as a State is usually answered with a series of references to the Montevideo Convention.[4] According to this view, an entity qualifies for statehood when it possesses a permanent population, defined territory and an effective government capable of entering into external relations. However, for an entity to fully benefit from international relations, it also helps to be recognized as a State. To cite Klabbers, 'an obvious circularity sets in: one needs to be a person to have a right, yet having a right implies that one is a person.'[5]

The notions of sovereignty and personhood appear as fertile grounds for circular arguments about the subject of law. While trying to define sovereignty, the Permanent Court of Arbitration (personified in the form of Arbitrator Max Huber) held that sovereignty allows States 'to exercise […] to the exclusion of any other State, the functions of a State on their territory.'[6] Meanwhile, the closest that the International Court of Justice got to pronouncing upon the nature of personhood under international law was when it described a legal person as 'a subject of international law [...] capable of possessing rights and duties' with a 'capacity to maintain its rights and duties by

[2] The feminist scholarship constitutes a notable exception in that regard. See: Ngaire Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," *The Modern Law Review* 66, no. 3 (2003): 346–67; Ngaire Naffine and Rosemary Owens, eds., *Sexing the Subject of Law* (Holmes Beach, Florida: Gaunt & Sons, 1997).
[3] Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 194.
[4] Jean d'Aspremont, "The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law," *Cambridge Journal of International and Comparative Law* 4, no. 3 (2015): 501–20.
[5] Jan Klabbers, "The Concept of Legal Personality," *Ius Gentium* 11 (2005): 49.
[6] PCA, *Island of Palmas case* (Netherlands v. USA), 4 April 1928, 838.

bringing international claims.'[7] It seems that whenever we speak of sovereignty, a certain dose of mysticism sets in, as we observe the operation of self-referential, circular arguments about the States as subjects of international law. However, rather than outright rebuking the concept of sovereignty for the lack of analytical precision, I propose to treat it as an important point of reference in the establishment of the anthropomorphic subject. Studying the anthropomorphism of the State through the lens of its connection to sovereignty allows us to revisit the historical and theoretical attempts at representing the sovereign subject through the anthropomorphic form.

This brings us to the research questions posed in this dissertation. The common themes and queries which will reappear throughout this dissertation are the following: what are the different anthropomorphic conceptualizations of personhood and sovereignty employed in relation to the State? What are the implications of the treatment of the State as a 'person'? What is the role of anthropomorphic vocabularies and assumptions in thinking about the sovereign State? Mainstream international legal scholarship provides us with few answers to these questions. Socialized into paradoxes and lacking the necessary analytical tools, international lawyers write 'around' the foundational axioms of State sovereignty and personality, without inquiring too much into the anthropomorphic assumptions about the subject of international law.

To a pragmatic eye, all of this may appear understandable: it is perhaps a *fatum* of every academic discipline to produce its own version of a 'truth' by deploying 'a mobile army of metaphors, metonyms and anthropomorphisms' to be cast upon the world. More so, the problem of anthropomorphism of international law seems to have already been addressed by the scholarship of the first half of 20th century (see: Chapter IV), which attempted to de-anthropomorphize the State and to wrap the naked body of the sovereign person in the guise of the 'legal fiction' instead. However, despite all the best efforts of the modernist jurisprudence, which sought to turn the page by reducing the State to an 'abstract entity,' a mere 'legal fiction' or a 'point of attribution' within the

[7] ICJ, *Reparation for Injuries Suffered in the Service of United Nations*, Advisory Opinion of 11 April 1949, 179.

legal order, the project to de-anthropomorphize international law has failed. As will be demonstrated in this dissertation, the State continues to display anthropomorphic qualities, while the anthropomorphic form is under increasing pressure from globalization and fragmentation of legal practices. We are also left with more general conceptual problems of the anthropomorphic foundations of legal hierarchy and with the questions about the source of agency in international law.

For all these reasons, I decided to dedicate the current study to the many instances, patterns and paradoxes of anthropomorphism in international legal theory and history. This dissertation is not to be understood as an exhaustive treatment of the topic – that would be to fall into the narrative of a 'scientific' character of legal studies, a narrative cherished by many of the jurists discussed in this contribution. Rather, while treating international law as a language, I study the epistemological shifts which occurred in hegemonic discourse of international public law by analyzing major historical texts familiar to legal imagination. I argue that various anthropomorphic vocabularies and imaginaries are tied to different conceptualizations and configurations of sovereignty. They help sustain different epistemologies and, by doing so, contribute to our conceptualizations of the international legal order. Anthropomorphism thus has legal and political implications that I intend to demonstrate throughout this dissertation.

The role of anthropomorphic representation

It comes almost instinctively to recognize the general importance of anthropomorphism in representing a political community. The many statues of Helvetia adorn the Swiss cities and they have successfully replaced the bull (*Schweizer Stier*) as a visual representation of the Alpine country. We may be tempted to view these representations as relics of the past, the remnants of nation-building projects which had swept the continent after the French Revolution. However, the mobile army of metaphors and anthropomorphisms does not begin and does not end with the revolution and nation-building projects; rather, the anthropomorphic representation is inherent in the way we use language.

Derrida considers figurative representation to be at the core of linguistic constructions, while authors such as Warren Shibles and Max Black see the metaphor as a cognitive device which plays a fundamental role in shaping our understanding of the world.[8] While arguing that metaphor relies on the semantic resources of the ordinary language, Donald Davidson considers it the 'dreamwork of language' which can be used to illuminate the novel or surprising likeness between two different things.[9] Personification goes even further, for it aims to elicit a specific affective response from its audience.[10] It displays a mnemonic function by creating an artificial memory linking the personified object with other constructs.[11] Personification can vest an otherwise abstract entity or virtue with a familiar human form and reproduce gendered and racial assumptions while doing so.[12] It would therefore be a mistake to discard the importance of anthropomorphic representations as mere figures of speech. Rather, my working hypothesis in this study is that anthropomorphic representations have helped jurists to conceptualize the abstract collective entity that is the State. The anthropomorphic representation allows us to think about the State in a way that we would think about a fellow human being, with his or her personality, status, and maybe even some characteristic quirks.

To an untrained eye which has not yet internalized legal vocabularies, a survey of legal materials would reveal that the State, the traditional subject of international law, is presumed to possess an array of cognitive capacities and bodily characteristics. It is assumed to possess a stable, continuous personality and identity over time to which

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[8] Jacques Derrida and F.C.T. Moore, "White Mythology: Metaphor in the Text of Philosophy," *New Literary History* 6, no. 1 (1974): 5–74; Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Ithaca, New York: Cornell University Press, 1962); Warren A. Shibles, *Metaphor: An Annotated Bibliography and History* (Whitewater, Wisconsin: The Language Press, 1971).

[9] Donald Davidson, "What Metaphors Mean," *Critical Inquiry* 5, no. 1, (1978): 31-47.

[10] Aoife O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law," *Melbourne Journal of International Law* 19 (2018): 227–58; Giuseppa Saccaro-Battisti, 'Changing Metaphors of Political Structures,' *Journal of the History of Ideas* 44, no. 1 (1983): 31–54.

[11] Gérard Genette, *Figures of Literary Discourse*, trans. Alan Sheridan (New York: Columbia University Press, 1982); George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003): 34.

[12] Marina Warner, *Monuments and Maidens: The Allegory of the Female Form* (Berkeley: University of California Press, 2000); O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law."

rights and duties may be ascribed. It is capable of engaging in performative enactments of sovereign power and it participates in the exclusive club of States, the society of Nations.

The anthropomorphic assumptions and vocabularies have served a variety of purposes. At the risk of losing nuance and granularity, we could simplify by saying that they allowed jurists to portray the State as:

- a unified object of inquiry, characterized by continuous personality and identity which prevails over time and which can be inherited by successor States;
- a 'person,' understood as a bearer of rights and duties under natural law, the classic law of nations or under modern international law;
- a cognizant, willing and rational participant in the legal discourse, who is assumed to *consent* to the law of treaties, to *know* the content of law and to hold legal opinions (for example, in the case of subjective element in the formation of custom);
- an embodied and gendered entity which subsumes the identity of inferior (non-State) entities and whose borders are stable and impenetrable;
- last but not least, the State can also be treated as a 'legal fiction' which displays stable identity and personality and which draws from the anthropomorphic source of agency in international law.

The contingent accumulation of anthropomorphic vocabularies throughout time has resulted in a peculiar blend of ideas about international legal subjects. On the one hand, modern international law displays a statist bias (what Mégret calls *l'étatisme*: the tendency to reproduce the legal argument about the State as the main bearer international rights and duties).[13] On the other hand, liberal appropriations of natural law tend to posit an individual human being or another anthropomorphic source of agency at the foundation of law (see Chapter IV for examples).

[13] Frédéric Mégret, "L'étatisme Specifique Du Droit International," *Société Québécoise de Droit International* 24, no. 1 (2011): 105–29.

One of the aims of this dissertation is to disentangle the circular, anthropomorphic arguments at the foundation of legal hierarchy: the many specters of 'Man' which haunt the theory of the State.

Methodology and Conceptual Framework

Method

In this dissertation I trace historical flows and adaptations of anthropomorphic vocabularies. In particular, I propose to retrace the creation of the main subject of international legal obligations: the sovereign State. It firstly needs to be noted that the jurists covered in this dissertation have encountered and responded to a variety of different 'problem situations' – they have built upon different epistemic systems and addressed problems stemming from specific political and legal contexts.[14] The vocabularies used to describe the anthropomorphic subject had to transform to suit epistemic systems of different times and places. My claim is never that a linear evolution has occurred, resulting in the State-form as we know it today. Neither do I treat the State as a transcendental form that has continued unchanged throughout centuries. Rather, I propose to treat the 'State' as a 'practico-reflexive prism.'[15] Foucault writes that the history of the State is to be recounted through the lens of practices of individuals: 'la pratique même des hommes, à partir de ce qu'ils font et de la manière dont ils pensent.'[16]

For these reasons, I assume the existence of a plurality of discourses which inform each other and which stabilize around the hegemonic discourse of public international law, with its references to the 'founding fathers,' 'doctrinal texts,' 'fundamental principles' and various efforts at the codification of the norm. Starting from this assumption, I follow Bhuta and Straumann in thinking that, while we may never hope to fully grasp

[14] Nehal Bhuta, "The State Theory of Grotius," *Current Legal Problems* 73, no. 1 (2020): 4–10; Benjamin Straumann, "The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality," *Journal of the Philosophy of History* 14 (2020).
[15] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, ed. Michel Senellart, trans. Graham Burchell (Palgrave Macmillan, 2007), 356.
[16] Michel Foucault, *Sécurité, Territoire et Population*, Hautes Etudes (Gallimard/Le Seuil, 1978), 366.

the past, the exercise of revisiting conceptual matrices of the past can grant us 'a better position to free ourselves from our own context and not remain trapped in our own assumptions.'[17] I therefore chose to focus this dissertation on historical and authoritative texts of international law which continue to inform legal imagination: the treatises of natural law and of the law of nations, the principles enshrined in international instruments, the celebrated doctrinal texts of international law and the cases before international tribunals. Much of this study revolves around scholars active in Europe and in Germany in particular. This should come as no surprise, given the importance of German public law tradition to the shaping of international law.[18] I focus my analysis on foundational texts of international law as the imperfect, yet the only available testimony to the reflected practice of jurists in their thinking about the State. I argue that successive accumulations of anthropomorphic vocabularies and the knowledge produced by powerful institutions and individuals have resulted in a configuration of concepts and associations connected to the kaleidoscopic image of the anthropomorphic State.

The genealogical method employed in this study allows me to focus on the fluctuation and contingency which mark the flows and accumulation of anthropomorphic vocabularies over time, while remaining attentive, yet not beholden, to the intellectual and political context surrounding the anthropomorphic analogy. I draw inspiration from Koskenniemi who proposes to experiment with 'a type of legal–historical writing that takes seriously the thesis of law as a "language" and the task of the lawyer as "bricolage" – trying to construct a persuasive argument from the bits and pieces of authoritative language.'[19] However, while I follow Koskenniemi in his treatment of the

[17] Bhuta, "The State Theory of Grotius," 4; Straumann, "The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality," 166.

[18] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), Chapter 3: International law as philosophy: Germany 1871–1933 3-International law as philosophy: Germany 1871–1933; Martti Koskenniemi, "Between Coordination and Constitution: International Law as a German Discipline," in *Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory*, ed. Kari Palonen, vol. 15 (Münster, 2011), 45–70.

[19] Koskenniemi, Martti. "Imagining the Rule of Law: Rereading the Grotian 'Tradition.'" *European Journal of International Law* 30(1) (2019), 24.

law as a language – or, should I say, as a set of discourses interacting with each other – I remain suspicious of the claim that this language has to be (can it ever be?) positioned in 'the appropriate professional context.'[20]

The notion of historical context has been associated with the so-called Cambridge School of historiography. Among the purported members of that school, it was Quentin Skinner who, in his early methodological texts, engaged with the notion of context as a centerpiece of historical scholarship. Writing against the textualist interpretation, Skinner criticized the tendency of historians to project paradigms upon 'great thinkers' in an anachronistic way.[21] Drawing from the philosophy of language of Ludwig Wittgenstein and John Austin, Skinner argued that speech constitutes a form of action within the context of a given community: words are used to do things with.[22] What followed was the argument that there are no timeless concepts. We can only learn from the past insofar as it provides us with another self-contained image of a political debate, a portrayal that we can use to get a sense of the contingency of our present legal-political arrangements. However, it must be noted that other alleged members of the Cambridge School – and later Skinner himself – have distanced themselves from this view of history. The view that writers of the past can actually help us think in the present has characterized the scholarship of Richard Tuck, particularly with regard to the invention of modern democracy.[23] On the extreme find of the spectrum, we find the work of David Armitage who writes in defence of presentism, seen as a device which can be used to connect the history of ideas with the overarching goal of human

[20] Ibid.
[21] Quentin Skinner, "The Limits of Historical Explanations," *Philosophy* 41, No. 157 (1966): 199–215.
[22] Quentin Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory* 8, No. 1 (1969): 3-53.
[23] Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2016)

flourishment.[24] Even Skinner, in his more recent work, seems to qualify his earlier statements and engages with a *genealogy* of the sovereign State.[25]

The proliferation of contextualist historiography has recently attracted criticism within the discipline of international law. Orford writes that, within international law, history is too often 'presented as offering a new foundation for formalism in international law.'[26] The attempts at imposing a particular type of empiricist historical method constitute a political intervention in a discipline otherwise organized around interpretative controversies.[27] On a more fundamental level, Derrida reminds us that the appropriate context may never be fully determinable. He asks:

> *Is there a rigorous and scientific concept of context? Or does the notion of context not conceal, behind a certain confusion, philosophical presuppositions of a very determinate nature?*[28]

Mindful of these criticisms, it would be premature to reject the notion of context, due to its pragmatic value. It can help us make sense of how ideas came to be and how they were deployed in concrete debates. Therefore, I draw from the works of the Cambridge School and consider the latter to be an important stream of scholarship in its own right. At the same time, I find my way of thinking closer to that of Armitage and Tuck. I posit that perhaps it is better to treat legal texts as a series of 'becomings' rather than stable 'beings' – to treat them critically, as points of reference within the fluidity and contingency of the legal imagination. Bartelson writes:

> *At some fluid moment in time, […] their meaning and truth become documentary, and the texts themselves become part of a historical legacy, either because the world of which they speak has withered away, or, because the world of*

[24] David Armitage, "In Defense of Presentism," in *History and Human Flourishing*, ed. Darrin M. McMahon (Oxford: Oxford University Press, 2023): 59-84.
[25] Quentin Skinner, "The Sovereign State: A Genealogy," in *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, ed. Hent Kalmo and Quentin Skinner (Cambridge: Cambridge University Press, 2014).
[26] Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021), 8.
[27] Ibid., 10.
[28] Jacques Derrida, *Limited Inc* (Evanston, Illinois: Northwestern University Press, 1988), 3.

which they speak has become all too real to the reader, who became its inhabitant.[29]

Therefore, my aim here is not to uncover a history of the past, but to cast new light upon specters haunting the history of the present. For these reasons, the focus of this dissertation is on linguistic simplifications which arise and reappear, which accumulate, which are fluid and marked by movement and contingency. I am interested in how the hegemonic discourse of international law reproduces certain vision of an anthropomorphic subject through webs of self-referential arguments, which rely upon references to historical precedents and authoritative figures in order to justify their own function.

The many paradoxes of law do not have to be viewed as bad in themselves; a perceptive lawyer can witness the constant role of paradoxes in shaping and upholding the legal argument (i.e. in providing him or her with a gainful employment). My objective here is not to deconstruct until we remain with hubris. Rather, when I choose to disentangle hierarchies and circular arguments of international law, I do so with a view of proposing new theories and concepts which can do better at capturing the increasing complexity of law in the time of accelerating technological and epistemological change.

Conceptual framework

The notion of the King's Two Bodies constitutes one of the foundational paradoxes of legal hierarchy and will serve as the conceptual framework for this thesis. In his seminal work, Kantorowicz provided us with a conceptualization of medieval political theology structured around the notion of duality of the person of the King.[30] On the one hand, there is the biological body of the King: the material body which ages and withers away. After all, the King is also a 'Man,' a fragile, precarious being, limited by his mortality and the finitude of his existence.[31] On the other hand, there exists the

[29] Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995), 8–9.
[30] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957.
[31] Eric L. Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty* (Chicago: University of Chicago Press, 2011), 5.

phantom body of the King: an intangible type of a body which does not cease upon the death of the sovereign, but prevails in line with the adage: 'The King is dead, long live the King!'[32] This phantom body would provide the source of mystical, quasi-divine authority to the political community and its representatives. It continues throughout generations, with its tangible manifestations codified in a set of political, legal and aesthetic rites and practices.[33] Foucault writes:

> *Autour de cette dualité, qui fut, à l'origine, proche du modèle christologique, s'organisent une iconographie, une théorie politique de la monarchie, des mécanismes juridiques distinguant et liant à la fois la personne du roi et les exigences de la Couronne, et tout un rituel qui trouve dans le couronnement, les funérailles, les cérémonies de soumission, ses temps les plus forts.*[34]

I propose to treat the theorem of the King's Two Bodies more extensively, as a conceptual framework for this dissertation. The evolution and accumulation of anthropomorphic qualities by the phantom body at the foundation of authority will therefore form the core analytical focus of much of this thesis.

In particular, I am concerned with repeated instances of the 'phantom body' argument: the reappearances of an anthropomorphic subject which provides the mystical foundation to law's hierarchy.[35] I share Santner's hypothesis that:

> *The complex symbolic structures and dynamics of sovereignty described by Kantorowicz in the context of medieval and early modern European monarchies do not simply disappear from the space of polities once the body of the king is no longer available as the primary incarnation of the principle and functions of sovereignty; rather, these structures and dynamics - along with their attendant paradoxes and impasses - "migrate" into a new location that thereby assumes a*

[32] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 409.
[33] Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 35.
[34] Michel Foucault, *Surveiller et Punir: Naissance de La Prison* (Gallimard, 1975), 33.
[35] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy."

> *turbulent and disorienting semiotic density previously concentrated in the "strange material and physical presence" of the king.*[36]

It is the objective of this dissertation to study how the anthropomorphic vocabularies have been employed to describe the 'phantom body of the King' at the foundation of legal authority and how these vocabularies migrated to inform the discourse of sovereignty of the State. My study of the 'phantom body of the King' will therefore follow different conceptualizations of sovereignty, of its territorialization and centralization. Studying the anthropomorphism of the State through its connection to sovereignty allows us to revisit the scholarly attempts at representing the sovereign subject through the anthropomorphic form by vesting it with personhood. Seen in this light, the notion of personhood of the State (understood more broadly than the modern concept of international legal personality) can be seen as an attempt at representing the State as the sovereign subject of law.

Foucault has famously posited that 'we need to cut off the King's head' in order to give way to political and legal theory that is not erected around the problem of sovereignty.[37] Latour also warns us of treating the State as a transcendental, self-explaining abstraction:

> *If there is one amalgam that precludes the analysis in philosophy, in sociology as well as in economics and political science, it is the State, this makeshift pile of arcane emblems. Politics, law and religion have so greatly exchanged their properties that it is very difficult to disentangle them and the last thing you want to have is a 'theory of the State'. 'State', like 'society', is not what provides an*

[36] Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 33; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005).
[37] Michel Foucault, "Truth and Power," in *The Foucault Reader*, by Paul Rabinow (New York: Vintage Books, 2010), 51–75.

> *explanation but what should be explained, especially when the question of enforcing the law is being raised*.[38]

However, before proceeding to decapitation, I start by asking how, in legal theory, the head of the King was actually placed on his shoulders and how the phantom body of the King has been construed in order to provide source of authority within a political community.

Throughout this study, I remain mindful of the fact that, with each invocation, the concept of the State may be used to designate something else. The image of the State is kaleidoscopic, characterized by movement and accumulation. Each subsequent invocation of its name can rely on an increased number of associations made in the accumulated materials dealing with the meaning of the category of 'the sovereign State.' I embrace this contingency and movement which characterizes legal theory. The reader will witness as I stroll between the lures of vulgar presentism and unyielding nominalism.[39] I take an intermediary position, recognizing that some patterns of thought may be perennial and tend to reappear, while others perish without leaving a trace behind.

This work, submitted in fulfillment of requirements of the doctoral programme in international law, offers an interdisciplinary perspective on issues relevant to international legal theory. Therefore, in this dissertation, I focus on appropriations of authoritative texts by the dominant discourse of international law and propose creative links between the past and the future. My role consists of tracing of associations and conceptual change which plays out in foundational legal texts which continue to contribute to the legal imagination. I invite the reader to join me on this journey of contemplating law – and maybe even an exercise in creating new concepts.

[38] Kyle McGee, ed., *Latour and the Passage of Law*, Critical Connections (Edinburgh: Edinburgh University Press, 2015), 348.
[39] Bhuta, "The State Theory of Grotius," 4.

Having outlined my conceptual framework and methodology, allow me to situate my current research among the existing literature.

Literature Review

Having presented my method and conceptual framework, I would now like to refer to other academic works, in order to position my writing in relation to them. In this thesis, I will draw from a variety of multidisciplinary sources. Three strands of scholarship and arguments are worth introducing at this stage, as they provide us with useful concepts and frameworks that will accompany us throughout this dissertation: literature on international legal personality, political theory and feminist scholarship in international law.

Literature on international legal personality

The first strand of scholarship directly relevant to this dissertation includes the academic literature on the notion of international legal personality. Janne Nijman's *The Concept of International Legal Personality* provides us with the most comprehensive historical account of the legal personality of the State.[40] Nijman employs the metaphor of the actor (the one who represents) and the mask (the thing or entity being represented) to trace the evolution of international legal personality. She shows that the notion of international personality (*persona jure gentium*) was firstly employed by Leibniz to recognize the new entrants into the diplomatic life of the late 17th century: the princes of the Holy Roman Empire.[41] Vesting individual princes with an international personality allowed Leibniz to make an argument which sought to preserve the universal structure of the Empire while accounting for the emergence of new participants in the European diplomatic community. It also allowed Leibniz to argue that German princes were subject to limitations imposed upon them by natural justice. Nijman then argues that, in the works of Wolff and Vattel, the notion of legal

[40] Janne Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 1st ed. (The Hague: T.M.C. Asser Press, 2004).
[41] Ibid., 58–80.

personality transitioned from being a personal attribute of the Prince to being a legal attribute of the State.[42] The mask of personality ended up subsuming the identity of the actor. Nijman argues that the philosophy of liberalism served to empower the Western State by positing it as the international legal person at the cost of individuals. This conceptual move has eventually led to the mystification of the State: the notion of the State as a divine person which creates the law by an act of will.

A few observations are in order: although Nijman follows the transition of the concept of legal personality from the individual to the State, her book only contains brief mentions of the 18th century (a period that Nijman calls 'the 18th-century interlude')[43] and of the 19th century's legal scholarship. For example, while Nijman mentions the influence of Hegel in 'mystifying' the person of the State,[44] she does so only as a brief prelude to her discussion of the 20th century's attempts at demystification of the concept of international legal personality. Chapter 3, which forms the core of Nijman's book, situates the projects of Brierly, Kelsen and Scelle against the intellectual context of the early 20th century: 'the democratic crisis in in modern European mass societies and the resulting threat to human individuality and freedom.'[45] Despite considerable differences, the projects of Brierly, Kelsen and Scelle are discussed together as attempts to formulate a response to parallel crises by means of 'an integrated legal approach in which the concept of (international) legal personality was fundamental.'[46] Nijman argues that, by employing the concept of personality, Brierly, Kelsen and Scelle attempted to de-mystify international legal personality by removing the mask off the sovereign, anthropomorphic State, and by elevating individuals to the role of ultimate subjects of law. She sympathizes with a kind of 'end of history' argument and, in the

[42] Ibid., 110.
[43] Ibid., 80.
[44] Ibid., 110–15.
[45] Ibid., 242.
[46] Ibid., 243.

words of Carty, sees the frameworks of Brierly, Kelsen and Scelle as 'firmly in place and perfectly adequate for the future.'[47]

Nijman's work then detours into the bi-polarity of the Cold War, as she explores the works of international relations scholars based in the US.[48] The penultimate chapter of the *Concept of International Legal Personality* is dedicated to 'the End of the Subject' and an attempt to recover personality in the age of globalization and postmodern sensibilities.[49] Nijman embeds this discussion in the 'fragmentation of the self' and the epistemological end of humanism.[50] She asks: 'who or what should bear responsibility in the post-modern world where man has ceased to exist – power relations or linguistic structures? […] what implications does this have to for individual responsibility?' Nijman's answer to these questions comes with the support of the philosophy of Paul Ricoeur.[51] Nijman argues that the capable and responsible human subject can be recovered if we are to take the view of the 'self' as constituting itself in relations with others.[52] This conceptualization leaves us with an anthropocentric vision of the subject of law. Nijman does not mind, because hers is a thoroughly humanist project: Nijman's main intellectual preoccupation throughout the book is the welfare of the individual human being in the face of collective entities.[53]

It is therefore worth situating my research against Nijman's *Concept of International Legal Personality.* While I am heavily indebted to Janne Nijman's teaching and inspiration, my dissertation serves a different purpose than her book. As described above, Nijman's work traces the history of the concept of international legal personality and attempts to

[47] Anthony Carty, "International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law," *Melbourne Journal of International Law* 6, no. 2 (2005): 539.
[48] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 245–344.
[49] Ibid., 347–444.
[50] Ibid., 365–78.
[51] Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1995); Paul Ricoeur, *Le Juste* (Paris: Esprit, 2001).
[52] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 386.
[53] Carty, "International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law."

recover it in the face of post-modern critique of international law. By embracing the natural law tradition, Nijman is less interested in:

> *[W]hat is arguably the heart of the problematic of international society, recognised clearly by Thomas Hobbes, Hegel and poststructuralism, that collective identities tend – apparently inevitably - to be constructed in opposition to one another, making instability endemic to international society.*[54]

In this dissertation, I propose to trace the attribution of anthropomorphic qualities (which include but are not limited to international legal personality) to the State. My arguments do not pertain to the linear evolution of the concept of personality, but to the contingent application and accumulation of anthropomorphic vocabularies employed in relation to the State or other 'phantom body' at the foundation of legal hierarchy. Furthermore, I do not attempt to recover personality from the torrents of structuralist critique. To the contrary: while I do recognize the importance of the notion of personality to legal practice, I am dissatisfied with the notion of 'personality' as an analytical lens. The aim of this dissertation is therefore to produce new concepts which may help us 'overcome' personality as an analytical tool and pave new venues and agendas for academic critique. Behind the menacing person of the Leviathan, a myriad of associations, interactions, alliances and processes are waiting to be explored.

It is also worth noting other scholars who have pointed to the paradoxes of the notion of international legal personality. Klabbers sees personality an 'ambivalent concept' and argues that the demand and subsequent acceptance of personality amounts to the political act of recognition of relations between actors.[55] According to this view, legal personality constitutes a manifestation of the tendency of collective entities to construct themselves in opposition to each other. To Klabbers, personality remains relevant in two ways: the acceptance of personality simultaneously constitutes recognition of the group's legitimate existence and it shields that existence from external interference.

[54] Ibid., 538–39.
[55] Klabbers, "The Concept of Legal Personality."

Building upon Althusser's notion of being in the world, Fleur Johns writes that doctrine of international legal personality 'hails' those in whom personhood is vested:

> *International law recruits some groups, entities and beings to experience themselves and others as legal persons, with all that that implies (usually, possession of a more or less coherent will as well as a relatively stable identity and systemic location).*[56]

Portmann then provides us with the most extensive study of international legal personality in modern international law.[57] Basing upon an extensive survey of legal texts and studies, Portmann divides the existing views on personality into five conceptions. Firstly, the 'States-only conception' reserves international legal personality exclusively to States. It is reflected in the *Lotus* dictum that 'international law governs relations between independent states.'[58] Today, this position is important mostly 'in historical context and is at times still relevant for legal issues today.'[59] Secondly, 'the recognition conception' of personality presents States as the primary persons of international law. Other entities can only be seen as lawful persons of law if they are recognized as such by States – the prime persons of international legal order. Thirdly, the 'individualistic conception' of personality sees individuals as persons who have rights and duties under international law. This position is characteristic of modern human rights discourse and international criminal justice which posits that individuals can be held responsible for violations of fundamental international norms.[60] Fourthly, the 'formal conception' declares international law as an open system, without presuming the identity of legal persons. Personhood so-understood is viewed as a mere point of attribution within legal order. Finally, the 'actor conception' of personality, associated with the New Haven school of international law, rejects the traditional accounts of international legal personality by proposing to treat all effective

[56] Fleur Johns, ed., *International Legal Personality*, The Library of Essays in International Law (Surrey: Ashgate, 2010), xxi.
[57] Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press, 2010).
[58] PCIJ, *Case of the SS Lotus.* The Judgement of 7 September 1927, 18.
[59] Portmann, *Legal Personality in International Law*, 13.
[60] Ibid., 154–67.

international actors as relevant to the operation of international law. The conceptual framework offered by Portmann will prove particularly helpful, as I transition from discussing the anthropomorphism of the sovereign State (Chapters I-III of the thesis) towards the modern attempts at de-anthropomorphizing the State and accounting for the role of other actors on the international scene (Chapters IV-V).

Political theory

Another strand of scholarship relevant to this dissertation stems from political theory. One of the most important instances of creation in legal and political history concerned the early modern conceptualizations of the State through the language of contract theory. In order to study the early modern conceptualizations of personhood used to explain the sovereign functions of the State, I will draw from a variety of writings in political theory and history. It is not my purpose to cite political theory in order to discover some 'objective' or 'social' basis preceding the law; rather, I believe that insights from other disciplines can be useful in offering a multidimensional critique and in opening new streams of inquiry. Several publications are particularly worth noting at this stage.

Bartelson's *A Genealogy of Sovereignty* traces the relationship between sovereignty and knowledge.[61] His main claim is that 'sovereignty and knowledge implicate each other logically and produce each other historically.'[62] Bartelson sees sovereignty as a frame employed to situate concepts. However, while acting as a frame, sovereignty itself escapes framing and representation.[63] This characteristic of sovereignty as a conceptual frame directs our attention towards the importance of anthropomorphic representation of the sovereign subject; it has influenced my way of conceptualizing sovereignty.

[61] Bartelson, *A Genealogy of Sovereignty*.
[62] Ibid., 5; Cynthia Weber, "Review: A Genealogy of Sovereignty. By Jens Bartelson.," *The American Political Science Review* 91, no. 1 (1997): 228–29.
[63] Weber, "Review: A Genealogy of Sovereignty. By Jens Bartelson."

Ben Holland's *The Moral Person of the State* begins with a historical introduction of the notion of the 'body politic.'[64] The author then proceeds to demonstrate the differences between conceptualizations of personhood employed by Hobbes and Pufendorf. Holland's most important contribution is that he sees Pufendorf as an exponent of a theory of facultative sovereignty: the conceptualization of sovereign power based upon faculty psychology previously applicable to individual 'free persons.'[65] The facultative conceptualization of personhood is based upon intrinsicist requirements: to be considered a moral person, the State has to display a 'will' and an 'intellect' of its own. In the State, the will is exercised by the King, while the intellect is provided by the Council of People and acts as an interface in determining what counts as a legitimate action. Holland then traces the reception, influence and misinterpretations of Pufendorf's theory in Europe and in the United States.[66]

In *Leviathan on a Leash,* Sean Fleming attempts to recover the importance of Hobbes for modern thinking about state responsibility.[67] Fleming writes that there are two approaches to conceptualizing responsibility of the State.[68] On the one hand, there's the *agential theory*, which treats the State as a responsible moral agent capable of intentional action. Fleming associates the agential view of State responsibility with the disciplines of IR & political theory. On the other hand, there exists the *functional theory* which treats the State as a legal person (a legal fiction) and which holds that States can only be responsible on the basis of attribution of actions of real individuals. Fleming associates this view with the discipline of international law and illustrates it with the example of Draft Articles on State Responsibility (2001).[69] Fleming's argument about the theory of statehood remains limited to the very specific subfield of international law dealing with

[64] Ben Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities* (Cambridge: Cambridge University Press, 2017), Introduction: Bodies, Souls, Persons, States.
[65] Ibid., see Part I dedicated to "The Constitution of the Free Person" and "The Constitution of the Person of the State."
[66] Ibid., Part II.
[67] Sean Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (Princeton: Princeton University Press, 2020).
[68] Ibid..
[69] Ibid., 32–44.

responsibility. However, his broader questions about identity, ownership of actions and source of agency provide useful frameworks for thinking about the person of the State.

The scope of the present dissertation differs from other publications mentioned above. My scope of research may appear broader in that I propose to study different theories of the State throughout a longer time span. However, my dissertation may also appear as more narrowly focused, in the sense that my study is very much concentrated on the anthropomorphic vocabularies employed in relation to the State. This dissertation will also draw from the works of Skinner, Runciman, Tuck and Brett, as well as other relevant debates in political theory which will be introduced in subsequent chapters.

Feminist scholarship in international law

Last but not least, this thesis draws from epistemological and methodological insights derived from the feminist theorization of the subject of law. Feminist writers have remained skeptical about the universalism of 'Man' at the foundation of authority and about the gendered language used to embody the State.

Naffine writes about the centrality of the notion of personhood in legal discourses and comments that 'perhaps the greatest political act of law is the making of a legal person.'[70] This leads her to pose the question: 'who are law's persons?'[71] In the multiplicity of legal writing, the word 'person' is used frivolously to refer to individual human beings and legal devices alike. For example, while the State has been described as a 'legal person,' slaves were for a long time considered not as persons, but as property. The apparent contingency of personhood leads Naffine to divide persons of law into four categories employed by lawyers.[72] Firstly, there is the abstract concept of a legal person, which Naffine describes as a 'Cheshire Cat' of legal theory.[73] This type of personhood, associated with Hans Kelsen in the discipline of international law, paints itself as ahistorical and not dependent upon any metaphysical claims outside of law.

[70] Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," 347.
[71] Ibid.
[72] Ibid., 349–50.
[73] Ibid., 350–57.

The category of a 'person' is treated as a useful analytical fiction employed to describe relations within the legal system. As we will see in this dissertation, jurists who claimed to have devised a 'legal fiction' of the State have also engaged in their own fair share of metaphysical theorizing about the subject of law. Secondly, there are lawyers who claim that law's persons have a natural (and sometimes God-given) character.[74] The 'person' understood in this way is a creation of nature characterized by some essential humanity that demands moral and legal consideration. While mostly applicable to biological individuals, we will see that the State has also been treated as a live organism characterized by its anthropomorphic qualities. Finally, there are jurists who deem the legal person to be, in its essence, an intelligent and responsible subject, a moral agent.[75] This language is reflected in the conceptualization of moral personhood which may include the State, corporations and (some) individuals. This category of an 'impossibly self-possessed and self-reliant, will-driven, clinically rational and individualistic' person has been the common object of much of feminist critique.[76] Certainly the person understood in this way 'is never pregnant, for this would threaten his physical integrity.'[77] Furthermore, this view of personhood generates problems with the attribution of agency to collective actors, which risks treating the State as a conscious and rational being, a 'Great Man' who *acts,* who *wills,* and who *consents* to be bound by obligations.

O'Donoghue writes about the *additive* character of personification which vests the State with human-like qualities.[78] Personification goes beyond the metaphor: it elicits a specific response from the audience by linking the personified object with other spaces and constructs.[79] Its ubiquitous power is such as to make us forget that what we perceive as 'truth' is nothing more than a dogma. O'Donoghue then proceeds to analyze

[74] Ibid., 357–61.
[75] Ibid., 362–65.
[76] Ibid., 365.
[77] Ibid.
[78] O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law."
[79] Ibid., 6–7.

the attribution of feminized qualities to the person of the State in the works of 19th century jurists. This tendency is particularly blatant in the writings of Johann Kaspar Bluntschli, whose works we will study in this dissertation (see: Chapter III). O'Donoghue argues that the anthropomorphic language had profound implications for legal and political thought, by morphing into understandings of natural order and negatively affecting the status of women in political communities. While organic conceptualizations of the State have been rejected by most social sciences, the equation of the State with mastery, autonomy and masculine power continues to permeate our discourses.[80]

In this context, Charlesworth argues that 'little attention has been given to the sex attached to the notion of statehood.'[81] Meanwhile, the *sexed* language of international law is defined in the very criteria for statehood under the Montevideo Convention. International practice has drawn a distinction between sexism and racism when assessing the population of the state. While apartheid is an international crime which has been invoked to impose sanctions upon South Africa, there is no functional equivalent of an international crime of mass-scale discrimination based upon sex. This leads Charlesworth to suggest the irrelevance of sex in assessing whether a particular group constitutes a permanent population.[82] Meanwhile, the concern with the integrity of state's territory and the impenetrability of its borders presents the State as a bounded, unified entity. This argument is echoed by Ngaire Naffine when she identifies a 'body bag' as a metaphor for a distinct, masculine and embodied person whose dignity is dependent upon his integrity:

[80] Ibid., 25–31.
[81] Hilary Charlesworth, "The Sex of the State in International Law," in *Sexing the Subject of Law*, ed. Ngaire Naffine and Rosemary Owens (Holmes Beach, Florida: Gaunt & Sons, 1997), 253.
[82] Ibid., 258.

> *The principal concern of law is (the policing of the boundaries of) the bounded heterosexual male body. Bodies which are not like this, or are not allowed to be like this, are somehow deviant and undeserving.*[83]

Judith Butler reminds us that there are no pre-discursive bodies;[84] bodies are constructed all the way down, before they are even born.[85] In her *Birth of the State*, Charlotte Epstein inverts some of the questions previously posed by Butler.[86] Epstein begins her analysis of mutual constitution of the State from the perspective of the body understood as 'unconstituted, the ultimate given.'[87] And while Butler saw the constitution of the bodies as a constraining force,[88] Epstein proposes to open up constitution to 'another kind of agency, that is enabling and not just constraining, that is creative, and collective.'[89] By separating questions of agency, power and body in her analysis, Epstein describes open (but still constraining) non-individualistic agency inherent in the crafting of modern politics.[90] In this dissertation, I will draw inspiration from feminist scholarship which has challenged the traditional view of the subjects of international law. To paraphrase Dona Haraway, 'it matters which thoughts think thoughts'[91] and which discourses about the State are reproduced by means of its personification.

The three strands of literature outlined above have provided inspiration and intellectual support for the present inquiry. One cannot understate the importance of anthropomorphic representations in explaining the functioning of the modern State and in conceptualizing the unitary foundation of law's authority. The rich history of

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[83] Ngaire Naffine, "The Body Bag," in *Sexing the Subject of Law*, ed. Ngaire Naffine and Rosemary Owens (Holmes Beach, Florida: Gaunt & Sons, 1997), 84.
[84] The point famously raised by Judith Butler in: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).
[85] Judith Butler, *Bodies That Matter: On the Discursive Limits of "'Sex'"* (New York: Routledge, 1993).
[86] Charlotte Epstein, *Birth of the State: The Place of the Body in Crafting Modern Politics* (Oxford: Oxford University Press, 2021).
[87] Ibid., 2.
[88] Butler, *Bodies That Matter: On the Discursive Limits of "'Sex.'"*
[89] Epstein, *Birth of the State: The Place of the Body in Crafting Modern Politics*, 7.
[90] Ibid., 10.
[91] Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (London: Duke University Press, 2016), 57.

philosophical, theological and juridical thought testifies to the weight exerted by anthropomorphic assumptions about the State. Having situated my research against the existing literature, I will now outline the contents of the chapters of this dissertation.

Overview of the Chapters

This dissertation is divided into five main chapters. Before proceeding to the first chapter, I will outline ancient and medieval examples of anthropomorphic thought and follow Kantorowicz's work on the medieval notion of the King's Two Bodies. I finish the introduction by describing the historical background and epistemological shifts which provided foundations for the conceptual innovations of early modernity. The latter will be discussed more in-depth in the first chapter of this thesis.

Chapter I – Performativity of State Theory

In the first chapter of this thesis, I study how the analogy between the State and the 'Man' of the state of nature was employed in the early modern contract theory. To do so, I study the works of Thomas Hobbes and Hugo Grotius and treat them as exponents of distinctively modern theories of the State and its sovereignty. I study how the assumptions about human nature influenced the formation of the person of the State and how these assumptions were projected upon available conceptualizations of the international sphere. I argue that the Hobbesian Leviathan and Grotius's conceptualization of sovereignty could be understood through the lens of their performative character. It was as if the sovereign, in a theatrical fashion, donned the mask of the State to represent it and to act on its behalf. I argue that this performativity of sovereign power continues to influence our thinking about the formation of subjects of law and I use the example of the use of force to demonstrate its lasting importance in international legal theory.

Chapter II – The Person of the State

In the second chapter, I discuss the 18th century's conceptual shift towards the understanding of the State as an independent, abstract entity. I use the genealogical method to trace the accumulation of anthropomorphic vocabularies and the liberation of the State from the bounds of its dependence upon the person of the sovereign. Drawing from faculty psychology of scholasticism, Pufendorf treats the State as a moral person, characterized by a 'will' and an 'intellect' of its own. The State becomes fully liberated in the works of Wolff of Vattel, who recognize that the unique nature of the moral personhood of the State has to be accounted for. They therefore propose to treat the State as a distinct subject of the law of nations. The sovereign State, an abstract, functionally independent entity characterized by a *conscience* of its own, thus becomes the prime bearer of rights and duties under the law of nations.

Chapter III – The State as an Organism

In Chapter III, I discuss the extreme manifestation of anthropomorphic thinking about the State which manifested itself in the organic theories of the 19th century influenced by the work of Hegel. I study the attempts of Otto von Gierke and Johann Kaspar von Bluntschli to establish the 'real' person of the State, the ultimate, anthropomorphic subject of law. While Gierke and Bluntschli differ in many ways, they were connected in their attempts to embody the State and to present it as an organism analogous to life forms studied by natural science. The objective of the third chapter is thus to study the implications of embodiment for legal theory. In the second part of the chapter, I propose to study the relation between the body of the sovereign State and the body of the colonized, by drawing from the case study of colonial embodiment in Imperial Germany. Building upon Foucault's notion of the 'body of the condemned' and Agamben's notion of 'bare life,' I study the embodiment of the colonized peoples in German South West Africa and the complicity of legal and scientific discourses in upholding colonial rule and in denying personhood to the colonized peoples.

Chapter IV – The State as a Fiction

Following the atrocities of the early 20th century, the anthropomorphic, organic treatment of the State became increasingly associated with unyielding nationalism and collectivism. The attention of jurists, such as Duguit, Anzilotti, Kelsen, Scelle and Brierly turned to the need to de-anthropomorphize the State and to present it as a legal fiction instead. Chapter IV of this dissertation can thus be read as an exercise in the mapping of projects which sought to counter the anthropomorphic, metaphysical conceptualization of the State. I follow Nijman in her selection of thinkers who tried to de-anthropomorphize law by treating the State as a legal fiction, an abstract entity, and who accorded increased attention to the role of individuals in the international legal order.[92]

However, I argue that the early 20th century projects of the aforementioned jurists have ultimately failed to de-anthropomorphize legal theory. Even if we were to accept the notion of the State as a fiction, we are still faced with the conceptual problem of the source of agency in international law which continues to influence our thinking about the foundations of international legal authority. I argue that projects discussed in Chapter IV tended to displace the question of the mystical foundation of law's authority towards other sources of anthropomorphic agency: the *Grundnorm* or the hypothetical individual at the foundation of international legal order. If we follow this way of thinking, we are still left with an anthropomorphic source of agency at the foundation of legal hierarchy.

Chapter V – The Dispersed Sovereign

In the last chapter of this dissertation, I ask about how a truly de-anthropomorphized theory of law could look like. Drawing from systems theory, Actor-Network Theory

[92] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*.

and infrastructural accounts of law, I propose de-anthropomorphized visions of law and apply them to the case study of European data regulation. I posit that the traditional conceptual apparatus of international law, with its pyramidal ordering of authority, State-centrism and presumption of stable borders, is ill-suited to the challenges of cyberspace. I address the dispersion of sovereignty in the domain of data regulation and illustrate the advantages offered by de-anthropomorphized theoretical approaches which build upon the view of law as a network.[93] The thesis finishes with an epilogue which summarizes the findings of each chapter and which addresses the broader epistemological shift towards the vision of law as a network.

Having outlined the contents of the chapters of this dissertation, I will now present some of the early examples of anthropomorphic thought.

[93] François Ost and Michel van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit* (Bruxelles: Presses de l'Université Saint-Louis, 2010).

Prologue:
Historical Background and the Two Bodies of the King

Some of the early examples of anthropomorphic thinking about a political community can be found in the ancient world. In the *Republic* of Plato, Socrates argued that the city of rulers, warriors and merchants reflected the tripartite structure of the soul, composed of reason, high spirit and appetite.[94] The structure of the *polis* was constructed by analogy to the human soul: both were composed of the same constituent parts, which existed in the same relation towards each other. The reason guides the soul, while the spirit keeps it noble and seeks satisfaction through the appetite. Aristotle saw 'Man' as an inherently political animal.[95] He compared *akrasia,* the personal failure to act in accordance with the better judgment of the soul, to a situation where a city enacted good legislation but failed to put it into practice.[96]

In ancient Rome we also find early traces of the organological language of the body politic. Cicero declared the State to be the highest achievement of human power that, of products of human labour, comes the nearest to the will of the Gods.[97] He compared the State to an individual, with the head of the State comparable to the spirit which rules the human body.[98] Livy recounts a fable of the revolt of the body's members in his *Early History of Rome*. In 494 B.C., in order to prevent an all-out civil war between the plebeians and the ruling class, Menenius Agrippa was sent as the spokesman by the senatorial party, for 'he was a good speaker and the commons liked him as he was one

[94] G. R. F. Ferrari, *City and Soul in Plato's Republic* (Chicago: The University of Chicago Press, 2005); Joshua I. Weinstein, *Plato's Threefold City and Soul* (Cambridge: Cambridge University Press, 2018); Plato, *The Republic*, trans. Paul Shorey, Reprint (Cambridge, Massachusetts: Harvard University Press, 1969).
[95] Aristotle, *Aristotle's Politics*, trans. Carnes Lord, Second Edition (Chicago: The University of Chicago Press, 2013).
[96] Aristotle, *Nicomachean Ethics*, trans. W. D. Ross (Batoche Books, 1999); Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, Introduction.
[97] Cicero, *De Re Publica*, trans. Clinton W. Keyes (Cambridge, Massachusetts: Harvard University Press, 1928), I, 7.
[98] Ibid., iii, 25.

of themselves.'[99] Upon his admission to the deserters' camp, he is said to have told them the following story:

> *Long ago when the members of the human body did not, as now they do, agree together, but had each its own thoughts and the words to express them in, the others resented the fact that they should have the worry and trouble of providing everything for the belly, which remained idle, surrounded by its ministers […] The discontented members plotted together that the hand should carry no food to the mouth, and that the mouth should take nothing that was offered it, and that the teeth should accept nothing to chew. But alas! While they sought in their resentment to subdue the belly by starvation, they themselves and the whole body wasted away to nothing. By this it was apparent that the belly, too, has no mean service to perform: it receives food, indeed; but it also nourishes in its turn the other members, giving back to all parts of the body, through all its veins, the blood it has made by the process of digestion; and upon this blood our life and our health depend.*[100]

The anthropomorphic assumptions have also been doused with a degree of mysticism. Perhaps, the mystical element reflected in anthropomorphic representations has forever been an ingredient of political power. Roman Emperors did not have to represent gods, for they *were* gods. Julius Caesar did not only claim his descent from Venus - he was also recognized as a god by the Roman State. This tradition was continued by Augustus and subsequent Emperors to an extent that it was perhaps easier to see the divine rather than the mortal element when looking upon Caesar:

> *When, on the day of his triumph, the victorious Roman imperator rolled on the chariot drawn by four white horses from the Campus Martius to the Capitol – a living god clothed in the embroidered purple toga of Jupiter Capitolinus, in his hand the eagle scepter of the god, and his face painted red with cinnabar – the*

[99] Livy, *The Early History of Rome*, trans. Aubrey de Sélincourt, Revised Edition (London: Penguin Classics, 2002), 146; Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 37–38, Footnote 3.
[100] Ibid.

slave riding with him on the chariot and holding the golden wreath over his head, whispered to him: 'Look behind thee. Remember thou art a man.'[101]

Indeed, the Emperor since the Roman times has been stylized as a *deus praesens* or *deus in terris.* The linkage between temporal and spiritual power continued to inform politics and reached its extreme form in the Byzantine Empire, where the political power derived directly from God. The mystical figure of the eastern Emperor was seen as perpetual and *sanctus* regardless of the personal characteristics of its bearer – even Empress Irene would bear the masculine title of the 'Emperor.'[102] Not only was the Emperor the embodiment of all virtues, he was also the living law, the *lex animata*.[103]

Meanwhile, the ancient scriptures saw the Roman provinces of Egypt, Gaul and Spain represented as female figures adorned with a halo of perpetuity. In the ancient world, certain virtues, such as *Justitia* or *Prudentia*, could also be represented as female figures.[104] Originally conceived as pagan goddesses, they have been later transformed by medieval theology into representation of virtues known throughout the Christendom.[105] Kantorowicz writes that the most important design of these representations or abstractions was to highlight their supra-temporal character and continuity in time of the values which they sought to represent.[106] Similar continuity of values could also apply in relation to places, as the idea of 'Rome' migrated between different incarnations, moving from the Apennine Peninsula to Constantinople and then to Moscow. The title of Roman Emperor would be claimed by Charlemagne, as he proceeded to establish Aachen as the *Roma futura.*[107] Finally, the fall of Constantinople in the 15th century saw Moscow claim the title of the third – and the last – Rome. In this context, we could also mention the eternal Jerusalem; while its material body may have

[101] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 496.
[102] Ibid., 80.
[103] Ibid., 127–29.
[104] On the allegory of the feminine form in representation, see: Warner, *Monuments and Maidens: The Allegory of the Female Form*.
[105] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 79.
[106] Ibid., 79.
[107] Ibid., 83.

been destroyed by the Romans, the idea of the Holy City continued to exist in the scriptures and minds of subsequent generations.

Anthropomorphic representation was also widely employed during the advent of Christianity. Here, we bring to the fore the conceptual background of the much of this dissertation: Kantorowicz's monumental study of the two bodies of the King in the political theology of the Middle Ages.[108] The medieval doctrine of the King's two bodies rested upon a bipartite division. On the one hand, there was the body natural of the King as a mortal, biological person.[109] On the other hand, there was the mystical body politic, which 'cannot be seen or handled,' constituted as a corporate entity which prevails over time.[110] The body politic, as was agreed upon by crown lawyers, was devoid of infancy and old age 'and other natural Defects and Imbecilities which the Body natural is subject to.' The body politic was created in the image of angels, for it represented the 'Immutable within Time.'[111] The King, as an incarnation of royal dignity, does not die, but is subject to demise which gives rise to another incarnation of Kingship: 'the King is dead, long live the King!'[112]

It is perhaps too early to speak about fully-fledged 'abstract' anthropomorphic person of the State when discussing the jurisprudence of the Middle Ages. Instead, medieval jurists tended to focus their attention on the set of human figures and their incarnations. The King and the bishop appeared at the same time as *personae mixtae* (spiritual and secular) and *personae geminatae* (human by nature and divine by grace).[113] Characteristically, John of Salisbury (1120–1180) posited the Prince as the head of the State and assigned social groups to different parts of the body politic, whilst a misery of

[108] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957.
[109] Ibid., 7.
[110] Ibid.
[111] Ibid., 8.
[112] Ibid., 409.
[113] Ibid., 59.

one element could affect the whole organism.[114] In this configuration, the Prince was a *persona publica,* expected to consider all issues with regard to the well-being of the commonwealth. The Prince was to be, at once, a lord and serf of the law.[115] Indeed, the very idea of division between natural and positive law seems to have necessitated the view of the Prince as both above and below the Law.[116] The Prince so understood was not a human being in an ordinary sense; rather, it was an ideal type and a standard of commendable behavior – the very idea of Justice.[117] We can therefore say that Justice, reminiscent of the goddesses of antiquity, was being represented and acted through the Prince:

> *By analogy, the Prince no longer was the christomimetes, the manifestation of Christ the eternal King; nor was he, as yet, the exponent of an immortal nation; he had his share in immortality because he was the hypostasis of an immortal Idea. A new pattern of persona mixta emerged from Law itself, with Iustitia as the model deity and the Prince as both her incarnation and her Pontifex maximus.*[118]

Meanwhile, the figure of the Emperor served to remind the mortals of their invisible Father in Heaven.[119] The late-medieval kingship by divine right was modelled after this fatherly figure. For example, Frederic II styled himself both as a father and son of justice: as the Emperor, he was at the same time above all made-man law and subject to the natural law of reason.[120]

In the late Middle Ages, the story gradually shifts 'from the ruling personages to the ruled collectives, the new national monarchies, and the other political aggregates of human society.'[121] Kantorowicz traces the transformation of the theological *corpus*

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[114] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 1-25; John of Salisbury, *Policratius*, ed. C. J. Nederman, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1990).
[115] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 95–96.
[116] Ibid., 144.
[117] Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 35–36.
[118] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 143.
[119] Ibid., 92.
[120] Ibid., 106–7.
[121] Ibid., 193; Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 37.

Christi, the unitary body of Christ, into the corporate *corpus mysticum* of the Church.[122] The discussion of the nature of Christ gradually gave way to the view of the Church as a corporation.[123] In this configuration, the body of the Church would form a *corpus mysticum Christi* with Christ as its head, his vicar being the Roman pontiff.[124] This Church as the mystical body of Christ was composed of all the faithful: past, future and present in a trans-generational body which continued throughout time. Even if all living adherents of the Church were replaced by other persons, the Church would continue to exist.[125] The Church so-understood was, above all, a political and legal organism, a mystical body politic on a level with secular body politics which were beginning to assert themselves as self-sufficient entities. Kantorowicz's argument is that the theological arguments about the *corpus mysticum* of the Church have served as a template which was gradually transferred into juristic thought about the secular entities, including the body politic of the State. Kantorowicz thus mentions the 'infinite cross-relations between Church and State,' a thesis reminiscent of Carl's Schmitt notion of political theology.[126]

It is also worth noting that medieval political theology featured a sophisticated set of ideas about the 'body' and 'personality.' For example, the theme of two natures of Christ has been a popular subject of medieval art and philosophy. Christ, a natural person born from the virgin, was also a Roman citizen who gave his life for humanity. In this context, Aquinas (1225–1274) wrote of the instrumental character of the manhood of Christ, where the incarnate Christ acted as the *instrumentum animatum* of the Deity. According to this view, God was the principal cause set in motion by the manhood of Christ.[127] Aquinas was also influential in developing the concepts of the

[122] Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 39–40.
[123] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 206.
[124] Ibid., 194.
[125] Ibid., 309.
[126] Ibid., 193; Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*.
[127] Aquinas, *The Summa Theologiæ*, trans. Fathers of the English Dominican Province (Digital: Benziger Brothers, 1920), Third Part, Question 7, a. 1, https://www.ccel.org/a/aquinas/summa/home.html; Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 443.

'body' and the 'mystical person' of the Church as a 'corporation of Christ.'[128] Similar lines of argument seem to have been popular, for Pope Innocent IV had to intervene in order to explicitly forbid excommunication of ecclesiastical *collegia.* In Pope's view, these collective entities were to be treated as *personae fictae.*[129] The intervention, although made in a negative sense, led to a clear distinction between natural and fictitious persons.

Kantorowicz writes that the objective of forming a body politic was in accordance with intellectual aspirations of the late Middle Ages: 'to hallow the secular polities as well as their administrative institutions.'[130]

> *The efforts, however, to provide the state institutions with some religious aureole, as well as the adaptability and general usefulness of ecclesiastical thought and language, led the theorists of the secular state very soon to a more than superficial appropriation of the vocabulary not only of Roman Law, but also of Canon Law and Theology at large. The new territorial and quasi-national state, self-sufficient according to its claims and independent of the Church and the Papacy, carried the wealth of ecclesiastical notions, which were so convenient to handle, and finally proceeded to assert itself by placing its own temporariness on a level with the sempiternity of the militant Church. In that process the idea of the corpus mysticum, as well as other corporational doctrines developed by the Church were to be of major importance.*[131]

An important practical consequence of this corporational thinking about the Crown was that knights were bound to defend and, if need be, to die for both the King and the fatherland – *pro patria mori.*[132] Jurists were quick to pick up the notions of body and corporation in their writings. 'Baldus, for example, defined *populus,* the people, as a

[128] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 202.
[129] Ibid., 305.
[130] Ibid., 197.
[131] Ibid., 207.
[132] Ibid., 259; Ernst Kantorowicz, "Pro Patria Mori in Medieval Political Thought," *The American Historical Review* 56, no. 3 (1951): 472–92.

mystical body' to be grasped by the intellect.[133] Medieval jurists, influenced by theology, developed the notions of *corpus verum* (the material body) and the *corpus fictum* (the plurality of persons united in one fictitious corporate body) and applied them in relation to political communities. The mystical body of the Church was thus transformed into the mystical body of the commonwealth with the Prince as its head.[134] We can therefore observe signs of a tendency to model the State after the Church, as 'a mystical corporation on a rational basis.'[135] A large part of Kantorowicz study is dedicated to explaining how the fictitious body did not cease, but prevailed over time.[136] Just as the Church was a mystical corporation which continued to exist throughout ages, the German Emperor could proclaim the Holy Roman Empire, with imperial jurists writing about *unum corpus reipublicae*.[137] Indeed, a large part of my thesis focuses on the developments within the Holy Roman Empire and the juristic attempts to account for the rapidly changing political order and the territorialization of sovereignty.

According to Kantorowicz, Dante Alighieri (1265–1321) struck a new chord with his humanist concept of 'Man'-centered kingship and by visualizing the operation of the Two Bodies 'in Man himself.'[138] Dante's 'Man' was both an individual and an exponent of the entire humankind. He was modeled after the first 'Man,' the biblical Adam.[139] This 'Man,' the *optimus homo,* became a standard against which the officeholders were to be judged. While the office of the Emperor and the Pope continued to be assessed in light of divine standards, the human incumbents could be compared and evaluated against the humanist standard of 'Man.' Each individual could then attain the terrestrial paradise through the proper use of his own faculties.

[133] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 210.
[134] Ibid., 261.
[135] Ibid., 194–95.
[136] Ibid., 421; Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 42.
[137] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 207–8.
[138] Ibid., 495; Santner, *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*, 43.
[139] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 456.

In Dante's work, humanity became united through the corporate image of 'Man,' which represented the universal intellect and the capacity for self-perfection. Meanwhile, scholastics at the universities of Paris and Salamanca argued for the existence of an international world united by reason and accessible to every human being.[140] Civic community was becoming a moral goal in itself, as the State was increasingly seen as a secularized imitation of the Church: an increasingly independent corporate body with a claim to universalism. Jurists wrote of the self-sufficiency of the *corpus morale et politicum* of civic communities.[141]

In the Renaissance, the search for the desirable qualities in a Prince who would rule over a civic community gave rise to a new genre of literature. Machiavelli (1469–1529) still saw the Prince as a transcendental figure fundamentally detached from his principality. According to Foucault:

> *Le Prince est en rapport de singularité, d'extériorité, de transcendance par rapport à sa principauté. Le Prince de Machiavel reçoit sa principauté soit par héritage, soit par acquisition, soit par conquête ; de toute façon, il n'en fait pas partie, il lui est extérieur.*[142]

We were still in the patriarchal type of power, characterized by the treatment of the *principauté* as property of the Prince.[143] The link between the Prince and principality is acquired either through inheritance or acquisition. It is not based in nature and it makes little difference whether it is founded upon violence, treaties or contract. This connection between the Prince and his principality is constantly under threat and a good Prince would know how to protect the link that binds him to his domain by manipulating the forces that threaten to weaken it.

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[140] Martti Koskenniemi, "International Community from Dante to Vattel," in *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*, ed. Vincent Chetail and Peter Haggenmacher, vol. 9, Graduate Institute of International and Development Studies (Martinus Nijhoff Publishers, 2011), 56–60.

[141] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 463.

[142] Foucault, *Sécurité, Territoire et Population*, 95–97.

[143] Ibid. However, Hay argues that in the literature of Machiavelli, 'the distinction between the state as structure and the state as agent became blurred for the first time' in: Colin Hay, "Neither Real nor Fictitious but 'as If Real'? A Political Ontology of the State," *The British Journal of Sociology* 65, no. 3 (2014): 470.

Meanwhile, the opponents of Machiavelli, such as Guillaume de La Perrière (c. 1500–1553), wrote about the act of governing that was not external to the principality, but which existed within it.[144] The governors within the State are multiple: the father of a family, the teacher, the master. This multiplicity, together with imminence of the act of governing, distinguished La Perrière's theory of rulership, which proposed a certain continuity of the art of governance *within* the State. An important element of Prince's education was the governing of a family (also called the 'economy' of the family). A good Prince would govern the increasingly abstract State, its finances and individuals, like a father who manages a household. The object of governance so-understood was the prospering of individuals who composed the State.

Writers such as Botero (c. 1544–1617) began to understand the State as a form of domination over the people. It has become safeguarded by *raison d'état,* a conceptual innovation understood as a rational capacity to maintain and prolong the State's domination.[145] It was in the break of the 16th and 17th centuries that the State and its *raison d'état*, 'ce quelque chose à la fois fragile et d'obsédant,' has entered into the reflected practice of men as an autonomous object of analysis.[146]

The inventions of early modernity

The process of devising the State as an independent object of inquiry has found its achievement in the early modernity which has witnessed the birth of the modern State. Skinner writes that the definition of the modern State rests upon three conditions:

> *(i) individuals within society are presented as subjects of the state, owing duties and their allegiance not to the person of a ruler but to the state itself (as an institution or structure); (ii) the authority of the state is singular and absolute;*

[144] Foucault, *Sécurité, Territoire et Population*, 96–104; Guillaume de La Perrière, *Le Miroir Politique* (Paris: Gallica, 2014).
[145] Giovanni Botero, *Raison et Gouvernement d'estat En Diz Livres*, 1599th ed. (Paris: Hachette Livre BNF, 2012); Foucault, *Sécurité, Territoire et Population*, 243.
[146] Foucault, *Sécurité, Territoire et Population*, 252–53.

and (iii) the state is regarded as the highest form of authority in all matters of civil government.[147]

Jean Bodin (1530–1596) is often presented as one of the exponents of the early modern State theory understood in that way.

Bodin, firstly in his *Methodus ad facilem historiarum cognitionem* and then in *Six livres sur la République,* proposed a distinction between, on the one hand, everyday affairs of government (*Reipublicae administratio*) and, on the other hand, the ultimate seat of sovereignty (*summum imperium*).[148] This allowed him to distinguish between the government and the abstract State behind it. To Skinner, Bodin's account represented an example of the absolutist theory based on a claim that the headless torso of the State was in need of a monarch to guide and to control it.[149] The State understood in this way was composed of the union of the people under the same sovereign: the prince who had a duty to protect his subjects and the whole body of the State. However, according to Tuck, Bodin was more interested in defending the independence of French *parlements* than in preserving the power of monarchy.[150] For Tuck, the important novelty of Bodin's writing concerned the separation between sovereign legislator and the type of government put in place by the sovereign.[151] Basing upon this conceptual distinction, Bodin could argue that, even if a dictator was to seize real power in a political community, the seat of sovereignty of that political community remained with the people.[152] It also allowed Bodin to argue for the strong role of the French *parlement* (sometimes referred to as the Senate). He cited Cicero approvingly when he wrote that:

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[147] Quentin Skinner, "The State," in *Political Innovation and Conceptual Change*, ed. Terrence Ball, James Farr, and Russel L. Hanson (Cambridge: Cambridge University Press, 1989), 90.
[148] Jean Bodin, *Methodus Ad Facilem Historiarum Cognitionem*, 1566th & 1572nd ed. (Paris: Bibliothèque nationale de France, 2022); Jean Bodin, *Les Six Livres de La République*, Édition et présentation de Gérard Maire. Un abrégé du texte de l'édition de Paris de 1583 (Les classiques des sciences sociales, 1993); Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2016), 10–12; Quentin Skinner, "A Genealogy of the Modern State," in *Proceedings of the British Academy*, vol. 162 (The British Academy, 2009), 325–70.
[149] Skinner, "A Genealogy of the Modern State," 329–33.
[150] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 9–10.
[151] Ibid., 21.
[152] Ibid., 28–29.

> *Cicéron appelle le sénat l'âme, la raison, l'intelligence d'une République, voulant conclure que la République ne peut non plus se maintenir sans Sénat, que le corps sans âme, ou l'homme sans raison*.[153]

According to this conceptualization, the *parlement* and the monarch would take on different roles: the *parlement* would determine the contents of law, while the person of the King would provide those laws with legitimacy.[154]

For the purposes of this dissertation, the importance of Bodin's theory of the State consists of his treatment of sovereignty as a perpetual force at the foundation of law: 'la puissance absolue et perpétuelle d'une République.'[155] Following Santner, we could say that, in early modernity, the phantom body of the King started to migrate towards the new location: the sovereign State. The State became increasingly understood as an abstract body distinct from everyday affairs of the government. Hidden behind everyday decisions of State's administration was that new abstract body which provided institutions and public acts with legitimacy.[156]

Other thinkers are worth mentioning at this stage for their contributions to the early modern conceptualization of the State.

For Bacon (1561–1626), the art of governing required taking into account the possibility of sedition and revolt – the dangers which came from *within* the State.[157] Bacon compared the situation of internal turmoil within the State to that of the planets derailed off their habitual orbits, lost in the sky without stars to guide them. He treated seditions as a natural phenomenon within the life of a republic, as the storms that arise when they are least expected. Seditions, according to Bacon, are caused by two sorts of

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[153] Bodin, *Les Six Livres de La République*, Livre III, Chapitre I.
[154] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 41.
[155] Bodin, *Les Six Livres de La République*, Livre I, Chapitre VIII; Bhuta, "The State Theory of Grotius," 22; James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1st Edition (Oxford: Clarendon Press, 1928), 6; Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 22, 85.
[156] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 27.
[157] Francis Bacon, "Of Sedition and Troubles," in *Bacon: The History of the Reign of King Henry VII and Selected Works*, ed. Brian Vickers (Cambridge: Cambridge University Press, 2012); Foucault, *Sécurité, Territoire et Population*, 274–78; Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, 348–53.

causes. On the one hand, seditions can come 'from the belly,' caused by extreme poverty and hunger.[158] This is the worst case of sedition. On the other hand, seditions may come from the head, that is, general perception of discontent. Bacon proceeded to outline the ways of minimizing discontent by remedies which referred to the economy and public perception. Here we can find a recognition of the fact that the *raison d'état* involves a degree of production of truth, of operation upon consciousness of the people for the purposes of governance.[159]

Spinoza (1632–1677) saw the State as an outcome of amalgamation of human passions.[160] In order to escape the oppressiveness and fear which characterize the state of nature, individuals establish must establish a collective political entity.[161] The multitude wishes to be 'guided, as it were, by one mind, […] common hope, or fear or the desire of avenging some common hurt.'[162] Whether by love or fear, individuals thus find themselves under the authority (*sub potestate*) of the State defined as domination over the mind and body of the subject.[163] Steinberg writes that the State defined in this way is 'an unintended, but salutary, outcome of the natural interplay of human passions' which ends up overcoming coordination problems.[164]

A few remarks are in order on Spinoza's conceptualization of individuals. In his *Ethics,* Spinoza writes that individuals are composite bodies whose parts 'communicate their motions to one another in a certain fixed relation.'[165] While a part of the individual can be replaced, the individual will prevail if the same ratio of motion and rest persist.[166] Individuals multiply their power when they are joined together. A question then arises

[158] Ibid.
[159] Foucault, *Sécurité, Territoire et Population*, 279–81.
[160] Benedict de Spinoza,, "A Political Treatise," in *The Chief Works of Benedict de Spinoza*, trans. R. H. M Elwes (George Bell and Sons, 1891); Justin Steinberg, "Spinoza's Political Philosophy," in *The Stanford Encyclopedia of Philosophy*, 2008, https://plato.stanford.edu/entries/spinoza-political/#TracPoli [Last access 11.07.2022].
[161] Spinoza, "A Political Treatise," Chapter II, s. 15.
[162] Ibid., Chapter VI, s. 1; Alexandre Matheron, *Individu et Communauté Chez Spinoza* (Paris: Les Éditions de Minuit, 1969).
[163] Spinoza, "A Political Treatise," Chapter 2, s. 10.
[164] Steinberg, "Spinoza's Political Philosophy."
[165] Benedict de Spinoza, *The Ethics, trans.* R. H. M Elwes (The Project Gutenberg, 2001), Part II, Prop. XXIV; Steinberg, "Spinoza's Political Philosophy."
[166] Ibid., Part II, Lemma V.

whether the State can be treated as an individual. Matheron and Balibar argue that political communities in the Spinozian sense can be seen as composite individuals with their own ratio of motion and rest and with a mind-and-body[167] of their own.[168] The objective of the State so-understood is to pursue peace and security and to promote the strength of mind which is necessary for attainment of peace.[169]

Montesquieu (1689–1755) began his work on the spirit of law by observing that human laws, unlike the divine laws of nature, are created by fallible human beings.

> *Les êtres particuliers sont bornés par leur nature, et par conséquent sujet à l'erreur ; et d'un autre côté, il est de leur nature qu'ils agissent par eux-mêmes. Ils ne suivent donc pas constamment leurs lois primitives ; et celles même qu'ils se donnent, ils ne les suivent pas toujours.*[170]

The basic capacity for legal order corresponded to the human capacity for reason.[171] Laws in a society also needed to be adapted to fit specific circumstances. They would have to accord with the climate ('brûlant ou tempéré'), to the way of life of people, their religion, morality, manners and inclinations.[172] Montesquieu believed that climate and geography of a particular country had impact upon customs and temperament of its inhabitants:

> *J'ai vu les opéras d'Angleterre et d'Italie : ce sont les mêmes pièces et les mêmes acteurs, mais la même musique produit des effets si différents sur les deux nations, l'une est si calme, et l'autre si transportée, que cela parait inconcevable.*[173]

He wrote that people inhabiting cold climates are frank, phlegmatic, sincere and less sensitive to extremities of pleasure and pain: 'il faut écorcher un Moscovite pour lui

[167] Jonathan Bennett, "Spinoza's Mind-Body Identity Thesis," *The Journal of Philosophy* 78, no. 10 (1981): 573–84.
[168] Matheron, *Individu et Communauté Chez Spinoza*; Etienne Balibar, "Spinoza: From Individuality to Transindividuality," *Mededelingen Vanwege Het Spinozahuis* 71 (1997).
[169] Spinoza, "A Political Treatise," Chapter V, s. 2 & 3; Steinberg, "Spinoza's Political Philosophy."
[170] Montesquieu, *L'esprit Des Lois* (Paris: Libraire de Firmin Didot Frères, 1844), Livre I, Chapitre I.
[171] Ibid., Livre I, Chapitre III.
[172] Ibid.
[173] Ibid., Livre XIV, Chapitre II.

donner du sentiment.'[174] People living in warm climate would then be more prone to sentimental life, love and laziness. The differences in climate and in people's temperament would provide conditions for different types of political regimes.

Montesquieu wrote extensively about different forms of government. For example, he wrote that democracy was characterized by the fact that the people ('le peuple en corps, ou seulement une partie du peuple') possessed the sovereign power.[175] Montesquieu saw democracy as a system where the public interest prevailed over any particular interest, and he compared that situation to the cultivation of self-renunciation practiced by monks.[176] Democracies could also be corrupted when they lose their spirit of equality ('l'esprit d'égalité'), leading to a situation where particular interest would prevail over public interest, paving the way towards despotism.[177] Under despotism, fear would repress the spirit and ambition of the people, reducing them to absolute obedience: 'l'homme est une créature qui obéit à une créature qui veut.'[178] We can thus see how, in the writings of Montesquieu, the vision of a human nature exerted direct influence upon conceptualizations of political order and different regime types.

It is worth noting the political and epistemological developments which provided intellectual foundations for the conceptual innovations in thinking about the State as a 'person' in the early modern period. Firstly, the Treaty of Westphalia (1648) put a symbolic end to the two *universalités* of the earlier age: the universal claims of the Holy Roman Empire and of the Church.[179] This resulted in a vacuum which was to be filled by the sovereign power of the territorial State, understood as the supreme and sovereign source of legal authority. In the words of Hobbes, there was no power which could be compared to this Leviathan: '*Non est potestas Super Terram quae Comparetur*

[174] Ibid; Hilary Bok, "Baron de Montesquieu, Charles-Louis de Secondat," in *Stanford Encyclopedia of Philosophy*, 2003, https://plato.stanford.edu/entries/montesquieu/ [Last access 11.07.2022].
[175] Montesquieu, *L'esprit Des Lois*, Livre II, Chapitre I.
[176] Ibid., Livre V, Chapitre II; Bok, "Baron de Montesquieu, Charles-Louis de Secondat."
[177] Montesquieu, *L'esprit Des Lois*, Livre VIII, Chapitre II.
[178] Ibid., Livre III, Chapitre X.
[179] Foucault, *Sécurité, Territoire et Population*, 298–99.

ei.'[180] What followed was a shift in understanding of European politics away from dynastic rivalries of the Princes and towards the competition between territorialized, self-contained units of *Jus publicum Europaeum*: the sovereign States.[181] This new ordering of space, characterized by the rise of territorial States as the main subjects of international obligations, has been reflected in the attribution of anthropomorphic qualities to collective entities.[182]

Another conceptual development of the period concerned the use made of *jus gentium* – the notion of universal law derived from the Roman legal tradition. The original purpose of *jus gentium* was to regulate conduct between Roman citizens and foreigners.[183] As *jus gentium* was deemed to be universally applicable, it has become synonymous with *jus naturale,* the universally applicable natural law which could be uncovered by any individual through the faculty of reason. While notions of *jus gentium* and *jus naturale* had been originally addressed to individuals, the early modern period saw writers such as Grotius and Hobbes increasingly apply them to the conduct of sovereigns and commonwealths, therefore paving the way for the application of anthropomorphic vocabularies to collective entities.[184] As the law of nations was becoming increasingly independent from natural law applicable to individuals, its objective became to regulate the relations between European States understood as moral persons: 'les *magni homines […] du Jus publicum Europaeum.*'[185]

Last but certainly not least, the epistemology of the early modern period was marked by parallel development of political theory and natural sciences, which resulted in a battleground of ideas pertaining to acceptable methods of knowledge production. The exchange between Thomas Hobbes (1588–1679) and Robert Boyle (1627–1691), in particular, has been documented by Shapin and Schaffer in their *Leviathan and the Air-*

[180] Thomas Hobbes, *Leviathan*, Reprinted from the Edition of 1651 (Oxford: Clarendon Press, 1965), Frontispiece.
[181] Foucault, *Sécurité, Territoire et Population*, 302, 308; Carl Schmitt, *Le Nomos de La Terre* (Paris: Presses Univesitaires de France, 2001), 142–43.
[182] Schmitt, *Le Nomos de La Terre*, 141–48.
[183] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 10–11.
[184] Ibid., 22.
[185] Schmitt, *Le Nomos de La Terre*, 144.

Pump.[186] In their classic text, the authors note 'the extent to which the figure of Hobbes as a natural philosopher has disappeared from the literature.'[187] We tend to forget that Hobbes, among other things, was widely known as a (controversial) mechanical philosopher who engaged in lively debates with his contemporary Boyle over the value of experimental method. Although Hobbes is considered to have lost this debate, it would be impossible to understand his mechanistic treatment of the body politic without paying regard to his natural philosophy.

In early modernity, the very idea of the *body* (and, thus, of the body politic) was transformed, for the body had become informed by the new mechanical science which saw the body as an artificial mechanism, an artifact.[188] Perhaps the most well-known example of this thought was the expression given to it by La Mettrie (1709–1751) in his *L'Homme machine,* where the author described human beings as automatons.[189] Not only did this shift of perception have a profound impact on the conceptualization of the bodies of individuals; it also opened the way for new vocabularies and imagery applicable to the body politic of the State. Hobbes would write:

> *For seeing life is but a motion of Limbs, the begining whereof is in some principall part within; why may we not say, that all Automata (Engines that move themselves by springs and wheeles as doth a watch) have an artificiall life? For what is the Heart, but a Spring; and the Nerves, but so many Strings; and the Joynts, but so many Wheeles, giving motion to the whole Body, such as was intended by the Artificer?*[190]

Schmitt notes the link between the individualism of Renaissance and the treatment of the State as a person.[191] He comments upon the corresponding shift in the discourse:

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[186] Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes*, *Boyle*, *and the Experimental Life*, 2nd ed. (Princeton, NJ: Princeton University Press, 2011).
[187] Ibid., 7.
[188] Michael Nutkiewicz, "Samuel Pufendorf: Obligation as the Basis of the State," *Journal of the History of Philosophy* 21, no. 1 (1983): 15–29.
[189] Julien Offroy La Mettrie, *L'homme Machine* (Paris: Gallimard, 1999).
[190] Hobbes, *Leviathan*, The Introduction, 1.
[191] Schmitt, *Le Nomos de La Terre*, 145.

> *Though it is feasible to conceive of the state as an artificial mechanism without an analogical mechanization of the human body, the mechanization of the state may be an enlarged mirror image of the mechanistic conception of the human body.*[192]

The methodological principle of the reconstruction of the object of inquiry was borrowed from the nascent natural sciences to infuse the political theory of the early modern period.[193] In this context, Hobbes offered a 'materialistic theory of knowledge in which the foundations of knowledge were notions of causes.'[194] Subsequently, the attention of the political philosophers of the seventeenth and eighteenth centuries turned to explaining, rather than describing, the artificial mechanism of the State in opposition to the forces of nature. The focus was to be on the processes through which individuals build their political societies and institutions; the State and its laws were to be viewed as products of human labor.[195] This conceptualization offered new ways of understanding the social sphere, as well as promises for a better future in a world ravaged by the political crises of the Thirty Years' War and the English Civil War.

This brings us to the first chapter of this thesis, where I will analyze the early modern State theories of Hobbes and Grotius through the lens of their performative character. I will then argue that performativity continues to inform our anthropomorphic conceptualizations of sovereign power.

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[192] Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, Global Perspectives in History and Politics (London: Greenwood Press, 1996), 91.
[193] Noel Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2004).
[194] Shapin and Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life*, 19.
[195] Nutkiewicz, "Samuel Pufendorf: Obligation as the Basis of the State."

Chapter I

Enacting the State:
Hobbes, Grotius and the Performativity of Sovereign Power

I had forgot myself; am I not king?
Awake, thou coward majesty! thou sleepest.
Is not the king's name twenty thousand names?

– William Shakespeare, *Richard II*, Act III, Scene II.

Si le cérémonial religieux peut se transférer aussi facilement dans les cérémonies politiques […] c'est parce qu'il s'agit, dans les deux cas, de faire croire qu'il y a un fondement au discours qui n'apparaît comme autofondateur, légitime, universel que parce qu'il y a théâtralisation — au sens d'évocation magique, de sorcellerie — du groupe uni et consentant au discours qui l'unit. D'où le cérémonial juridique […] — les perruques, etc. — qui ne peut pas se comprendre complètement si on ne voit pas qu'elle n'est pas simple appareil, […] elle est constitutive de l'acte juridique.

– Pierre Bourdieu, *Sur l'État.*[196]

Introduction

Legal theory has long been in search for its protagonist, a reliable actor who would conquer the stage of international legal drama and suspend disbelief in its spectators.[197] Throughout history, the Prince, the State and the natural individual have appeared on stage, as if jealous actors competing for the main role.[198] The early modern thinkers

[196] Pierre Bourdieu, *Sur l'État: Cours Au Collège de France (1989-1992)* (Paris: Seuil, 2012), 115. For the inspiration behind the quote, see: Edward P. Thompson, "Patrician Society, Plebeian Culture," *Journal of Social History* 7, no. 4 (1974): 382–405.
[197] For a discussion of theoretical attempts at making a civic unity out of a plurality of actors, see: David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).
[198] For the transition between patriarchal power of the Prince towards modern conceptualizations of statehood, see in particular: Lecture of 1 February 1978 & Lecture of 8 March 1978 in: M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, ed. M. Senellart, trans. G. Burchell (Palgrave Macmillan, 2007). Today's scholarship discusses the inclusion of non-state actors, who are on a quest for recognition as *dramatis*

recognized the paradox of political representation and performativity: their main objective was to construct civic unity out of the natural plurality of actors.[199]

One such attempt at constructing unity out of plurality was through the language of natural law and contract theory. Early modern contract theory was based upon the assumption that the natural 'Man'[200] covenanted with others to establish the State. The mechanistic 'person' of the State, established through the social contract, would provide individuals with security. This collective entity would be designed in a way that would enable it to prevail over time and to incur rights and duties over the lifespans of biological individuals. However, to act upon the world, the person of the State also needed to be represented by the figure of the sovereign.

Conjured into life by men, the State was a person 'by fiction' who could only act through its personification in the figure of the sovereign. One of the thinkers discussed in this chapter is Thomas Hobbes (1588–1679). In order to explain the functioning of the fictitious person of the State, Hobbes derived his notion of personhood from theater:

> *The word Person is latine: instead whereof the Greeks have Prosopon, which signifies the Face, as Persona in latine signifies the Disguise, or Outward Appearance of a man, counterfeited on the Stage; and sometimes more particularly that part of it, which disguiseth the face, as a Mask or Visard: And from the Stage, hath been translated to any Representer of speech and action, as well in Tribunalls, as Theaters. So that a Person, is the same that an Actor is, both on the Stage and in common Conversation; and to Personate, is to Act, or Represent himselfe, or an other; and he that acteth another, is said to beare his Person, or act in his name.*[201]

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personae of international law. See: A. Bianchi, "The Fight for Inclusion: Non-State Actors and International Law," in *Non-State Actors and International Law*, The Library of Essays in International Law (London: Routledge, 2009).

[199] Annabel Brett, "Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius," *The Historical Journal* 45, no. 1 (2002): 32.

[200] Masculine pronouns are adopted intentionally, to underline the gendered connotations behind their historic usage: Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," 349; O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law."

[201] Thomas Hobbes, *Leviathan*, Reprinted from the Edition of 1651 (Oxford: Clarendon Press, 1965), XVI, 123.

In theater, the notion was used to denote both a character and the performance of that character by donning a mask. Just as the actors in the Shakespearean plays could credibly represent the Moonshine, the Lion or the Wall on stage, the sovereign would represent the person of the State on the stage of natural law. It was as if the sovereign donned the mask of the State to act on its behalf. Depending on the circumstances, the sovereign could be a King, an Assembly, or another socio-historical arrangement – what mattered was the performative act of the final decision, of donning the mask to speak and act on behalf of the State.

Another jurist whose work we will discuss in this chapter is Hugo Grotius (1583–1645). The State theory of Grotius was also performative in character, for he distinguished between the common subject of sovereignty (thing-itself) and the proper subject of sovereignty (the exercise of sovereign power).[202] In Grotius's reading, the people possessed the capacity to form the common subject of sovereignty, the State. However, the sovereign power then needed to be exercised as 'a mode of rulership' by the proper subject of sovereignty (one or more persons acting as the sovereign).[203]

In this chapter, I follow the theatrical allegory of the actor (the one who represents) and the mask (the entity being represented) to describe the early modern search for persons who would become subjects of natural law.[204] To do so, I examine the relationships between the images of 'Man,' the 'State' and the 'sovereign' which appear in *the Leviathan*[205] of Hobbes and in *De iure belli ac pacis*[206] of Grotius. I then invite the reader to think about the broader implications of performativity in the international realm.

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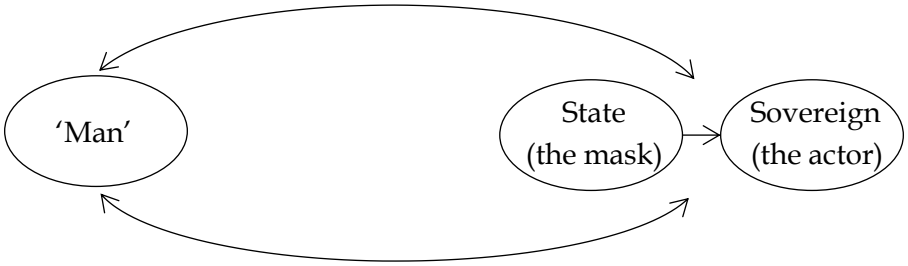
[202] Bhuta, "The State Theory of Grotius"; Annabel Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," *Modern Intellectual History* 17 (2019): 619–45.
[203] Bhuta, "The State Theory of Grotius," 37.
[204] I borrow the metaphor of the actor and the mask from Janne Nijman, who used it in her seminal work on the concept of international legal personality. See: Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*.
[205] Hobbes, *Leviathan*.
[206] Hereinafter, the following editions of Grotius's work will be cited: Hugo Grotius, *On The Law of War and Peace*, trans. Francis W. Kelsey, Translation of 1646 edition, 'The Classics of International Law' (New York: Carnegie Institution, 1913); Hugo Grotius, *On the Laws of War and Peace*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925); Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005).

Anthropomorphic constructs

In their search for the subjects of the social contract, jurists in the natural law tradition have made numerous claims about the legal hierarchies, the nature of human beings and the very possibility of the international legal order. The image of the hypothetical 'state of nature' was used to delineate the realm of possibility for the individuals and the State and to determine the nature of their mutual relations.[207] The circular argument about the human nature, the State and the possibility of the international legal order was based upon a set of anthropomorphic constructs and binaries.

By assuming the priority of certain human faculties, the natural law theorists have created anthropomorphic vocabularies to describe the natural individual, the State and the location of sovereignty within the political community. The point of departure for their social contract theories was an atomized, gendered individual: 'Man.' His nemesis, the State, existed on the opposite pole of a circular argument, with both images informed by the characteristics of the natural 'Man.'[208]



In an echo of the King's Two Bodies and of the corporation doctrines of the canon law, the abstract State began to appear as an increasingly independent figment of the brain, a mystical body which displayed anthropomorphic qualities of its own.[209] While the State started to accumulate some human-like qualities, the use of the performative

[207] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 195–96; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 110–11.
[208] Tuck argues that the 'individuals' took on the qualities of sovereign States. In: Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 130.
[209] Hobbes, *Leviathan*, Chapter XVI, 125.

language also allowed the early modern thinkers to keep anthropomorphism of an organic kind at bay, by highlighting the fictitious and mechanistic nature of the State which depended on being represented by real actors. Nevertheless, the performative language proved to be a double-edged sword and the stage was set for the anthropomorphic vision of the State to set in.

Fundamental in the creation of legal subjects was a set of anthropomorphic binaries. The distinctions between 1) nature and society, 2) fear and reason, 3) the body and the soul and, ultimately, between 4) the subjects and objects of law, have played an important role in characterizing entities, in ascribing them with agency and sovereignty. The binaries played a crucial part in the discursive creation of the persons of law; they were reproduced through the performative enactments of sovereign power.

Fundamental binaries	
society (State)	nature
reason	fear
body	soul
subject	object

Key to the early modern theories of the State discussed in this chapter was their performative, generative force which allowed different thinkers to localize sovereignty, to construct legal ordering of the world and to reproduce it using the anthropomorphic claims about the subjects of law.

Performative State theory

How was the fictitious person of the State supposed to *act*, *consent* and to incur rights and duties? To address these issues, the early modern theory of the State had recourse to the notion of performativity.[210]

I argue that performativity can play multiple roles in the legal discourse. Firstly, it presupposes the existence of a represented entity (the mask) and the person engaged in the act of representation (the actor). This presupposition can be interpreted as a distinction (with the person of the State being functionally separate from the person of the sovereign), but it can also be read as a connecting link (as one cannot exist without the other). According to John Austin's definition, performative utterances 'perform' an action and they are to be understood in contrast with constative utterances which merely 'describe' an action or make statements about the facts.[211] Social theory increasingly views concepts, such as the State, not merely as a reason for action, but also as 'a constitutive part of the world that they diagnose and describe.'[212] The State of the early modern theory can then be seen as a declaration-type utterance in accordance with Searle's theory of social reality.[213] The abstract State is 'created by the semantics' but its power 'goes beyond the semantics;' as 'meanings are used to create powers that go beyond meaning.'[214] Performative concepts, such as 'the State,' thus become entangled with materiality and generate tangible effects that I will seek to demonstrate throughout this chapter.

[210] Bhuta, "The State Theory of Grotius."
[211] Nehal Bhuta, "State Theory, State Order, State System — Jus Gentium and the Constitution of Public Power," in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, ed. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 404; John L. Austin, *How to Do Things with Words: Second Edition*, ed. J. O. Urmson and M. Sbisà (Cambridge, Massachusetts: Harvard University Press, 1975), 6.
[212] Bhuta, "State Theory, State Order, State System — Jus Gentium and the Constitution of Public Power," 404.
[213] John Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010), 113; Bhuta, "The State Theory of Grotius," 9.
[214] Searle, *Making the Social World: The Structure of Human Civilization*, 113; Bhuta, "The State Theory of Grotius," 9.

Secondly, due to the fundamentally binary logic of performativity, the argument of this type can be used to localize sovereignty in a given entity and to deny it to others. This conceptual move is achieved using the binaries listed in the section above. As the sovereign dons the mask of the State, he proceeds to reenact the foundational binaries in a set of performative enactments of power. I argue that revisiting the different instances of the use of performative language can help us shed light upon the contingency of our present arrangements. The decision to include or to exclude participants in the international legal discourse through the creative use of binaries is just that – a decision. Rethinking it in a critical fashion can open way towards other possible conceptualizations and configurations of sovereignty.

I now move to discuss the different images of 'Man' which make their appearance in the works of Hobbes and Grotius.

Hobbesian fearful 'Man' and the Leviathan

The 'Man' who makes his appearance in the state of nature described by Hobbes is primarily a fearful, self-protective being which attacks in order to forestall the potential attack of an enemy.[215] This image of an individual is subsequently projected unto the State, the *Leviathan* which exists in the international stance of constant war-readiness. The natural 'Man,' a fundamentally self-sufficient being, enters into conflict upon contact with other atomized individuals. To escape the resulting conflict of rights, he must form a covenant and establish the State, the supreme rational community. The sovereign dons the mask of the State which represents the highest rationality possible in the international sphere. This traditional reading of Hobbes relies heavily on the binaries of nature/society and fear/reason distinction, as the irrational nature gives way to the rational order of the civic society.

[215] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 1999, 130; 'Promptnesse To Hurt, From Fear' and 'Feare of oppresion, disposeth a man to anticipate, or to seek ayd by society: for there is no other way by which a man can secure his life and liberty.' In: Hobbes, *Leviathan*, Chapter XI.

One could easily notice cracks in that interpretation: the self-sufficient individuals in the state of nature are presupposed to be already familiarized with the notion of a contract – otherwise, they would not be able to covenant with each other to form the State.[216] Nevertheless, my working hypothesis is that the binary way of thinking (nature/society; fear/reason; subject/object) continues to influence the modern legal discourse around formation of subjects. Elements which do not neatly fit into the binaries of law are suppressed by the legal discourse, or (even more tragically!) delegated to the sister disciplines of IR and political science. It is perhaps worth thinking about this process in psychological terms: as a repression of truth which allows the legal discourse to maintain a semblance of unity and coherence. Against this context, it is unsurprising that it was Carl Schmitt, an avid reader of Hobbes and a figure discussed extensively by disciplines of law and international relations alike, who anticipated the notions of absolute enmity and the dehumanization of outlaws in his *Theory of the Partisan*.[217]

My working hypothesis in this chapter is that the binary structure of the legal argument is a useful thinking tool which finds reflection in the discursive creation of subjects and objects of modern international law, which I illustrate with examples of the use of force in international law.

Grotius's reasonable 'Man' and the society

Hugo Grotius offers an image of 'Man' as a free, social and responsible agent, a vision which ascribes primacy to the faculty of reason.[218] 'Man' is elevated from 'nature' and exercises his *dominion* upon creation ('nature') and the material world by the use of

[216] For the discussion of entanglements of morality and legal system in contract theory, see: Nutkiewicz, "Samuel Pufendorf: Obligation as the Basis of the State."

[217] Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, trans. Alfred Clement Goodson (Berlin: Duncker & Humblot, 1963); Robert Howse, "Schmitt, Schmitteanism and Contemporary International Legal Theory," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffman (Oxford, 2016), 213.

[218] Grotius, *On The Law of War and Peace*, Prolegomena, para. 6; Janne Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium," in *International Law and Religion*, ed. Martti Koskenniemi, Mónica García-Salmones Rovira, and Paolo Amorosa (Oxford: Oxford University Press, 2017); Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition.'"

reason. Here, too, the nature/society, fear/reason and 'Man'/un-'Man' distinctions play an important role. As Janne Nijman has demonstrated, Grotius's assumptions about human nature were deeply embedded in the author's religious beliefs about human beings created in the image of God.[219] In an anthropocentric fashion, this 'Man' is elevated from nature and orders creation through reason – he replenishes the Earth and subdues it.[220]

Meanwhile, Grotius has sometimes been accused of lacking a truly modern theory of the State that would distinguish between the seat of sovereign power and everyday operations of the government; this assumption led Tuck to present Grotius as an exponent of medieval ideas in the modern form.[221] However, recent contributions by Bhuta and Brett show us how Grotius can be read as an exponent of a truly modern State theory on a par with Thomas Hobbes. For Grotius, sovereign power was marked by the finality of decision taken by the sovereign, who donned the mask of the State to exercise its power as the proper subject of sovereignty. Modes of holding sovereignty so-understood could differ, depending on the socio-historical arrangements at stake.

It is difficult to deny the importance of Hobbes and Grotius to disciplinary self-identifications of international law. What connects the two early modern theories of the State discussed in this chapter is their performative character, a set of anthropomorphic assumptions and binary thinking about formation of subjects of law.

Caveat

In this chapter, I propose a discursive analysis of authoritative historical texts and of the images of 'Man' and the 'State' which continue to inform the legal imagination. The anthropomorphic vocabularies of Hobbes and Grotius have been appropriated and adapted to the needs of the modern international legal discourse. Nijman writes of a 'corrupted' version of these ideas which came to define so much of modern legal

[219] Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium."
[220] *Genesis* I, 26– 28.
[221] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 85.

theory,[222] while Malcolm observes that some IR scholars have arguably become more 'Hobbesian' than Hobbes ever got a chance to be.[223]

It would also be 'absurd' to claim that the State was 'created' in the early modernity: big armies and centralized apparatuses had existed before they have become conceptualized in the writings of natural law theorists.[224] However, it remains important that the conceptualization of the abstract person of the State has 'really entered into reflected practice'[225] and that the discourse of sovereignty has become entangled with socioeconomic and military forces in the performative enactments of sovereign power. To paraphrase Carl Schmitt's interpretation of Hamlet, it is as if 'a piece of historical reality irrupted into the drama' of the discourses about the State.[226]

Differences of opinion exist as to what came first: the notion of the early modern State or the very idea of a liberal individual. Tuck is of the opinion that the early modern international system of Europe, built around balance of power and colonial exploitation, subsequently became a model for human relations between free moral agents engaged in adventurism and exploitation.[227] I take the middle way by arguing that the notions of the natural individual and of the State inform each other. The performative aspect of State power and its role in sustaining and reproducing binary distinctions and anthropomorphic assumptions continue to be relevant today, due to the lasting importance of thinkers discussed in this chapter in shaping legal imagination and due to the essentially performative character of modern State theories.

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[222] Janne Nijman, "Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword," *European Journal of International Law* XX, no. XX (2019): 8; Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition,'" 27.

[223] Malcolm, *Aspects of Hobbes*, 432–56; Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 109–39.

[224] Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78*, 247; Bhuta, "The State Theory of Grotius," 10.

[225] Ibid.

[226] Carl Schmitt, *Hamlet or Hecuba: The Intrusion of the Time Into the Play*, trans. Simona Draghici (Plutarch Press, 2006), 20.

[227] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 195–96.

I submit that employing early modern vocabularies related to statehood and subjecthood can, if anything, help us critically revisit our present convictions. My intention here is only to offer a simplified model of international legal discourse and practice: one that could map the paradoxes and binaries encountered on the way of performative exercises of State power. I use this model to cast light upon discursive formation of persons through the binaries of law and anthropomorphic claims of international jurists.[228] I therefore propose an intertextual '*bricolage*'[229] of ideas which shape the world inhabited by the international legal persons modeled after 'Man.' It allows me to present a story of the international legal discourse's search for its basic, unitary, and rational subject – the *dramatis personae* of international law who wear the mask of the State in performative enactments of sovereign power.

I begin this chapter by discussing the images of 'Man' and theories of the State of Thomas Hobbes and Hugo Grotius. Instead of proceeding chronologically, I propose to firstly discuss Hobbes, the traditional point of reference in discussions about the early modern theory of the State. Then, I move to discuss Grotius's conceptualization of sovereign power in light of recent scholarship which presents Grotius as an exponent of modern State theory.[230] Finally, I propose to think *with* and *through* the performative vocabularies of Hobbes and Grotius about the formation of legal subjects and to apply them to the examples of the use force under the UN Charter. I follow Carl Schmitt's notions of enmity and recent contributions on the State theory of Grotius to retrace the performative enactments of sovereign power through the example of international violence. The exercise allows me to uncover the continuing relevance of assumptions about the subjects of law and the performative character of State theory in the discipline of international law.

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[228] Andrea Bianchi and Anne Saab, "Fear and International Law-Making: An Exploratory Inquiry," *Leiden Journal of International Law* 32 (2019): 351–65.

[229] A term proposed by Koskenniemi to mean 'grasping other texts and utopias so as to try as best we can to persuade new audiences of the authority of what we have to say, provided that there is anything we are able to say.' in: Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition.'"

[230] Bhuta, "The State Theory of Grotius"; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius."

This chapter can then be read as a call for anthropological sensitivity in international law, as the specter of 'Man,' and of the legal artifacts shaped in his image, continues to haunt the legal discipline. I suggest that this sensitivity is especially important now, as we speak of the growing managerialism and fragmentation of international law. 'Stateness,' often understood as a 'technical achievement,' sets the stage for performative enactments of power between subjects and objects of the legal discourse.[231] Meanwhile, fragmentation of international law brings an end to the phantasy of the unified Ego of 'the' subject of law.[232] In a fragmented world, the Janus-faced images of 'Man' and the State continue to inform each other through webs of performative enactments of power.

I now turn to discuss the images of 'Man' and the State in the works of Thomas Hobbes and Hugo Grotius in their search for the unified subject of natural law.

Constructing the Leviathan

Thomas Hobbes (1588–1679) is credited with establishing one of the most influential early modern conceptualization of the State founded upon an image of human nature.[233] The Hobbesian theory of individual self-preservation in the state of nature has been projected upon conceptualizations of the State and of the international sphere. It is no accident that, while searching for an example of the state of nature characterized by the incessant struggle, Hobbes decided to refer to relations between the sovereigns:

> *But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and persons of Soveraigne authority, because of their Independency, are in continuall jealousies,*

[231] Nehal Bhuta, "Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order," in *Governance by Indicators: Global Power through Quantification and Rankings*, ed. Kevin E. Davis et al., Law and Global Governance (Oxford: Oxford University Press, 2012); Bhuta, "The State Theory of Grotius," 8.
[232] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy"; International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (Geneva: UN General Assembly, 2006); Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *The European Journal of International Law* 17, no. 1 (2006): 1–13; Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2001).
[233] David Armitage, "Hobbes and the Foundations of Modern International Thought," in *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2006); Skinner, "The Sovereign State: A Genealogy"; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*.

> *and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War. But because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery, which accompanies the Liberty of particular men.*[234]

The Hobbesian State of nature reflects two epistemological developments of early modernity. Firstly, it reflects the ideal type of a raw, natural world, which European jurists thought to have found in the Americas.[235] Secondly, this world is inhabited and can be claimed by self-contained units of political thought: individual 'Men' and States. The image of the State and 'Man' inform each other. Just like individuals in the state of nature, States exist in a permanent posture of war in relations with each other. Both the individual and the State are also fundamentally self-sufficient, independent entities presumed to be unified subjects of natural law.

Marx criticized the resulting vision of 'Man' as a lone individual, whom he saw as a Robinson Crusoe lost on an island, outside the scope of social systems of labor and political organization.[236] Judith Butler writes that the discursive figure of the 'natural man' in social contract theory is assumed to be independent masculine adult, with his masculinity defined as a complete lack of dependency.[237] In the Hobbesian world, adult 'Men' spring up like mushrooms, with neither a mother nor a father.[238] The individual who is introduced into the discourse, this 'outbreak of the human unto the world […] is posited as if he was never a child; as if he was never provided for, never depended

[234] Hobbes, *Leviathan*, Chapter XIII.
[235] Schmitt, *Le Nomos de La Terre*, 98.
[236] Karl Marx, *Economic and Philosophic Manuscripts of 1844*, trans. Milligan (Moscow: Progress Publishers, 1959), 88.
[237] Judith Butler, *The Force of Nonviolence: The Ethical in the Political* (London: Verso, 2020), Nonviolence, Grievability, and the Critique of Individualism, 29-37.
[238] Lauren B. Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations* (Oxford: Oxford University Press, 2015), 31; Christine DiStefano, *Configurations of Masculinity: A Feminist Perspective on Modern Political Thought* (New York: Cornell University Press, 1991), 83–90.

upon parents or kinship relations, or upon social institutions.'[239] Hobbes himself wrote that there exists no fundamental difference between the way that a child consents to its mother sovereignty to protect its own life and the way that the defeated in wars submit to the victor when the battle is over.[240] What matters is not a quality or type of a will, but the fact of complete submission. The figure of a woman also cannot be fully represented on the stage, because of the presumed dependency of the feminine gender.[241] Wilcox comments that 'the representation of the subject as autonomous understates not only the importance of women's labor in the private sphere but the degree to which adults are entangled in the webs of social relationships.'[242]

The preservation of the natural 'Man' is only endangered when other individuals enter the stage; each with a claim towards the universal right. The rest of the story is well known: the interaction in the state of nature results in a conflict of rights which creates misery for individuals and makes their life uncivilized, brutish and short. In the state of nature, which is the state of war of all against all (*bellum omnium contra omnes*), 'everyone can slay everyone else' in order to protect oneself.[243] Strictly speaking, men are fundamentally self-protective and only secondarily aggressive: it is only the fear of an attack which leads them to preemptively strike the enemy.[244] *Fear* is therefore understood as a defensive mechanism based upon a subjective (mis)perception – Man's deepest insecurity and existential anxiety which stems from cognitive limits, from what he cannot know about the natural world.[245] To devise a way out of this tragic conundrum on the level of an individual, Hobbes advocated for the creation of the

[239] Butler, *The Force of Nonviolence: The Ethical in the Political*, 40.
[240] Michel Foucault, *Society Must Be Defended*, trans. David Macey (London: Penguin Books, 2020), 96; Thomas Hobbes, *De Cive* (Public Library UK, 1642), II, ix.
[241] Butler, *The Force of Nonviolence: The Ethical in the Political*, 41.
[242] Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations*, 31.
[243] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 31.
[244] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 130–31.
[245] 'Men that distrust their own subtlety, are in tumult, and sedition, better disposed for victory, than they that suppose themselves wise, or crafty. For these love to consult, the other (fearing to be circumvented,) to strike first.' In: Hobbes, *Leviathan*, Chapter XI. Also see: Jan H. Blits, "Hobbesian Fear," *Political Theory* 17, no. 3 (1989); for integration of existential anxiety into IR, see: Bahar Rumelili, "Integrating Anxiety into International Relations Theory: Hobbes, Existentialism, and Ontological Security," *International Theory* 12 (2020): 257–72.

Leviathan which would provide security through rational organization of the community and the unification of the source of legal authority.

Hobbes wrote *the Leviathan*, during the events of the English Civil War (1642–1651) and he could be seen as proposing solutions to the state of anarchy which engulfed the political climate of his times.[246] The frontispiece of the *Leviathan* famously features an interpretation of the body-politics specific to Hobbes: the image of the Leviathan consisting of his subjects.[247] The sea monster from the Bible and the Platonic huge man are united to create the mortal God that is the State.[248] On the picture, we can see that the King does not simply serve as the head of the body, as medieval fashion would dictate; rather, a wholly new type of an artificial person is established.[249] While the bodies of the individuals are fragile and in need of protection, the political body of the Leviathan serves as a unifying force which guarantees security and demands obedience.

The message conveyed by this image is to be explained in line with the Hobbesian notion of the covenant.[250] Contrary to earlier thinkers, Hobbes did not have faith in any innate sociability of individuals. Just as beasts, humans had existed in a state of nature which only knows the law of self-preservation and the conflict of rights. Therefore, to escape the anarchy and incessant warfare of the state of nature, each individual must agree with each other to covenant and thus become subject to the pacifying *imperium* of the State. It would not be possible for the sovereign to represent the multitude as a collection of individuals with differing wills and voices. That is why the sovereign

[246] For context of the debate between absolutists and the populists upon which Hobbes was commenting, see: Skinner, "A Genealogy of the Modern State"; in fact, the hypothetical character of the state of nature has given rise to debates during the lifetime of the author. A young admirer of Hobbes, François Peleau warned Hobbes that his detractors will use the example of a family unit as a 'little kingdom' that predated the Leviathan. See: Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 135–39.
[247] Hobbes, *Leviathan*. For the embodiment of peace and security in the thought of Hobbes, see: Charlotte Epstein, *Birth of the State: The Place of the Body in Crafting Modern Politics* (Oxford: Oxford University Press, 2021).
[248] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 19–20.
[249] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 1–25.
[250] Hobbes, *Leviathan*, Part 2: "Commonwealth"; Malcolm, *Aspects of Hobbes*. For a detailed analysis of the image at the frontispiece and its theoretical implications Quentin Skinner, "Thomas Hobbes: Picturing the State" (Public Lecture at Uppsala University, Uppsala, Sweden, January 24, 2018), https://www.youtube.com/watch?v=YPxvfoVqqH4&.

represents the person of the people united by the covenant, who authorize the sovereign to speak on their behalf.

When all individuals who possess a multitude of different wills reach a single will and single voice, the many become one and thus form a person 'by fiction:' that of the artificial man[251] of the State, which is called the Leviathan:

> *For by Art is created the great Leviathan called a Common-Wealth, or State, (in latine, Civitas) which is but an Artificiall Man; though of greater stature and strength than the Naturall, for whose protection and defence it was intended[…]*[252]

The relationship between the unified people has an effect of a marital union blessed by God, with the difference that the artificial man of the State is a mechanistic creation and the offspring of such union of people has no determinate gender.[253] The union is personified by the sovereign – whether a man or a representative body - characterized by the capacity to act and speak on behalf of the people.

As noted by Skinner, Hobbes's work constitutes a clear enunciation of 'the doctrine that the legal person lying at the heart of politic is […] the person of the State.'[254] The capacity for action is the determining factor in Hobbes's notion of personhood.

> *A PERSON, is he whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction*.[255]

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[251] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*; Skinner, "A Genealogy of the Modern State"; Quentin Skinner, "Hobbes and the Purely Artificial Person of the State," *The Journal of Political Philosophy* 7, no. 1 (1999): 1–29; David Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," *The Journal of Political Philosophy* 8, no. 2 (2000): 268–78.
[252] Hobbes, *Leviathan*, Introduction.
[253] Skinner, "Hobbes and the Purely Artificial Person of the State," 19; Skinner, "A Genealogy of the Modern State," 344–45. In that regard, it is interesting to note that Butler regards an 'individual' who leaves the state of nature as necessarily gendered. In: J. Butler, *The Force of Nonviolence: The Ethical in the Political* (London: Verso, 2020).
[254] Quentin Skinner, *Visions of Politics Volume 2: Renaissance Virtues* (Cambridge: Cambridge University Press, 2002), 404.
[255] Hobbes, *Leviathan*, Chapter XVI.

The above definition relies on a set of distinctions. Firstly, there is the distinction between persons and non-persons: one can only be considered a person if his words are considered either as his own or as spoken on behalf of another man.[256] Another distinction concerns natural and artificial persons. Natural persons speak and act on their own behalf, while artificial persons speak for (represent) others. The act of representation of 'another man' may occur either 'truly' or 'by fiction', which depends on whether the represented person can truly take responsibility for actions. The persons who cannot truly take responsibility for their actions are represented 'by fiction' (hereinafter: person 'by fiction')[257] a category which includes: bridges, hospitals, children, madmen, gods, idols and, most importantly, the State.

Runciman argues that the State is accurately described as a person 'by fiction.'[258] But how exactly did the State end up in the company of madmen and gods? The State is a person 'by fiction' because it cannot by itself 'own up' and take responsibility for the real actions performed on its own behalf.[259] Just like 'Children, Fooles, and Mad-men', the States need to be 'Personated by Guardians or Curators; but can be no Authors.'[260] The State thus cannot represent itself: it needs to be represented by the sovereign – a King or an Assembly. It is by fiction that State's personhood is created; by donning the mask of the State, the sovereign represents what would otherwise be a non-person, which points to the importance of performativity to Hobbes's theory of the State.

Personhood by fiction is performative, and, as mentioned in the chapter's introduction, Hobbes acknowledged that the notion was borrowed from theatre: it could denote both the character and the performance of that character by donning a mask.[261] Skinner notes that characters in Shakespeare's plays would often impersonate objects: in *A Midsummer Night's Dream* actors agree that, in order to convey the romantic charms of moonlight,

[256] Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner."
[257] It needs to be noted that the term 'person by fiction' is a Runciman's invention. Given the spirit of his political project and the important role of Leviathan, Hobbes himself avoided writing about the fictitious nature of the State.
[258] Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," 272.
[259] Ibid., 271.
[260] Hobbes, *Leviathan*, XVI, 125.
[261] Skinner, "Hobbes and the Purely Artificial Person of the State," 6–7.

one person has to come `with a bush of thorns and a lantern and say he comes to disfigure, or to present, the person of Moonshine.'[262] Outside of theater, a bridge in the English countryside could be represented in way which would make it appear as if the bridge itself was acting responsibly.[263] At the core of the personhood so understood lies the attribution of words and actions and determination of what counts as an authorized action.

In Hobbesian terms, any representation 'by fiction' had to be duly authorized by owners or governors of the thing represented.[264] However, as the fictitious person of the State could not act by itself, it could not authorize the sovereign to act on its behalf. Instead, the person of the State and the person of the sovereign had to be called forth and authorized by the covenant of the people. Hobbes's theory thus avoided the temptation to fully anthropomorphize the State and to provide it with intrinsic qualities of its own.[265] Instead, it provided for a regime of attribution based upon the triangular relationship between the State, the State officials and the People.[266] The Hobbesian State could under no conditions be deemed as a 'real' person. Without the sovereign, the State is 'but a word, without substance, and cannot stand.'[267] At the same time it would be a mistake to dismiss the importance of the State on the basis of its 'fictional' nature. Sovereigns come and go, while the person of the State endures, as it continues to incur and to enforce rights and duties.[268] The mask of the State may change hands, but it continues to exist as a unified *persona* at the foundation of legal hierarchy. The State so-understood appears as the real and ultimate seat of power, as the actions of any individual sovereign are ultimately attributable to the State which exists throughout time.[269] Hobbes likened the situation to that of the heathen gods of antiquity; for although they never amounted to anything more than a figment of the brain, they were

[262] Shakespeare 1988, A Midsummer Night's Dream, Act III, Scene I, i. 54-56.
[263] Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner," 272.
[264] Hobbes, *Leviathan*, XVI.
[265] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*.
[266] Ibid.
[267] Hobbes, *Leviathan*, Part 2, Chapter XXXI, 274; Skinner, "A Genealogy of the Modern State," 347.
[268] Skinner, "A Genealogy of the Modern State," 346.
[269] Hobbes, *Leviathan*, Chapter XVI.

represented by the priests and thus capable of performing actions and of holding rights.[270] And even if the State exists only as a figment in our brains, it, too, provides a conceptual framework for understanding social reality and, in a manner of a self-fulfilling prophecy, creates tangible effects in the material world. This is particularly relevant given that Hobbes considered all mental activity to result from the mechanistic movement of the brain: we can consider the performance of the State to be important precisely because it was inscribed in our brains and, thus, moved individuals to action.

The Hobbesian State is a 'person' in the sense that actions, rights and duties are attributable to it.[271] It also provides a rational structure to the community, as opposed to the irrationality of the state of nature. The project of liberation from 'anarchy' ends with the Leviathan, modeled after 'Man,' who replaces the figure of God.[272]

Of Mortal Gods

In his reading of Hobbes, Carl Schmitt describes the Leviathan as a 'mortal god;' a mythical totality of images of man, beast and the machine, who imposes peace upon everyone.[273] 'Because state power is supreme, it possesses a divine character. But its omnipotence is not at all divinely derived: It is a product of human work and comes about because of a "covenant" entered into by man.'[274] The State is more than the mere sum total of covenanting wills.[275] This god is above all other power, be it religious or political in nature, while the sovereign is its governor on earth, the 'soul' of the mechanistic person of the State and a part of the grand machine of the State.[276] The notion of the soul is to be read in purely mechanistic terms: it is a vital element which gives life and animates the body. According to Schmitt, the personification of the State in the figure of the sovereign completes the mechanization process and becomes

[270] Ibid., Part 1, Chapter XVI, 125; Skinner, "A Genealogy of the Modern State," 347.
[271] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*.
[272] Anthony Carty, *Postmodern Law: Enlightenment, Revolution and the Death of Man* (Edinburgh: Edinburgh University Press, 1990), Introduction.
[273] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 19.
[274] Ibid., 33.
[275] Ibid., 34.
[276] Ibid., 32–34.

absorbed by it. As a totality, the State is body and soul, a *homo artificialis* – a machine made by men and of men. The State enters into a form of mechanistic symbiosis with 'Man' – 'its material and maker, *materia et artifex*, machine and engineer, are one and the same, namely, men.'[277] While Hobbes's conceptualization of the State as a person 'by fiction' avoids the trappings of outright anthropomorphism, the connection between the person of the sovereign and the person of the Leviathan opens the gateways for accumulation of anthropomorphic qualities by the State.

For Hobbes, natural law could be subdivided into that applicable to individuals in the state of nature and the natural law applicable to commonwealths, with both bodies of law sharing the same precepts.[278] The taxonomy used to describe natural law applicable to men and law applicable to States results from the very fact that commonwealths, once instituted, take on the personal qualities of men.[279] This is a testimony to the feedback loop between the image of the State and that of the individual in the state of nature.[280] This relationship provides a structure of the Hobbesian international order. The legal implications of such a move are particularly apparent in the Hobbesian notion of rights. Hobbes distinguished between external and internal rights of nature.[281] An individual in the state of nature acts in the absence of any external obligation. Thus, Hobbes proposed a type of a 'subjective' notion of a right, which consists of a freedom or liberty of action in the moral vacuum of the state of nature. Therefore, such actions could only be judged by the internal 'egoistic' standard of conduciveness to self-preservation, which derives from a personal decision to attach value to certain behaviors as instrumental to preservation.[282] Controlled by the forces they cannot fully

[277] Ibid., 34.
[278] Armitage, "Hobbes and the Foundations of Modern International Thought"; Thomas Hobbes, *On the Citizen*, ed. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 1998), Chapter XIV; Hobbes, *Leviathan*, Chapter XX, Part 2.
[279] Hobbes, *De Cive*, Chapter XIV.
[280] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 129.
[281] Malcolm, *Aspects of Hobbes*, Chapter: 'Hobbes and Spinoza.'
[282] Ibid., 34. See discussion on internal and external rights.

comprehend, men are 'led into conflict by their differing judgments about what will protect them' and need to establish the Leviathan to escape the brutish condition.[283]

Once established, the machine of the State realizes 'right' and 'truth' in itself and rationality is only possible within the framework of the State.[284] On the international level, the Leviathans confront each other in an irrational state of nature governed by fear.[285] The role of the State personified by the sovereign is to decide on the course of action most conducive to its own self-preservation.[286] The Commonwealth in a Hobbesian sense, once instituted as a person, inherits the characteristics of fearful individuals.[287] Indeed, the very fact that the sovereign must pursue self-preservation of the State implies that the person of the State is mortal and can be destroyed. The world where the highest order is that of the will of individual Leviathans is also the world devoid of the possibility of unity or global rule of law. Hobbes's theory of self-preservation has been described as 'uncommercial,' for the Englishman detached the right of survival of the State from considerations of economic aggrandizement and market competition.[288] Nevertheless, the liberty of States to act as they please is not followed by 'that misery, which accompanies the Liberty of particular men,'[289] because the Leviathan is assumed to uphold a form of social organization that is autarkic enough to provide the basis for survival of single individuals. The images of the self-sufficient 'Man' in the state of nature and that of the Leviathan continue to inform each other.

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[283] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 131.
[284] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 45.
[285] Tuck notes that '[…] men are fundamentally self-protective, and only secondarily aggressive—it is the fear of an attack by a possible enemy which leads us to perform a pre-emptive strike on him, and not, strictly speaking, the desire to destroy him' in: Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 130.
[286] Armitage argues that "If the Hobbesian theory of international relations rests on a conception of international anarchy characterized by interstate competition without any possibility of cooperation, then Hobbes himself was no Hobbesian." In: Armitage, "Hobbes and the Foundations of Modern International Thought." See also: Malcolm, *Aspects of Hobbes*, Chapter 'Hobbes's Theory of International Relations,' where the author discusses in depth the misappropriation of the Hobbesian thought by modern theorists of international relations and their undue focus on moral subjectivism and anarchic relations of states.
[287] Armitage, "Hobbes and the Foundations of Modern International Thought."
[288] István Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Cambridge, Massachusetts: Harvard University Press, 2005), 17–22.
[289] Hobbes, *Leviathan*, Chapter XIII.

As the State absorbs all rationality and social reality, everything outside of the State belongs to the state of nature. State parties to the covenants are the ultimate judges upon their validity and they can always resort to enmity.[290] There can be no internationally legal war or peace, for that would imply existence of law external to State authority. Rather, States confront each other as self-contained units, as in a duel. This is by itself a mark of honor, for 'only men who are capable of engaging in duels can do so.'[291] Communities unable to develop the machinery of a centralized State are looked down upon as 'uncivilized,' destined to be governed by an outside power.[292] It is no coincidence that empowering the State through the language of natural law took place precisely at the time when European States were pursuing unprecedented colonial ventures abroad.[293] These assertions sound like a distant echo of the more recent discourse on 'failed states' which perceives State-ness as a form of technical achievement.[294]

As Hobbes negated the existence of any distinct body of law applicable to commonwealths, the modern concept of international legal personality finds little application in the works of the English philosopher.[295] Instead, the external relationships between commonwealths were governed by fear and distrust characteristic to the State of nature, as sovereigns uphold the dispositions of their subjects.[296] All rationality is only possible within the domestic order, while different sovereigns recognize each other as a threat and exist in 'a posture of war.' Fear governs their relations and the pre-emptive strike to prevent an enemy attack is always a

[290] Murray Forsyth, "Thomas Hobbes and the External Relations of States," *British Journal of International Studies* 5, no. 3 (1979): 204.
[291] Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 47–48.
[292] Ibid., 47.
[293] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2010), 23.
[294] Bhuta, "Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order."
[295] Brölmann and Nijman, "Personality," 679.
[296] Hobbes, *On the Citizen*; Hobbes, *Leviathan*; Armitage, "Hobbes and the Foundations of Modern International Thought"; In particular, see: Malcolm, *Aspects of Hobbes* for discussion on how Hobbesian conceptualization of natural law was built around the notion of self-preservation. However, it must be mentioned that Hobbes distinguished between just and unjust causes of fear. For, example, a large state shall not justly fear a smaller state and, in *De Cive*, Hobbes even advocated for carrying out intelligence operations between deciding to act.

possibility. The vocabulary related to emotional and legal disposition of individuals is thus projected upon the behavior of States represented by sovereigns. The person of the State, while fictional in nature, acts through the sovereign and incurs actions, rights and characteristics of natural persons. Fundamentally mortal, the State has as its objective to pursue self-preservation and *salus populi,* which can be loosely translated as the common good or public interest.[297] To resort to the language of psychoanalysis, the rationality possible within the State can be contrasted against the overarching void of the subconscious fear present in the state of nature. However, there is no therapy for States and the solace can only be found in subsuming the Other within the rational system of the Leviathan. Accordingly, any possibility of order is subservient to one's overarching desire for self-preservation: any agreement can be breached and any institution disbanded in order to allow for one's own survival.

Imago Dei Anthropology of Grotius

Hugo Grotius (1583–1645) offers us a very different image of 'Man.' Grotius's vision of human nature was embedded in his religious beliefs.[298] Hugo Grotius developed his conceptualizations of the law of nature and nations at the time of the Calvinist and Lutheran Reformations. Grotius adhered to Arminianism, a branch of Protestantism which featured an *imago Dei* doctrine which held that 'Man' was created in the image of God.[299] Accordingly, in Grotius's anthropology, 'Man' appears as a being created in the God's image and endowed with a mind (the 'intellectual faculty' or the 'faculty of reason') and with a free will which distinguishes him from animals.[300] Grotius wrote:

> *Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another; evidence on this point may be found in the many traits peculiar to the human species. But among the traits characteristic of man is an impelling desire*

[297] Hobbes, *Leviathan*, Part 2, Chapter XXX.
[298] Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium."
[299] Ibid., 92–93.
[300] For Grotius's views on human nature, see: Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium."

> *for society, that is, for the social life-not of any and every sort, but peaceful, and organized according to the measure of his intelligence […]*[301]

It is the ability to live by the rules that distinguishes human beings as creatures of *reason*.[302] Grotius understood reason as the ability of committing oneself to principles of sociability that are discoverable.[303] Human intelligence enables for a reasonable organization of human society and enables individuals to look beyond their immediate interest. It is the source of law which allows man to distinguish between agreeable and harmful actions.

Nijman writes: 'Grotius' conception of human nature was well-suited as a foundation for a theory of (universal) society and the law of nature and nations.'[304] The nature of 'Man' was to 'follow the direction of a well-tempered judgment, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse.'[305] Thanks to the capacities of reason, free will, sociability, and speech, humans can find and create law.[306] Human beings are seen to possess a law-making capacity, as well as a natural capacity to be bound by law. The 'Man,' created in the image of God, is able to control creation and to exercise dominion over the material world through reason.[307] He is less of a tragic actor in the Hobbesian vein and more of a free, social and responsible agent.[308] A human being is then both a law-giving creator and a subject of law who desires to be bound by rules. The acts dictated by reason as obligatory or unlawful were to be seen as commanded or forbidden by God himself.[309] Natural law would continue to apply even if there was no God, because it flows from the innate characteristic of a rational and sociable human being.[310] The circle around the principle

[301] Grotius, *On The Law of War and Peace*, Prolegomena, para. 6.
[302] Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition,'" 30.
[303] Ibid., 23.
[304] Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium," 89.
[305] Grotius, *On the Laws of War and Peace*, Prolegomena, para. 9.
[306] Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium," 100.
[307] Ibid., 105.
[308] Ibid., 93.
[309] Grotius, *On The Law of War and Peace*, Book I, Chapter I, s. X, 38–40; Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition,'" 31.
[310] Grotius, *On the Laws of War and Peace*, Prolegomena, para. 11.

of natural reason is complete as the rational 'Man' replaces the mystical conception of God. 'Law, with a capital L, reason, with a capital R, and man, with a capital M, make up a defunct Trinity' instead.[311]

It must be noted that Grotius did profess the overarching importance of self-interest and of self-preservation of the individual. Tuck argues that Grotius represented a proto-Hobbesian strand of thought.[312] However, for Grotius, the existence of a system of law and order did not need to stand in contraction with self-interest; on the contrary, it was a guarantee of the latter. The so-called 'Grotian tradition,' enshrined in the classic text of Hersch Lauterpacht, has been traditionally associated with the search for order of the 'rule of law' in the international sphere.[313] However, for the purpose of this chapter, I propose to follow Bhuta in thinking of Grotius as an exponent of a modern State theory on a par with that of Thomas Hobbes.[314]

State Theory of Grotius

Grotius has sometimes been presented as an exponent of a 'medieval idea in modern form,' who lacked a truly modern conceptualization of the State.[315] Tuck accuses Grotius of failing to locate the locus of sovereignty in a unitary organ that would be distinct from daily operations of government.[316] Bhuta disagrees with this assessment and argues that Grotius coined a State theory on a par with the conceptualization of the Leviathan by Thomas Hobbes.[317] Bhuta's contribution allows us to see a truly modern theory of the State hidden beneath the somewhat eclectic language of *De Jure Belli ac Pacis*.

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[311] Carty, *Postmodern Law: Enlightenment, Revolution and the Death of Man*, 2.
[312] For the minimalist interpretation of human sociability, see: Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 78–108. This interpretation of the work of the Dutchman was also shared by Rousseau and Kant.
[313] Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Year Book of International Law* 23 (1946): 1–53; Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition.'"
[314] Bhuta, "The State Theory of Grotius."
[315] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 85.
[316] Ibid.
[317] Bhuta, "The State Theory of Grotius."

Echoing the Greek idea of a *polis,* Grotius writes about the sovereign and perpetual civil society, the *civitas*.[318] For sovereign power (*majestas*) to be exercised and to permeate the whole body politic 'as the soul permeates the body,'[319] there must be 'an agency of rulership which has the capacity to substitute a decision as to the general will or interest, in place of the decision or judgment of the individual will of any subject.'[320] We observe the return of the phantom body of the King argument, which rests upon the assumption of anthropomorphic agency at the foundation of legal hierarchy. Grotius's society presupposes a hierarchy of subordination and an artificial unity of wills set in motion by the acts of the sovereign. Indeed, the 'comprehensive relationship of supremacy and subordination between a ruler and individual subject' forms the core of Grotius's State theory.[321] Interestingly, the enactments of sovereign power may well be 'distributed across different agencies of rulership;' what matters is 'the finality of an instance of decision.'[322]

In Grotius's theory, the functioning of the State is dependent upon its ability to produce and maintain legal-political unity. The latter does not have to be understood as power unified in a single organ or person. While commenting the work of Grotius, Bhuta writes of 'a complex composite unity of law, concrete political existence, and history' of a people in concrete time and place.[323] The law is 'in a State like the soul in a human body,' for it creates unity that accommodates for interests of pact-making individuals.[324] 'The State is a compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit.'[325] The People, by measure of a free covenant, the 'Spirit or Constitution of the People,' give a 'Breath of Life' to the

[318] Brett writes about the Aristotelean pedigree of the notion in: Annabel Brett, "The Space of Politics and the Space of War in Hugo Grotius's De Iure Belli Ac Pacis," *Global Intellectual History* 1, no. 1 (2016): 41. See: Bhuta, "The State Theory of Grotius," 2–3 for an argument on how the notion of *civitas* fits into the theory of the State.
[319] Otto von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, trans. Ernest Barker (Boston: Beacon Press, 1957), 55.
[320] Bhuta, "The State Theory of Grotius," 2.
[321] Ibid., 22.
[322] Ibid., 2.
[323] Ibid., 3.
[324] Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition,'" 44.
[325] Grotius, *The Rights of War and Peace*, Book I, Chapter I, s. 14; Grotius, Book I, Chapter III, s. 7.

complete association for political life.[326] This Spirit or Constitution defines the limits of the artificial body of the people as an integrated unity.[327] The unity so understood does not have to be reducible to one concrete instance of historical existence; rather, it can change over time and ever survive mass displacement of its biological members. In an echo of the scholastic notion of the *corpus mysticum* and of the phantom body of the King, we observe an attempt at describing secular civil community in terms of a 'body.'[328] Such designations lend themselves to organic imaginery and to anthropomorphic assumptions.

According to Grotius, the people have a capacity to generate sovereign power in their search for civil peace and prosperity.[329] Sovereign power is 'the natural-legal emanation of the unity of wills that is produced *historically*.'[330] The people retain the capacity to generate sovereignty even if they commit unjust acts, for 'a sick Body is yet a Body. A State, however distempered, is still a State, as long as it has Laws and Judgments.'[331] Grotius then conceptualizes State power through the analogy of the human eye:

> *As the Body is the common Subject of Sight, the Eye the proper; so the common Subject of Supreme Power is the State; which I have before called a perfect Society of Men [...] The proper Subject is one or more Persons, according to the Laws and Customs of each Nation.*[332]

We can observe the anthropomorphism apparent in this definition. While eyes may be necessary for me to see anything, my body is the ultimate subject of the sense of sight. Similarly, while we cannot have a State without a form of government, it is the sovereign State which acts and retains political identity over time, operating, as it were,

[326] Ibid., Book II, Chapter IX, s. 3.
[327] Bhuta, "The State Theory of Grotius," 34.
[328] Kantorowicz argues that the concept of the mystical body prevailing over time was taken from the domain of theology and applied to the State by jurists. E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, Princeton Classics (Princeton, NJ: Princeton University Press, 2016), 194, 261, 309; 'Baldus, for example, defined *populus*, the people, as a mystical body.' in: Kantorowicz, 210.
[329] Bhuta, "The State Theory of Grotius," 47.
[330] Ibid., 37.
[331] Grotius, *The Rights of War and Peace*, Book III, Chapter III, s. 2; Bhuta, "The State Theory of Grotius," 35.
[332] Ibid., Book I, Chapter III, s. 7.

through its subjects. The mask of the State is the source of supreme power, but it also needs to be enacted upon the world. Grotius builds upon the analogy of the globe as a theater, where the right of the sovereign to sovereign right resembles the right of theater goers to occupy their seats for the show.[333] Inherent to both Hobbesian and Grotian conceptualizations of the State is their performative character.

As long as it is independent, the State is free and sovereign.[334] Sovereignty (*summum imperium*) is a 'moral thing,' a *materia moralis* distinct from the natural world.[335] The unitary sovereignty and the relationships of hierarchy within the State are a human artifice validated by natural law to allow for large-scale cooperation.[336] We can observe the distinction between nature and society characteristic of the language of contract theory. While human society (including, for example, the family bonds) may have their distant origins in nature, sovereign power is characterized by its artificial nature.[337] Sovereign power is understood as the supreme unitary source of obligation and coercion, the final instance of decision subject to no other will.[338]

The notion of the State as an artificial unity of wills means that the State 'must be conceived of as something self-sufficient, which in itself constitutes a whole entity.'[339] In an echo of the 'Man' of the state of nature, the rational, free and sociable nations can be seen as analogous to human beings.[340] Bhuta argues that this conceptualization of State power is also crucial to Grotius's explanation why the power to wage war constitutes a

[333] Grotius, Book II, Chapter II, s. 2; Eyal Benvenisti, "The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks," *Theoretical Inquiries in Law* 16, no. 2 (2015): 537.
[334] In this context, it is particularly interesting to see how Grotius discussed the cessation of rights of property and of sovereignty by making a direct comparison between cases of dissolution of individual property rights, rights of family units and, finally, the dissolution of the *corpora artificialia* of the People. See: Grotius, *The Rights of War and Peace*, Book II, Chapter IX, s. 3.
[335] Bhuta, "The State Theory of Grotius," 23; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 624.
[336] Bhuta, "The State Theory of Grotius." Note that the language of divide between the natural and civil order is lost in the Grotian tradition of Lauterpacht.
[337] Ibid., 25.
[338] Ibid; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 636.
[339] Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine J. van Ittersum (Indianapolis: Liberty Fund, 2006), Chapter Vi, Question V, 65.
[340] Nijman, "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium," 101.

public right of the State, closely tied with the notion of subjecthood.[341] While the power to wage war resides in the supreme will of the self-sufficient State, the war itself is enacted by the proper subjects of this supreme power. 'The will of the whole in the respublica becomes a command for the individual' from whose perspective 'the command of *respublica* is justice itself.'[342] We can therefore see how individual human wills are delegated to the supreme will of the artificial State, a mechanistic amalgam of law, history and continuous political existence. The sovereign power is enacted by donning the mask of the State, which represents the supreme will and the finality of the sovereign decision.

Grotius's conceptualization of sovereignty rested upon the distinction between 1) sovereignty-itself and 2) the manner of holding sovereignty, derived from the Roman law.[343] In Grotius's reading, sovereignty is necessarily a legal phenomenon and a political force. As discussed earlier, the people possess the capacity of forming the common subject of sovereignty, the State. However, sovereign power also needs to be exercised as a performative 'mode of rulership'[344] by the proper subject of sovereignty: one or more persons acting as the sovereign. The proper, acting subject of sovereignty might differ and would depend on specific socio-historical arrangements of establishment of sovereign power for a given people and territory.[345] For example, Grotius famously disagreed with Bodin on the question of the role of Roman dictators. Grotius considered Roman dictators to be exercising sovereign power as long as they held their function.[346] What mattered was the fact that the dictator exercised sovereign power and issued supreme decisions which could not be annulled by any other body that would be supreme to his will.

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[341] Bhuta, "The State Theory of Grotius," 27.
[342] Ibid., 29.
[343] Ibid., 37; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 638.
[344] Bhuta, "The State Theory of Grotius," 37.
[345] Ibid., 38.
[346] Grotius, *The Rights of War and Peace*, Book I, Chapter III, s. 11; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 644; Bhuta, *The State Theory of Grotius*, 40; For a different interpretation, see: Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 70–72.

Grotius was sensitive to the importance of socio-historical arrangements in the practical operation of sovereignty. On the one hand, the People may have retained their ability to act as the sovereign. On the other hand, the King 'by an act of conquest or through contract of submission, may have acquired State-authority.'[347] Even patrimonial Kings, however, could not partition their kingdoms without consent. For the body-politic is formed by the covenant 'which can never be reasonably imagined to be such, as to invest the Body with a Power to cut off its own Members whenever it pleases, and to subject them to the Dominion of another.'[348] Different peoples could also share the same sovereign while retaining their particular identities:

> *For it is not in the moral Body, as 'tis in the natural, where one Head cannot belong to several Bodies; for there the same Person may be head, under a different Consideration, to several distinct Bodies; of which this is a certain Proof, that upon the Extinction of the reigning Family, the Sovereign Power reverts to each People.*[349]

This theoretical move, based on the argument about the nature of the political body, had far-reaching practical implications. It allowed Grotius to argue that the Netherlands retained a separate identity despite sharing a monarch with Spain.[350] While Hobbes used the language of the body to argue for centralization of all power in a single political community, Grotius allowed for the possibility of different political bodies coexisting under one head while retaining their separate identities. Contrary to Bodin, Grotius also argued that rulers were, in general, bound by the debts incurred by their predecessors.[351] A debt incurred 'by the people' would not cease simply because they found themselves ruled by a King, for 'the People are the same and they still retain a

[347] von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, 57.
[348] Grotius, *The Rights of War and Peace*, Book I, Chapter VI, s. 4; Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 81–82.
[349] Grotius, *The Rights of War and Peace*, Book I, Chapter III, s. 7; Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 78.
[350] Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 80.
[351] Ibid., 79.

Property in those Things that belonged to them as a People, and hold the Sovereignty too, tho' it be not exercised now by the Body, but the head.'[352]

In conclusion, given his sensibility towards the importance of historical and social arrangements:

> *Grotius finds no contradiction between the idea of sovereign power as founded in a unity of wills with no superior (in the sense of a generative force inherent in a community answering to no other), and the possibility of a dividing and tailoring of the rights of sovereignty (viz. the manner of holding) among different proper subjects.*[353]

Bhuta and Brett see the distinction between the common and proper subject of sovereignty and the possibility of division of rights of sovereignty as useful conceptual tools which can help dissect various entanglements and arrangements of sovereign power.[354] I now invite the reader to think with theories of Grotius and Hobbes about the performativity of the use of force in the international sphere of the present.

Performativity of State Theory: Thinking about Use of Force with Hobbes and Grotius

I now propose to think about the use of force through the performative categories of subjecthood and sovereignty discussed in this chapter. The exercise may appear eclectic at first. After all, I intend to project conceptual frameworks of early modernity unto a very different problem-set of our contemporary institutional infrastructure for the legitimate use of force. More so, I propose to think about the present world together with Hobbes and Grotius, the two thinkers whose views have been counterposed to each other. However, I believe that the *performative* character of State theories provides us with a conceptual linkage between historical conceptualizations of sovereignty and the problem-situations of today. Bhuta writes: 'state-concepts and state-theories are

[352] Grotius, *The Rights of War and Peace*, Book II, Chapter IX, s. 8; Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy*, 79–80.
[353] Bhuta, "The State Theory of Grotius," 43.
[354] Ibid., 41; Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 643.

worthy of specific attention because their performative character allows them to have a (potentially) significant role in shaping social reality.' He echoes Straumann in claiming that revisiting conceptual matrices of the past can grant us 'a better position to free ourselves from our own context and not remain trapped in our own assumptions.'[355] Given our present problem-situation of apparently reclining state power, of legal entanglements and fragmentations, I submit that the reevaluation of our doctrinal assumptions is due. I therefore invite the reader to join me in thinking creatively about the performative character of State power in relation to the use of force.

The conceptual matrices of Hobbes and Grotius can then help us revisit the arguments about the formation of the subjects of international law and about their sovereignty (and the corollary 'right' to war) as the ultimate instance of decision. I choose the subject of international use of force as the purest emanation of sovereign power. Modern international legal discourse passes over the questions of normative foundation of authority in silence. By doing so, international law ignores that 'international intervention necessarily recognizes some claimants to authority rather than others, and systematically privileges certain institutional forms and practices.'[356] The use of force, together with the notions of international recognition and international legal personality, point our attention towards the fact that collective entities tend to construct themselves in opposition to each other.[357]

The rhetoric of self-defense enshrined in Art. 51 of the UN Charter could be seen as mirroring the Hobbesian and Grotian emphasis on self-help: 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.' The language of 'inherent right' echoes the natural right which belongs to the 'Man' in the state of nature, presumed to be a self-sufficient and fundamentally self-protective being, who only attacks in order to forestall the potential

[355] Straumann, "The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality," 166.
[356] Orford, *International Authority and the Responsibility to Protect*, 195.
[357] Klabbers, "The Concept of Legal Personality."

attack of an enemy.[358] The States, too, are deemed as juridically equal, self-contained rational units which recognize each other in the posture of war. The *Nuclear Weapons* Advisory Opinion saw the ICJ discuss 'the fundamental right of every State to survival.'[359] But who is to decide on the course of conduct conducive to State's survival? We are reminded of the swings of the pendulum[360] and of the fact that the substantive resolution of these paradoxes is deferred elsewhere: 'into further procedure, interpretation, equity, context, and so on.'[361]

When discussing the use of force between two equal States, we speak of conventional enmity in the Schmittian sense. The States are deemed as juridically equal, self-contained units which recognize each other in the posture of war: the sovereign States confront each other as in a duel between two Victorian gentlemen. They bear uniforms or insignia testifying to their equal status. The very possibility of engaging in argumentative practice before the International Court of Justice is a mark of distinction and of recognition of the status of parties to the dispute, of belonging to the club of sovereigns who bear the masks of juridically equal States. Dispute settlement between the sovereigns can then be seen as a performative way of asserting one's own status and reproducing power dynamics on the stage of international legal drama.

Another instance of the use of force envisaged by international law is the military action authorized by the Security Council under Chapter VII of the UN Charter. The possibility of joint action under auspices of the Charter fits less squarely within the vocabularies of Hobbes, who offers a monistic view of sovereignty. The 'existence of any threat to the peace, breach of the peace, or act of aggression' would be treated as a state of emergency which would determine who is the real bearer of the mask of sovereign power – and there could only be one ultimate seat of such power. Meanwhile, the language of Grotius allows us to distinguish between the common subject of

[358] Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, 130.
[359] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 96-97.
[360] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).
[361] Martti Koskenniemi, "The Politics of International Law," *European Journal of International Law* 1 (1990): 28.

sovereignty (thing-itself) and the proper subject of sovereignty (the exercise of sovereign power). It follows that when the UN authorizes intervention on a territory of a given State, the coalition acting under UN auspices could be seen as exercising sovereign power for the population in question – of being the proper subject of sovereignty.[362] Meanwhile, the population of a State subject to intervention could retain their status as the common subject of sovereignty. Modern international law appears to reflect similar divisions. As stated in the ICJ's Advisory Opinion on Kosovo, in the UNSC Resolution 1244 (1999),

> *the Security Council, "determined to resolve the grave humanitarian situation" which it had identified (…) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo . . . which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions"*[363]

Sovereignty can then be understood as consisting of bundles of entitlements which can be disentangled and allocated between different actors. While the population of a State/territory in question can be the common subject who has claims to the mask of sovereignty, the mask is taken up by the proper subject(s) who exercise sovereign power and are thus deemed sovereign for the duration of their office.[364] There can be no escape from politics on 'humanitarian' grounds: what matters is the finality of sovereign decisions over a given people and territory.

Having looked at the use of force between States, let us consider a more contemporary instance of international exercise of violence: a situation where State A intervenes in the territory of State B by means of drone strikes to carry out an 'anti-terrorist' campaign.

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[362] Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 643.
[363] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para. 58.
[364] Brett, "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius," 643.

Clearly, neither Grotius nor Hobbes could predict the technologically advanced realities of modern warfare. However, using their vocabularies can help us rethink our own disciplinary assumptions and sensibilities in the times of accelerating fragmentation of law. The vocabularies of the two early modern thinkers can be employed to revisit the revisionist modern legal arguments concerning the 'police action' using drone strikes and to retrace the formation of 'persons' through international legal discourse. Hardt and Negri remind us that in the postmodern world, 'war is reduced to the status of police action.'[365] Bhuta writes:

> *This technical-functional terminology of state-ness has started to penetrate the categories of international law governing state sovereignty, with an accelerating willingness to accept the idea that weak states of a certain kind (those 'unable or unwilling' to control non-state terrorist groups on their territory) may be subject to the lawful use of military force against them, through tactics such as drone strikes.*[366]

The modern arguments about legality of the use of drone strikes follow a revisionist interpretation of the right to self-defense.[367] According to this interpretation, the threat emanates from the existence of a terrorist network on a territory of a state 'unwilling or unable' to eradicate them. The technologically superior State A is deemed to exercise its right to self-defense when it intervenes on the territory of State B by means of 'surgical' drone strikes.[368] These interpretations could be seen in parallel to the early modern conceptualizations of natural law, whose only limitations were those dictated by the prospect of one's own self-preservation. As the social structure of the State is the highest order of rationality possible in the international sphere, an entity deemed 'fragile' or 'unable' to prevent operation of outlaws on its territory is presumed to fail in establishing state-ness as a matter of technical achievement. Any entity incapable of

[365] Hardt and Negri, *Empire*, 12.
[366] Bhuta, "The State Theory of Grotius," 8.
[367] Theresa Reinhold, "State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11," *American Journal of International Law* 105, no. 244–286 (2011): 278–79.
[368] For an array of legal and ethical considerations concerning autonomous drones, see: Nehal Bhuta et al., *Autonomous Weapons Systems: Law, Ethics, Policy* (Cambridge: Cambridge University Press, 2016).

establishing statehood is thus delegated to the realm of 'nature' and becomes a passive space for policing operations.[369]

Hobbesian vocabulary on personhood and its subsequent appropriation by Carl Schmitt can then help us retrace formation of subjects and objects of law within the dynamics of a technologically advanced armed conflict against terrorists. It is no surprise that it was Carl Schmitt, an avid consumer of Hobbesian State theory, who distinguished the figure of the 'absolute enemy.'[370] The notion of the absolute enemy originates in the revolutionary setting of class warfare.[371] It evolves with the technical-industrial development of mankind, as new weapons produce new kinds of absolute enmity.[372] However, 'it is not in fact the means of destruction that annihilate, but men who kill other men by these means.'[373] Schmitt wrote that supra-conventional weapons call for a supra-conventional 'Man.'[374] Those who possess technologically advanced weapons experience compulsion to protect their community by annihilating 'the enemy.' Within the Hobbesian framework, all rationality is only possible within the confines of the State: 'the political world is a pluriverse, not a universe.'[375] The forces of the Leviathan can thus be harnessed to dehumanize its adversaries, to present them as enemies of mankind, as *hostes humani generis*, whose mere existence is an insult to civilization.[376] The appropriation of 'humanity' by one side necessarily reduces the enemy to humanity's antithesis; the discriminatory dichotomy results in the enemy being seen as an outlaw, as a mere object upon which violence is to be inserted.[377]

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[369] Reinhold, "State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11," 277–84.
[370] Howse, "Schmitt, Schmitteanism and Contemporary International Legal Theory."
[371] Schmitt credited Lenin with the making of the 'absolute enemy.' In: Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, 66.
[372] Edward Fairhead, "Carl Schmitt's Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama's Enemy," *Journal for Cultural Research* 22, no. 1 (2018): 41.
[373] Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, 66.
[374] Ibid., 67.
[375] Carl Schmitt, *The Concept of the Political*, trans. George Schwab, Expanded Edition (Chicago: The University off Chicago Press, 2007), 82.
[376] Ibid., 54; Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, 67.
[377] Fairhead, "Carl Schmitt's Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama's Enemy," 42.

The technological practice of war produces the image of the enemy to be annihilated. Leander writes about the role of drones in the formation of legal expertise.[378] Drones, too, can be seen to possess agency: as non-human actants, they generate meaning and have 'performative' effects.[379] Leander writes that the technological agency of the drone is entangled in co-constitution of legal expertise and the determination of who is to count as a legal expert.[380] Drones can also generate legal interpretations – while the human operator behind the drone is supposed to know the law and to be bound by it, the 'human in the loop' is often so distant and detached that it is up to the drone to generate meaning and to perform legal evaluations.[381]

Donna Haraway has famously described the 'god-trick' of Western scientific epistemologies: the apparent ability to perceive from a disembodied God's point of view as part of the logic of technologically-advanced militarism.[382] The depictions of the unblinking, God-like vision of the drone situate the machine as the sovereign, the one who decides over life and death, able to see the entire world and into the past and future.[383] Seen from this perspective, human bodies only appear as targets, dead or dying, if they appear at all.[384] To cite Haraway, 'what counts as human and as non-human is not given by definition, but only by relation, by engagement in situated, worldly encounters, where boundaries take shape and categories sediment.'[385]

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[378] Anna Leander, "Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program," *Leiden Journal of International Law* 26, no. 4 (2013): 811–32.
[379] Ibid; Holmqvist also proposes to think about agentic capacity of drones in terms of 'embodied performances' by virtue of their 'superhuman' qualities. In: Caroline Holmqvist, "Undoing War: War Ontologies and the Materiality of Drone Warfare," *Millennium: Journal of International Studies* 41, no. 3 (2013): 545.
[380] Leander, "Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program," 813.
[381] Ibid., 822.
[382] Donna Haraway, "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective," *Feminist Studies* 14, no. 3 (1988): 575–99.
[383] Grégoire Chamayou, *A Theory of the Drone*, trans. Janet Lloyd (New York: The New Press, 2015); Lauren B. Wilcox, "Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare," *Security Dialogue* 48, no. 1 (2016): 13; Holmqvist, "Undoing War: War Ontologies and the Materiality of Drone Warfare," 545.
[384] Derek Gregory, "From a View to a Kill: Drones and Late Modern War," *Theory, Culture & Society* 28, no. 7–8 (2011): 118–215.
[385] Donna Haraway, "A Game of Cat's Cradle: Science Studies, Feminist Theory, Cultural Studies," *Configurations* 2, no. 1 (1994): 64.

Fairhead analyzes the dynamics between drone operators and their targets.[386] In a drone strike, the enemy is reproduced via the vision of the drone camera and immediately destroyed by its missile.[387] There is hardly any temporal break between the identification and destruction of the enemy. The image of the enemy is fluid, constantly transgressing any easily discernible boundaries between the 'civilian' and the 'combatant' in the vision of the camera and in the operation of algorithms.[388] The data collected to identify enemies and to green-light drone strikes is digital and sometimes completely devoid of a human element: 'what is often being targeted is not in fact a person but non-human objects like a mobile phone.'[389] As noted by Wilcox, the signature strikes carried out by drones are not necessarily aimed at pre-defined individuals; rather, they concern 'packages of information that become icons for killable bodies on the basis of behavior analysis and a logic of preemption.'[390]

The enemy is thus pushed to the point of maximum abstraction, as biological characteristics and personal identity give way to technological attributes such as the number of a SIM card and its corresponding grid reference. It is in these moments preceding the lethal strike that the logic of the language of 'mortal Gods' and the exclusionary nature of the notion of 'Man' are particularly visible. Drone operators testify to feeling like Gods hurling thunderbolts from afar, while the target is dehumanized and reduced to a 'grid location,' with its destruction comparable to a bugsplat – thus delegating the enemy to the domain of 'nature.'[391] The technical language of the law, together with the technology of the drone, is harnessed to divide actors into Gods and grids. The Gods exert power upon the grids in the performative

[386] Fairhead, "Carl Schmitt's Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama's Enemy."
[387] Ibid., 40.
[388] Ibid., 42.
[389] Ibid., 45.
[390] Wilcox, "Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare," 16.
[391] Fairhead, "Carl Schmitt's Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama's Enemy," 49; Joseph Pugliese, *State Violence and the Execution of Law: Torture, Black Sites, Drones* (New York: Routledge, 2014), 193.

practice aimed at reenactment and reproduction of power relations between subjects and objects of the legal discourse.

These examples testify to the weight of repercussions flowing from the discursive creation of persons of international law and the performative reenactments of State power. Only select actors can wear the mask of sovereign power and their capacity to do so depends on historical arrangements of power sustained by material and digital infrastructure. The sovereign decision to exert force is based upon the assumption that there exists a whole class of passive objects upon whom sovereign power can be exercised. Violence exercised in this frame is performative in nature: it is exercised in order to reproduce and uphold distinctions between persons and non-persons, between, on the one hand, subjects wearing the mask of mortal gods and, on the other hand, passive objects relegated to the domain of 'nature.' The drone targets an outlaw – subject, verb, object.

Chapter conclusion

Early modern theory of the State relied upon a specific type of anthropomorphism: while portraying the State as a mechanistic person, it employed a performative conceptualization of sovereign power. For the fictitious person of the State to act, it had to be represented by real persons who would bear the mask of sovereignty and act on its behalf. I argued that the performative character of State theory serves to create, uphold and reproduce power relations between the subjects and objects of law.

In their search for the protagonists of natural law, Thomas Hobbes and Hugo Grotius made a fair dose of anthropomorphic claims and coined influential vocabularies about the nature of 'Man,' the law, and the mechanistic State. The discursive creation of persons of law was achieved through the language of natural law and social contract, based upon a set of binaries: nature and society, fear and reason, subjects and objects of law. According to this conceptualization, the figure of natural 'Man' and the person of

the 'State' existed on two different ends of a circular argument about the nature of sovereign power, with the two images informing each other.

The image of natural 'Man' which makes its appearance in the work of Hobbes is based on the assumption that the natural individual acts fearfully when faced with the conflict of rights in the state of nature. To escape the brutish state of nature, men covenant with each other to establish the State. The Hobbesian *Leviathan*, created by means of social contract, provides individuals with security and retains a unified identity over time, as it continues to incur rights and duties over time. Meanwhile, to act in the world, the State has to be represented by the figure of the sovereign, who dons the mask of the State to represent it and to act on its behalf.

However, the mask of the State also displays anthropomorphic qualities of its own: according to the Schmittian reading of Hobbes, different Leviathans exist in a state of constant war-readiness, as they recognize each other as equal rivals. I gave an example of the use of force under UN Charter, which presents States as equal gentlemen sorting out their disputes by means of a duel. Meanwhile, as long as it is the role of each Leviathan to define 'right' and 'truth,' an entity which does not display sufficient characteristics of statehood may be relegated to the domain of nature and deemed a passive space of intervention. In this context, it is worth highlighting that the early modern theory of the State came to fruition at the time of bourgeoning colonial enterprises of European States, which were eager to use the new conceptual tools to their advantage.

It is then unsurprising that it was Carl Schmitt, an avid reader of Hobbes, who anticipated the notions of absolute enmity and the dehumanization of outlaws, which we analyzed in the closing of this chapter. I discussed how notions of enmity developed by Carl Schmitt, coupled with the arguments about material agency of drones, can be used to analyze the dynamic inherent in 'targeted killing.' In a revisionist legal argument concerning drone strikes, sovereign power manifests itself in the

dehumanization of the enemy relegated to the domain of 'nature.' The material agency and legal expertise become entangled in the formation of subjects and upholding of distinctions of international law. Entities which are not deemed equal participants in international legal drama are relegated to the domain of 'nature,' seen as passive objects for intervention. The anthropomorphic vocabularies and binaries of Hobbes and Schmitt can assist us in retracing the formation of legal subjects and allow us to revisit our own assumptions about subjects and objects of law.

Hugo Grotius offers a different conceptualization. The free, independent and responsible 'Man' is created in the image of God. He is a sociable creature and his faculty of reason allows him to establish a political community, the *civitas*, with other men. Grotius, too, can be read as an exponent of an early modern theory of the State. In his search for the person bearing the mask of sovereignty, he offers a view of sovereign power that is not monist (as is Hobbes's) but allows for a distinction between the common subject and proper subject of sovereignty. Grotius's view of sovereignty is better understood as a form of energy, for it permeates the body politic as the soul permeates the human body. This conceptualization is illustrated by an anthropomorphic allegory of an eye and the sense of sight, which relies upon distinction between sovereignty-itself and the manner of holding it. This argument relies on the different conceptualizations of the political 'body' discussed in this chapter. While Hobbes used the body of the Leviathan to illustrate the subjugation of the bodies of the individuals to the protective and unifying force of the State, Grotius argued that that the political bodies differ from the biological ones in that multiple political bodies can have the same head (the sovereign), while retaining their individual identities.

Grotian vocabulary can be useful in analyzing bundles and entanglements of sovereignty characteristic of our times. I gave an example of the UN-imposed territorial administration which exercises sovereign rights for the population and territory for a limited period of time. While the proper subject of sovereignty is the one who dons the

mask of sovereignty, the population at stake can remain the common subject of sovereignty. We are reminded of the dichotomy between the biological and the phantom bodies of the King.

I now turn to discuss how legal theory has moved beyond the language of performance in its description of the State. In the next chapter, I discuss how the mask of the sovereign has become independent of the identity of its biological holder, as we observe the appearance of a separate, autonomous entity: the person of the State.

Chapter II

The Moral Person of the State: The Anthropomorphic Subject of the Law of Nations

Les Nations, ou Etats, sont des Corps Politiques, des Sociétés d'hommes unis ensemble pour procurer leur salut & leur avantage, à forces réunies. Une pareille société a les affaires & les intérêts, elle délibére & prend des résolutions en commun; & par là elle devient une Personne morale, qui a son Entendement & la Volonté propre & qui est capable d'Obligations & de Droits.

– Emer de Vattel, *Le Droit des gens*.[392]

Introduction

In the previous chapter, we have discussed the early modern theories of the State and their performative character. The performativity of theories of Hobbes and Grotius could be explained with a theatrical allegory of an actor donning the mask of the State to exercise sovereign power. According to this line of reasoning, the State appeared as a separate, albeit fictitious, person. The very fact of separation of the identity of the mask of the State from the identity of the actor behind the mask gave way to attribution of anthropomorphic qualities to the State. However, the State still needed to be represented by the person of the sovereign in order to act in the world.

In this chapter, I discuss how the abstract State became the main subject of rights and duties under the law of nations. In particular, I trace how theorists of the law of nations, such as Samuel von Pufendorf, Christian Wolff and Emer de Vattel, have used the term 'moral person' to describe the State and to vest it with psychological faculties (will, intellect and conscience) of its own. I study the role of these faculties in constructing the

[392] Emer Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle* (Indianapolis: Liberty Fund, 1758), Préliminaires, https://oll.libertyfund.org/titles/vattel-le-droit-des-gens-ou-principes-de-la-loi-naturelle-vol-1.

image of the moral person of the State and in explaining the functioning of legal obligations under the law of nations.

In 1917, while deploring the residues of anthropomorphic thought in international law, Edwin DeWitt Dickinson acknowledged the debt owned by international lawyers to the analogy between natural persons and the persons who compose international society:

> *An examination of the writings of the great publicists, particularly those of the seventeenth and eighteenth centuries, reveals something of the extent to which we are indebted to this analogy for almost everything that is regarded as fundamental in modern international law. Such a study shows that the analogy has had a significant influence in contributing to determine (1) our conception of the nature of international society, (2) our conception of the nature of the persons who compose that society, (3) our conception of the nature of the law applicable to that society, (4) the actual content of that law, and (5) the classification of the content of that law.*[393]

In their attempts to formulate a theory of international legal obligations, the 'great publicists of seventeenth and eighteen century' such as Pufendorf, Leibniz, Wolff and Vattel have employed the analogy between the natural person and the 'person' of the State. In this chapter, I follow the transition towards the view of the State as a distinct and autonomous subject of the law of nations and unpack the baggage of anthropomorphic assumptions accumulated along the way.

This chapter purports to address the following questions: 1) what were the different conceptualizations of personhood of the State employed by the publicists of the law of nations? 2) How did the early modern thinkers come to regard the State as the holder of international legal personality, the subject and the holder of rights and duties under the law of nations? Finally, 3) what was the role of anthropomorphic assumptions about the faculties of the State in the writings of the aforementioned jurists?

[393] Edwin DeWitt Dickinson, "The Analogy between Natural Persons and International Persons in the Law of Nations," *The Yale Law Journal* 26, no. 7 (1917): 564–91.

To answer these questions, I start by studying the notion of a 'moral person' employed by Pufendorf. Samuel von Pufendorf is sometimes characterized as a disciple of Hobbes in the lands of the Holy Roman Empire.[394] However, I choose to build upon the notion of 'facultative sovereignty' developed by Holland[395] to describe the distinct theory of sovereignty conceptualized by Pufendorf and to compare Pufendorf's notion of a 'moral person' against performative views of personhood discussed in the previous chapter. I then trace how the theorists of the law of nations have applied faculty psychology, previously applicable to individual human beings, to the increasingly abstract 'person' of State. I argue that, in the hands of Christian Wolff, influenced by both Leibniz and Pufendorf, the language of facultative sovereignty provided a distinct basis of obligation under the law of nations and became directly applicable to the State as a person and the main subject of the law of nations.

The tendency to treat the State as a distinct 'person,' subject to another set of obligations, has reached its logical conclusion in the works of Emer de Vattel, who built upon and popularized Wolff's distinction between law applicable to individuals and law applicable to States *qua* moral persons. In the works of Vattel, the person of the State becomes fully liberated as an abstract, independent entity with a capacity to engage in legal actions. The State became the main protagonist of the drama of international law, as the mask subsumes the identity of biological individuals who act on its behalf. Vattel's work did not spring up from an ahistorical void, however, nor did it have a singular origin; instead, Vattel borrowed the anthropomorphic vocabularies from Pufendorf and Wolff, among others, and adapted them to explain the basis of obligation under the law of nations. For these reasons, a genealogy of the treatment of the State as a moral person is due.

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[394] Fiammetta Palladini, "Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of Socialitas," *History of European Ideas* 34 (2008): 26–60.

[395] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*; Ben Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," *History of Political Thought* 33, no. 3 (2012): 427–54; Ben Holland, "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order," *History of European Ideas* 37, no. 4 (2012): 438–45.

The allegory of the 'person' of the State relies on the assumption that there exists an entity which possesses a stable identity and continues to incur rights and duties over time and beyond the lifespan of biological individuals. The working hypothesis for this chapter is that both naturalist and positivist lines of legal argument are founded upon anthropomorphic assumptions. Natural law presupposes a set of international norms which can be uncovered by reason. The positivist approach relies on the anthropomorphic notions of voluntary consent and good faith to explain the functioning of international obligations. The genealogical approach employed in this thesis allows me to focus on fluctuation and contingency which mark the flows and accumulation of anthropomorphic vocabularies over time, while remaining attentive to intellectual and political context surrounding the anthropomorphic analogy.[396]

Last but not least, in the chapter, I will analyze the role of anthropomorphic assumptions about the faculties of the State. In the treatises of the law of nations, the State appears as a being capable of exercising *will,* of *knowing* the law and *consenting* to legal obligations. Modern international lawyers would instinctively look down on any attempts to ascribe intentions and knowledge directly to the State.[397] The mainstream dogma is that all cognitive capacities of the State can ultimately be reduced to the psychological dispositions of the individuals forming that State: the biological holders of sovereign power who are assumed to be the ones who *really* engage in all the acting and thinking.[398] However, the mainstream reduction of the State to the acts and

[396] I draw inspiration from Koskenniemi who proposes to experiment with 'a type of legal–historical writing that takes seriously the thesis of law as a "language" and the task of the lawyer as "bricolage" – trying to construct a persuasive argument from the bits and pieces of authoritative language lying about in the appropriate professional context.' In Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition,'" 24.

[397] In line with the Nuremberg dictum that 'crimes against international law are committed by men, not by abstract entities.' The Trial of Major War Criminals before the International Military Tribunal Nuremberg. *International Military Tribunal*, 14 Now 1945 – 1 Oct 1946. Published at Nuremberg, 1947, 447. Allott writes: 'The subjects of international law are states but only in the sense that the present conceptual structure of international law attaches legal rights and duties to the category "state." The subjects of international law, in the sense of the persons whose behavior is conditioned by the law, are government officials who implement those rights and duties and also the citizens who may have to pay for such implementation with their possessions or their lives' in Philip Allott, "State Responsibility and the Unmaking of International Law," *Harvard International Law Journal* 29, no. 1 (1988): 14.

[398] The practical implications of such view were discussed in the context of dual responsibility for international crimes. Milanovic writes: 'The question of how genocidal intent is to be attributed to a state is a very simple one: one does not have to.' In Marko Milanovic, "State Responsibility for Genocide," *The European Journal of*

dispositions of its functionaries ignores the paradoxes flowing from the fact that the State is the main dramatic actor in the spectacle of international law and that the notion of the 'State' and of the 'individual' exist in constant dramatic tension. Hidden beyond the veil of abstraction, the anthropomorphic vocabularies continue to be used to describe the State.

In order to explain the functioning of anthropomorphic vocabularies relating to faculties of the State, I have recourse to the notion of intentional stances developed by Daniel Dennett.[399] Tollefsen notes: 'In everyday discourse and in the context of social scientific research we often attribute […] beliefs, desires, and other intentional states to groups.'[400] Intentional stances are not, as the Cartesian picture would dictate, internal processes within one's mind; rather, they can be seen as states or systems of thought that are attributed to unitary entities (such as States) to make sense of their behavior. This is particularly relevant in the context of the treatises of the law of nations, which often referred to *knowledge, beliefs, intentions,* of collective, abstract entities. I give an example of the subjective element in the formation of customary law in order to explain the continuous importance of anthropomorphic assumptions about the State.

I thus propose to trace how theorists of the law of nations had recourse to the analogy between the natural person and the State to explain the operation of international obligations and the scope of legitimate international action. The genealogy proposed in this chapter is intended to show how the State accumulated anthropomorphic qualities ascribed to it by jurists over the course of time and how these anthropomorphic vocabularies continue to be relevant. When the (capital S) State became a functionally independent actor depicted in *Le droit des gens* of Emmer de Vattel, it was ready to take the role of the main actor on the stage of international legal drama.

International Law 17, no. 3 (2006); Nina Jørgensen, "State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty," *American Journal of International Law* 108, no. 4 (2014): 745; Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?," *The European Journal of International Law* 18, no. 4 (2007).

[399] Daniel Dennett, *The Intentional Stance* (Cambridge, Massachusetts: MIT Press, 1987); Deborah Tollefsen, "Collective Intentionality and the Social Sciences," *Philosophy of the Social Sciences* 25 (2002).

[400] Tollefsen, "Collective Intentionality and the Social Sciences," 26.

I now turn to analyze the transfer and adaptation of anthropomorphic vocabularies in the works of Pufendorf, Leibniz, Wolff and Vattel.

Pufendorf's and the Facultative Theory of Sovereignty

An important development in the history of the anthropomorphic thought occurred in the works of Samuel von Pufendorf (1632–1694). Having witnessed the destruction of the Thirty Years' War, Pufendorf responded by creating a language of government by law, with an important role reserved for the law of nations.[401] While doing so, he created a sociological account of an international community based on the pursuit of self-love by individuals.[402] Coming from a family of a Lutheran priest, Pufendorf saw humanity as a sinful race, whose individual members were unable to see reason clearly. 'Man' Pufendorf wrote, 'is an animal with an intense concern for his own preservation.'[403] He recognized the natural weakness (*imbecillitas*) of men at the early stages of their lives: 'it would be something of a miracle, if he came through to maturity without the help of other men, since even now when so many things have been discovered to relieve men's needs, a careful training of several years is required to enable a person to get his food and clothing by his own efforts.'[404] The need to have laws and for the sovereign to enforce them flows from this natural weakness of 'Man.' Reason, Pufendorf argued, would lead human beings to surmount their inherent weaknesses and to cultivate their sociability by establishing a political community that would realize their interests.[405]

[401] Koskenniemi compares Pufendorf's contribution to the Foucauldian notion of governmentality, the rule of technical discourses that appear to bring about security and well–being of population. See: Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European Journal of International Relations* 15, no. 3 (2009): 414; Ian Hunter, "The Figure of Man and the Territorialisation of Justice in 'Enlightenment' Natural Law: Pufendorf and Vattel," *Intellectual History Review* 23, no. 3 (2013): 289–307.
[402] Koskenniemi, "International Community from Dante to Vattel," 61–65.
[403] Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. James Tully, trans. Michael Silverthorne (Cambridge: Cambridge University Press, 1991), Book I, Chapter 3, s. VII.
[404] Ibid., Book I, Chapter 3, s. III.
[405] Ibid., Book I, Chapter 3, s. VII-IX.

Due to his interest in self-preservation, Pufendorf is sometimes presented as a disciple of Hobbes in the German lands of the Holy Roman Empire.[406] While certainly inspired by the conceptual work of the English philosopher, Pufendorf disagreed with Hobbes's account of personhood. I propose to follow Holland in treating Pufendorf as a proponent of the theory of 'facultative sovereignty,' which sought to limit the scope of legitimate sovereign action by employing the allegory of the human mind.[407]

In Pufendorf's writings, the State appeared as a moral person, established through the union of wills of covenanting individuals.[408] The term 'moral person' reflects the taxonomy used by Pufendorf to describe social and physical realms.[409] Pufendorf distinguished between moral and physical entities; just as physical substances interact within a physical space, moral persons operate within the moral or the legal realm. Pufendorf argued that entities to which moral laws apply could then be seen as objects of analysis analogous to the substances examined by natural science. The notion of 'moral person' could refer either to an individual or to the State (a compound or composite moral person).[410] It was used to refer to the new object of analysis of moral science.[411] Pufendorf wrote:

> *As Natural Bodies continue the Same, although in length of Time, by flow and silent degrees they receive a considerable alteration from the various accessions and desertions of their Particles; so by the particular Succession of Individuals, the Identity of the Compound [Moral] Person is not injur'd*[412]

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[406] Palladini, "Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of Socialitas"; Kalmo and Skinner, "The Sovereign State: A Genealogy," 38.
[407] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 65–66; Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State."
[408] Samuel Pufendorf, *Of the Law of Nature and Nations: Eight Books*, ed. Jean Barbeyrac, trans. Basil Kennett, 4th Edition (London: Printed for J. Walthoe et al., 1729), Book VII. In Chapters I & II of Book VII the author deduces the necessity of a covenant from human nature.
[409] Ibid., Book I, Chapter I, 'Of the Origin and Variety of Moral Entities,' especially s. XII–XVI.
[410] Ibid., Book I, Chapter I, s. 12 & 13.
[411] Holland, "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order," 438. Characteristically, Pufendorf saw morality as reified within the working of a functional legal system. See: Michael Nutkiewicz, "Samuel Pufendorf: Obligation as the Basis of the State."
[412] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter I, s. XIII.

Although individuals forming the State may come and go, the identity of the moral person of the State prevails and continues throughout time. Faculty psychology, which had been used to describe the constitution mind of free persons, found its application in relation to the moral person of the State.[413]

Pufendorf's notion of personhood thus differed from the performative concept of personhood employed by Hobbes. Stemming from the tradition of Stoic and Christian thought, Pufendorf's notion of personhood relied on the possession of the intellect and will.[414] Pufendorf's composite moral person of the State was to be understood as 'one Person, endued with Understanding and Will.'[415] This was no longer a merely performative act of enacting a 'fictitious person' upon the world. Instead, Pufendorf's moral persons formed unified identities and centers of choice and action, which could be understood in direct analogy to natural persons.[416] An important conceptual difference regarded the treatment of inanimate objects: Pufendorf explicitly criticized the Hobbesian notion of personhood 'by fiction,' which allowed for representation of objects such as churches, hospitals or bridges.[417]

Instead, in Pufendorf's view, the action of the State, like that of any biological person, was made possible by the very fact that it possessed a separate intellect and will, modeled after a free individual.[418] In his work *Of the Law of Nature and of Nations* (1672), Pufendorf discussed the role of faculties of intellect and will in determining moral action.[419] The choice of intellect and will as two faculties of human being was drawn from the long tradition of scholastic debate. In the high Middle Ages, a debate raged concerning the primacy of either of the two faculties in determining freedom of action

[413] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 80–85.
[414] Fleming calls it an 'intrinsicist' approach to personhood, in: Fleming, *Leviathan on a Leash: A Theory of State Responsibility*, 12.
[415] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book VII, Chapter II, s. XIII; Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," 444.
[416] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 65.
[417] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter I, s. XII.
[418] Ibid.
[419] Ibid., Book I, Chapter III discusses the 'understanding,' while Chapter IV addresses the 'will' of man.

of individuals.[420] On the one hand, for the 'intellectualists,' true freedom of human beings comprised of acting in accordance with dictates of reason. Reason was to be discovered by the faculty of the intellect and irrational action was deemed contrary to the notion of individual freedom. On the other hand, the 'voluntarists' argued that any freedom should involve choice, even if that entailed a choice to opt for an irrational course of action. Pufendorf employed the vocabulary of a medieval dispute to serve new goals; he transposed the language of faculties of individuals unto his conceptualization of the powers of the State. The staunchly protestant Pufendorf ended up sharing the views of Francisco Suárez (1548–1617), a Jesuit priest opposed to reformation, on the role of the intellect and will.[421] According to the faculty psychology of Suárez, to which Pufendorf subscribed (although without citing the Jesuit explicitly), the will could only elicit an act if some reason was presented to it through the interface of the intellect.[422] The will would not result in an act if a sufficient reason was to be absent. Therefore, the intellect was seen as the *conditio sine qua non* of the acts of will. This conceptual framework was to be projected upon the actions of the State.

Pufendorf's conceptualization of the legitimate action of the State could be understood in analogy to moral action of individuals.[423] To achieve security, individual wills of the citizens needed to be submitted to the single will of the moral person of the State.[424] The *will* of the State constituted the locus of sovereignty and it was to be exercised through the will of the King. However, the will could only be exercised within the conditions of possibility set by the council of the people, who would decide whether a given course of

[420] Holland, "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order," 439.
[421] Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," 428–29; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 73; Francisco Suárez, *On Efficient Causality: Metaphysical Disputations 17, 18, and 19*, trans. Alfred J. Freddoso (New Haven: Yale University Press, 1994), Disputation 19. See also the editor's introduction 'Suárez on Metaphysical Inquiry, Efficient Causality, and Divine Action.'
[422] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter III, s. I–IV; Pufendorf, Book I, Chapter IV, s. I; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 79; Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State."
[423] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter III & IV; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 78–80.
[424] State is 'a compound Moral Person, whose Will, united and tied together by those Covenants, is deemed the Will of all,' In Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book VII, Chapter II, s. XIII.

action was deemed *reasonable*. For the sovereign to exercise the will in an unreasonable manner would effectively mean that the State has gone mad.[425] Therefore, the intellect of the State constituted an interface that translated the will of the sovereign into a reasonable course of action. It provided a safety net against the arbitrary action of the sovereign.

Pufendorf's theory was both inspired and confounded by the intricate political model of the Holy Roman Empire.[426] To apply his model of facultative psychology to the institutional structure of the Holy Roman Empire would be to see the Emperor as the sovereign (who exercises the *will*), while the Diet of the Empire would ensure that the Emperor wielded power in accordance with the fundamental laws of the Empire (by determining a *reasonable* course of action necessary for exercise of sovereign will).[427] If the Diet decided unanimously that a certain action is unreasonable and yet the sovereign decided to act upon it, this would effectively mean that the State has gone mad. This conceptualization of the 'Mind of the State' can be seen as Pufendorf's attempt to provide space for protestant societies to desist from absolute obedience to their sovereign.[428]

Pufendorf, just like Hobbes before him, did not distinguish any separate law applicable to commonwealths, the same natural law was to apply to relations between States as it applied to individuals in the state of nature.[429] Therefore, as was also true for Hobbes, the modern notion of international legal personality finds little application in the works

[425] Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," 446.
[426] Indeed, in the first edition of *Monzambano*, dissatisfied Pufendorf compared the Empire to a monster incapable to be grasped through traditional understanding of the State: 'There is now nothing left for us to say, but that Germany is an Irregular Body, and like some misshapen Monster.' However, Pufendorf retracted from these comments in later editions. Samuel Pufendorf, *The Present State of Germany*, trans. E. Bohun (Indianapolis: The Online Library of Liberty, 2007), 101, http://oll-resources.s3.amazonaws.com/titles/1890/Pufendorf_1367_EBk_v6.0.pdf; Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," 450.
[427] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 93.
[428] Holland, "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State," 451.
[429] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book II, Chapter III, s. XXIII. Book VIII treats of the application of natural law to States; Samuel Pufendorf, *Two Books of the Elements of Universal Jurisprudence*, trans. W. Abbott, 1931 Edition (Indianapolis: Liberty Fund, 2009), Book I, Definition III, s. 5–6; Kari Saastamoinen, "Pufendorf on the Law of Sociality and the Law of Nations," in *The Law of Nations and Natural Law 1625–1800*, ed. Simone Zurbuchen, Early Modern Natural Law: Studies & Sources (Leiden: Brill, 2019).

of the German jurist. Pufendorf did not distinguish law applicable to States *qua* moral persons. Instead, Pufendorf's world was teeming with moral persons subject to the same duties under natural law, be they individuals, corporations or States.[430] The criteria for being a moral person were based solely upon the facultative configuration, that is, on the possession of a separate intellect and will.[431]

Pufendorf employed his facultative conceptualization of the State to serve his constitutionalist account of sovereignty. Pufendorf described the State as a moral person with the mind of its own, comprised of the faculties of intellect and will. He did so to provide a safety net against an arbitrary action of the sovereign and to provide criteria for legitimacy of State's actions. By ascribing intellect and will to the State, Pufendorf created an anthropomorphic vocabulary of government by law and reason based upon his views on human nature.[432] Faculty psychology, which served as his inspiration, was a study of cognitive powers of an individual. By employing the language of faculty psychology in relation to the State, Pufendorf arrived at a functional separation of mental powers of the moral person of the State. His reasoning was to allow for a more exact treatment of social life (or what he called 'moral science') by employing corporal images to which our minds are accustomed.[433] The attribution of faculties of 'will' and 'intellect' to the moral person marked the transition towards the view of the State as an increasingly independent entity defined by its intrinsic qualities.

Pufendorf went on to become a practicing diplomat and the world's first professor of the law of nations.[434] Pufendorf's theoretical contributions to the *Droit des gens* were such that he was designated as the father of the law of nations in Diderot and

[430] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter I, s. XII–XIII; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 13.
[431] For example, a corporation could constitute a moral person, but not every moral person would also be a legal person.
[432] d'Aspremont, "The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law"; Nutkiewicz, "Samuel Pufendorf: Obligation as the Basis of the State."
[433] Pufendorf, *Of the Law of Nature and Nations: Eight Books*, Book I, Chapter I, s. I–IV.
[434] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 107–9.

d'Alembert's *l'Encyclopédie*.[435] The anthropomorphic vocabulary coined by Pufendorf proved highly influential and was to be appropriated and adapted to suit different intellectual projects of his readers.[436] Pufendorf's classification of the State as a moral person with a will and intellect of its own, has put the first touch of life into the person of the State, which had previously been understood by Hobbes in purely mechanistic and performative terms. The abstract entity's apparent capacity for cognitive life, once discovered, was only to expand.

The Stately Metaphysics of Leibniz and Wolff

Before moving to discuss the adaptation of the Pufendorfian vocabulary by Christian Wolff, it is necessary to briefly discuss the philosophical beliefs of his master, Gottfried Wilhelm von Leibniz (1646–1716). It was the German polymath Leibniz who first employed the term *persona jure gentium,* which could be loosely translated as an 'international legal person.'[437] However, he did so in relation to individual princes within the Holy Roman Empire.[438] The notion used by Leibniz was embedded within the historical context surrounding his works. Leibniz was writing at the time when the Holy Roman Empire was showing signs of structural weakness, with heads of smaller polities competing with the Emperor to be recognized as sovereigns.[439] Leibniz attempted to preserve the universal structures represented by the Pope and the

[435] 'L'auteur (Puffendorf) dans le premier livre cherche d'abord la source du droit naturel & des gens dans l'essence des êtres moraux, dont il examine l'origine & les différentes sortes. Il appelle êtres moraux certains modes que les êtres intelligens attachent aux choses naturelles ou aux mouvemens physiques : en vûe de diriger & de restraindre la liberté des actions volontaires de l'homme, & pour mettre quelqu'ordre, quelque convenance & quelque beauté dans la vie humaine.' In Diderot and D'Alembert, "Droit Des Gens," in *L'Édition Numérique, Collaborative et CRitique de l'Encyclopédie Ou Dictionnaire Raisonné Des Sciences, Des Arts et Des Métiers* (l'Académie des sciences, 1772 1751), http://enccre.academie-sciences.fr/encyclopedie/article/v5-256-25/; Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," 401.

[436] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*, 12.

[437] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 29; P. Riley, ed., *Leibniz: Political Writings*, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1988), Codex juris gentium diplomaticus.

[438] For the historical context of Leibniz's work, see: Janne Nijman, "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire," *New York University School of Law: International Law and Justice Working Papers*, History and Theory of International Law Series, no. 2 (2004).

[439] Ibid.

Emperor while accounting for the emergence of new participants in the European diplomatic community.[440]

Leibniz's metaphysical optimism relied on his philosophical view that individuals would exercise best judgment through the use of reason.[441] In Leibniz's philosophy, the 'monads' were the smallest possible mind-like substances of which the world comprised.[442] The world of the monads was hierarchical and the human soul was to be regarded as a monad of the highest degree, a spirit capable of feeling and memory.[443] According to Leibniz, the 'Rational Soul or the Mind' was what distinguished humans from beasts, by making it possible for an individual to uncover the order of the universe.[444] The rational mind would enable 'Man' to distinguish between right and wrong, just and unjust, true and untrue. On the basis of this sensitivity, each individual would strive for self-perfection and universal justice by advancing closer towards the union with God and public good.[445] The rational soul thus served as a passport to the City of God, the most perfect State possible under the most perfect monarch and it qualified its bearer for the citizenship of the Christian Republic.[446]

In Leibniz's conceptualization of international affairs, the source of all natural law was *justice* based upon the command of loving thy neighbor.[447] This was a moral safeguard against the arbitrary use of power. The voluntary law of nations, in form of custom and (tacit) consensus, created by their sovereigns in their mutual relations, had to follow the commands of natural law. Together, natural law and voluntary law formed the law of nations. The notion of international legal personality, as employed by Leibniz, was used

[440] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 31.
[441] Ibid., 42–43.
[442] Leibniz, Gottfried Wilhelm. *The Monadology*, trans. R. Latta (PLATO – Philosophy Learning and Teaching Organization, 1898), https://www.plato–philosophy.org/wp–content/uploads/2016/07/The–Monadology–1714–by–Gottfried–Wilhelm–LEIBNIZ–1646–1716.pdf.
[443] Ibid., §19–20.
[444] Ibid., §28–29.
[445] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 72–73.
[446] Ibid., 56–57.
[447] Ibid., 74–76.

to impose obligation upon individual princes to act reasonably and justly.[448] It enabled its holders to enter into treaty relations on the conditions that this capacity was used in accordance with *ius naturae et gentium.* Leibniz's employment of the term *persona jure gentium* thus provided for the recognition of new entrants to the European diplomatic life, while simultaneously subjecting their powers to the limitations imposed by natural justice.

Displaying rather optimistic views on human nature, Leibniz only mentioned the name of the pessimist Pufendorf in order to dispute him. Leibniz's account of personality also applied to individual princes rather than States *qua* subjects of law. Meanwhile, Christian Wolff (1679–1754), Leibniz's disciple and a reader of Pufendorf, took a different approach. He attempted to reconcile Leibniz's metaphysics of perfection and with Pufendorf's conceptualization of the moral person.[449] Wolff's conceptualization of the rights and duties of States was 'premised on the understanding that nations would be equivalent to individuals in a state of nature.'[450] Wolff wrote:

> *Nations are regarded as individual free persons living in a state of nature. For they consist of a multitude of men united into a state. Therefore since states are regarded as individual free persons living in a state of nature, nations also must be regarded in relation to each other as individual free persons living in a state of nature.*[451]

Wolff followed Pufendorf in thinking about the State as a moral person (*persona quadem moralis*),[452] a composite entity whose organs are 'the different groups of men living the same kind of life.'[453] From this, Wolff deduced: 'since every nation is to be considered as

[448] Nijman points to the use of the wording *persona jure gentium* instead of *persona inter gentes* as signaling that holder of so–defined personality had still to obey by the natural law. Ibid., 79.
[449] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 109.
[450] Helmut P. Aust, "Fundamental Rights of States: Constitutional Law in Disguise?," *Cambridge International Law Journal* 4, no. 3 (2015): 525.
[451] Wolff, Christian. "Ius Gentium Methodo Scientifica Pertractatum," in *The Classics of International Law*, ed. James Brown Scott, trans. Joseph H. Drake (Oxford: Clarendon Press, 1934), Prolegomena, §2.
[452] Wolff, "Ius Gentium Methodo Scientifica Pertractatum," §3; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 116.
[453] Wolff, "Ius Gentium Methodo Scientifica Pertractatum," 1934, §32.

a single personality, the characteristics of individuals pass from them to the nation.'[454] It followed that, 'since by nature all men are equal, all nations too are by nature equal the one to the other.'[455] Furthermore, the categories of the 'body' and the 'soul' were to be used to describe the compound moral person: 'every nation ought to know itself and its form of government [...] what sort of capabilities of mind and powers of body, and what things are needed for perfecting itself and its form of government.'[456] We can thus see how Leibniz's language of self-perfection and personality was mixed with Pufendorf's vocabulary of facultative sovereignty applied to collective entities.

The conceptual innovation of Wolff concerned the treatment of the moral person of the State as a subject to a different set of rules applicable to nations *qua* moral persons:

> *The preservation of the physical individual is one thing, that of the moral person another. The latter presupposes the former, but does not remain alive because the former is intact. [...] The preservation of the individuals who constitute the nation, as made up of physical individuals, belongs to general public law; but the preservation of a nation as a nation belongs to the law of nations and must be here demonstrated. And hence it appears that there are duties of a nation to itself, which have to be considered separately from general public law.*[457]

The State, as a moral person, thus became subject the duties of self-preservation and self-perfection under the necessary law of nations.

The necessary law of nations concerned immutable perfect duties owed to one's conscience.[458] Wolff wrote that it 'it evidently binds the nations in conscience' and that it 'controls the acts of nations as such.'[459] While Pufendorf equated 'body' and 'soul' with what we could call different organs of the State (the King and the Council of the People), Wolff elevated the conscience of the State above the conscience of any natural

[454] Ibid., §43.
[455] Ibid., §16.
[456] Ibid., §40.
[457] Ibid., §28.
[458] Ibid., §4–5.
[459] Ibid.

person. The moral person of the State thus became a separate subject to the necessary law of nations and a member of the 'society among nations.'[460] Wolff wrote that 'association in a state is as it were the life of a nation' and that 'just as a man ought to avoid every risk to his life so far as in his power, so also is a nation bound to avoid risk of destruction.'[461] Since the State had a perfect duty to preserve itself from destruction, it also followed that it had a right to 'all those means by which it can, as far as possible, avert the peril of destruction.'[462] For example, States were deemed to possess a right to non-interference in their sovereign affairs.[463] Every State was also subject to the duty to pursue self-perfection: to accomplish the purpose for which it had been created and to be 'on its guard against and avoid those things which in any way interfere with its perfection.'[464] Finally, to ensure effective pursuit of self-perfection, 'every nation ought to know itself and its form of government.'[465] We can therefore observe a mixture of the language of facultative sovereignty (with an important role reserved for the 'conscience' of the State), with the Leibnizian metaphysics of self-perfection. Furthermore, while Pufendorf had employed facultative sovereignty to delimit the scope of State's legitimate action, in the hands of Wolff the references to *conscience* and *will* became a part of a theory about the State as the subject of law and as a basis of obligation under the law of nations.

While States were bound to observe immutable duties of self-preservation and self-perfection addressed to their *conscience*, they could also exercise their *will* to bind themselves to the positive law of nations (subdivided into voluntary, stipulative or customary law of nations).[466] For example, treaties entered into between States formed part of the stipulative law of nations: they only bound the parties to the agreement,

[460] Ibid., §7.
[461] Ibid., §33.
[462] Ibid., §34.
[463] Ibid., §256.
[464] Ibid., §35–36.
[465] Ibid., §40.
[466] Ibid., §25.

were subject to change and found analogy in 'the private life of citizens.'[467] Meanwhile, customary law (*das Herkommen* – usage) rested upon tacit consent of States.[468] Wolff was conscious that different interpretations of perfect and imperfect duties could lead to the conflict of rights. To remedy the ensuing tension, Wolff famously advocated for the vision of *civitas maxima,* the great republic established to pursue common good.[469] This supreme State would be headed by a 'fictitious ruler' who would constitute the personification of right reason at the international level.[470] To those who argued that any such arrangement was merely a fiction, Wolff responded:

> *Fictions are advantageously allowed in every kind of science, for the purpose of eliciting truths as well as for proving them. […] Nay, all moral persons and, too, the supreme state itself in the law of nature and nations have something fictitious in them. Those who disapprove of such things, abundantly show that they are only superficially acquainted with the sciences.*[471]

While the references to the 'scientific' language of law of nations continued to be applied, the boundaries between fiction and reality were beginning to blur. Wolff's account of personhood of the State was far-detached from the notion of personhood 'by fiction' employed by Hobbes. While the Hobbesian State could not act by itself and needed to be represented, Wolff's moral person was characterized by a separate 'conscience' and rights and duties addressed to it. It could also exercise its 'will' to bind itself to voluntary, stipulative or customary law of nations. Wolff's claim that natural law applied differently to States because of their nature *qua* moral persons was an

[467] Ibid., §23.
[468] Ibid., §24.
[469] Nicholas G. Onuf, "Civitas Maxima: Wolff, Vattel and the Fate of Republicanism," *The American Journal of International Law* 88 (1994); Christian Wolff, *Ius Gentium Methodo Scientifica Pertractatum*, ed. James Brown Scott, trans. Joseph H. Drake, The Classics of International Law (Oxford: Clarendon Press, 1934), Prolegomena, paras. 11–12; Koskenniemi, "International Community from Dante to Vattel"; Holland, "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order," 118–20; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 81–82; Thomas Kleinlein, "Christian Wolff: System as an Episode?," in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, ed. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017).
[470] Wolff, *Ius Gentium Methodo Scientifica Pertractatum*, Prolegomena, §21; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 81.
[471] Wolff, *Ius Gentium Methodo Scientifica Pertractatum*, §21.

important conceptual innovation. While Pufendorf had employed the language of facultative sovereignty to delimit the scope of legitimate action, Wolff went a step further and treated the separate conscience and will of the State as a basis of obligation under the law of nations. Perfect duties under the necessary law of nations were thus to be addressed to State's conscience, while positive law of nations flowed from the will of the State. Wolff thus paved the way for the liberation of the State as a separate person and a bearer of rights and duties under the law of nations. The moral person of the State was modeled after, but became functionally independent of the natural 'Man.' This train of thought was to be taken up and popularized in the works of his famous disciple.

Vattel and the Liberation of the Person of the State

The most comprehensive early modern theory of the *Droit des gens* and its subjects was coined by Emer de Vattel (1714–1767).[472] Vattel was a disciple of Wolff and studied law in Geneva under Jean-Jacques Burlamaqui, a proponent of Pufendorfian philosophy.[473] The result was that Vattel built upon the notion of moral personhood of the State and embedded it within the narrative of self-perfection, which he inherited from Wolff. The anthropomorphic assumptions about the moral person of the State and the international society were at the core of Vattel's thought.

Vattel wrote his *Le Droit des gens* (1758)[474] during the Seven Years' War, a period of warfare within what was, on the surface, a single Empire. Written in accessible French and originally conceived as a mere commentary on the works of Wolff, *Le Droit des gens* became a far-reaching intellectual project that was to shape imagination of international

[472] Emmanuelle Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique* (Paris: A. Pedone, 1998).
[473] Holland, "The Moral Person of the State: Emer de Vattel and the Foundations of International Legal Order"; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 119–25; Peter Haggenmacher, "Le Modèle de Vattel et La Discipline Du Droit International," in *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*, vol. 9, Graduate Institute of International and Development Studies (Martinus Nijhoff Publishers, 2011), 10.
[474] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*.

jurists for generations.[475] In his magnum opus, Vattel embarked on a mission to establish a demonstrable 'science' of international law, whose rules and workings would be as precise and measurable as those of natural sciences.[476]

Having witnessed the demise of the Holy Roman Empire and of the set of overlapping legal orders, Vattel rejected Wolff's notion of *civitas maxima*. Instead, he proposed a vision of the law of nations that would apply to equal and independent States as basic units of international politics.[477] The equal sovereignty of States flowed from the direct analogy to individuals in the State of nature:

> *Chaque Etat Souverain se prétend, & est effectivement, indépendant de tous les autres. Ils doivent tous, suivant M. Wolf lui-même, être considérés comme autant de particuliers libres, qui vivent ensemble dans l'état de Nature & ne reconnaissent d'autres Loix que celles de la Nature même, ou de son Auteur.*[478]

The States were thus free and equal because 'Men' were naturally free and equal.[479] Vattel pushed the Wolffian tenet that the law of nations was distinct from natural law to its logical conclusion. He wrote that the State should be considered a moral person because it possessed the 'entendement, une volonté & une force qui lui sont propres.'[480] When the people confer the sovereignty unto the State, they also confer their will and understanding upon the newly instituted sovereign.[481] The sovereign is the representative of the Nation, but the office is of a representative character and he or she

[475] For discussions of Vattel's legacy, see: Vincent Chetail and Peter Haggenmacher, eds., *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*, vol. 9, Graduate Institute of International and Development Studies (Martinus Nijhoff Publishers, 2011); Koen Stapelbroek and Antonio Trampus, eds., *The Legacy of Vattel's Droit Des Gens* (Cham: Palgrave Macmillan, 2019).
[476] Haggenmacher, "Le Modèle de Vattel et La Discipline Du Droit International," 13, 14.
[477] Holland, "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order"; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 120–30.
[478] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préface, XVII-XVIII; Haggenmacher, "Le Modèle de Vattel et La Discipline Du Droit International," 40–48.
[479] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préliminaires, §15.
[480] Ibid., §11.
[481] Ibid., §5.

can be deposed if the underlying social contract is breached.[482] The locus of sovereignty rests within the moral person of the State, the ultimate subject of the law of nations.

We have seen how Pufendorf embedded sovereignty in the will of the State and used the allegory of the intellect as a constraint upon what could be seen as a reasonable course of public action. However, Emer de Vattel, who represented the intellectualist tradition of thought, saw no need for such functional separation between the intellect and the will of the State. Instead, he employed the language of facultative sovereignty in a way which removed some of the constraints upon public action that this vocabulary had been designed to convey.[483]

Later scholars have criticized Vattel for providing an intellectual foundation to the inviolability of the State's sovereignty, for the subjectivism and apparent voluntarism of his doctrine.[484] Van Vollenhoven went as far as calling Vattel a 'Satan' who presented a 'kiss of Judas' to the works of Grotius.[485] Lauterpacht preferred to refer to Grotius in his search for foundations of international legal order,[486] while Brierly called Vattel's individualism a 'disaster' for international law.[487] Haggenmacher and Allot also criticize the dislocation of the international punitive system and its replacement by State-centered voluntarism.[488] Notwithstanding the criticisms, Vattel's thought paved way for the modern conceptualization of the law of nations as the law based upon and flowing from the fundamental equality and liberty of its subjects.

Vattel credited Wolff with establishing the distinct character of law applicable to States and he followed his master in claiming that States possess a capacity to hold rights and

[482] Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 324–325.
[483] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 127–29.
[484] Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 142.
[485] Cornelis van Vollenhoven, *Die Drei Stufen Des Völkerrechts* (The Hague: Martinus Nijhoff, 1919).
[486] Lauterpacht, "The Grotian Tradition in International Law," 27.
[487] James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. (Clarendon Press, Oxford, 1963), 39–40.
[488] Haggenmacher, "Le Modèle de Vattel et La Discipline Du Droit International," 7; Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002), 418.

duties *qua* moral persons.[489] Vattel then subdivided the law of nations into three distinct categories. Firstly, the *necessary* law of nations applied to all States in an absolute manner due to their very nature as sovereign moral persons.[490] Under the necessary law of nations, each State had a perfect duty to strive for self-preservation and self-perfection.[491] Then, there was the *arbitrary* law of nations, subject to constant change by way of agreements and treaties between States. Finally, there was the *voluntary* law of nations based upon consent, which could also be presumed. Voluntary law relied on the presumption that there existed a natural community of States (as opposed to individuals or Princes), with each State possessing a legal personality.

The result was an anthropomorphic conceptualization of the duties of the moral person of the State. Perfect duties (under the necessary law of nations) were addressed to one's own conscience – in that case, to the conscience of the State itself – and included the duty to pursue self-preservation and self-perfection.[492] The duty of self-preservation rested upon the State's obligation to maintain a separate existence. It was to be read in conjunction with the State's duty of self-perfection.[493] The duty of self-perfection entailed the obligation 'de travailler à sa perfection & à celle de son état.'[494] Building upon Wolff, Vattel thus distinguished between 1) *sa perfection* and 2) *celle de son état*. On the one hand, the duty of self-perfection of the State would entail the betterment of a population as a distinct body, which echoes the Foucauldian notion of governmentality.[495] The nation, as a separate unit, was presumed to pursue perfection by understanding itself and its position in the international system.[496] On the other hand, the State, in its own capacity as a moral person, was also subject to the perfect duty of striving for the perfection of its *own* faculties. The conscience of the State was thus elevated on a different plane altogether from the corresponding faculties of the

[489] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préface, XII-XVI.
[490] Ibid., Préface, XX-XXII.
[491] Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 146-151.
[492] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préliminaires, §12-14.
[493] Haggenmacher, "Le Modèle de Vattel et La Discipline Du Droit International," 34-38.
[494] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Livre I, Chapitre II, §21.
[495] Foucault, *Sécurité, Territoire et Population*, Leçon du 18 janvier 1978.
[496] Koskenniemi, "International Community from Dante to Vattel," 68–74.

State's population. Each nation was then to decide for itself what its conscience prescribes in the quest for preservation and self-perfection:

> *C'est à châque Nation de juger de ce que sa Conscience exige d'elle, de ce qu'elle peut ou ne peut pas, de ce qu'il lui convient ou ne lui convient pas de faire; & par conséquent d'examiner & de décider si elle peut rendre quelque office à une autre, sans manquer à ce qu'elle se doit à soi-même.*[497]

Therefore, the subjectivism of Vattel's doctrine reposed on his conceptualization of the State as a moral person with a 'conscience' of its own. On that basis, Vattel could be said to have established a system of coexistence of States modeled after individuals in the state of nature.[498] What followed was a different perspective on the very nature of duties and the scope of action available to States. Nijman comments that the philosophy of liberalism served to empower the Western State, rather than the individual, as international legal personality transitioned from being a personal attribute of the Prince to being a legal attribute of the State.[499]

However, the modern criticisms of Vattel as a 'prince of positivists,'[500] influenced by the writers of the *interbellum* period, tend to overlook the fact that Vattel's account of law of nations can be read to assume the existence of an international society with fundamental obligations of States flowing directly from their personhood.[501] The very notion of personhood, as understood by Vattel, relied on the notion of 'speaking and acting' in public – the moral person of the State was at its core, a communicative being comparable to a human being.[502] Vattel wrote:

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[497] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préliminaires, §16.
[498] Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 145.
[499] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 110.
[500] A term originally used by Georges Scelle and challenged by Zurbuchen and Jouannet. Simone Zurbuchen, "Emer de Vattel on the Society of Nations and the Political System of Europe," in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, ed. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 286; Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 163.
[501] Jouannet, *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*, 142–43.
[502] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 129–30.

> *Cette Société, considérée comme une personne morale, puisqu'elle a un entendement, une volonté & une force qui lui sont propres, est donc obligée de vivre avec les autres Sociétés, ou Etats, comme un homme était obligé avant ces Etablissements, de vivre avec les autres hommes.*[503]

The society of nations thus reproduced basic human solidarity on the global level. Every nation shall then contribute with all its capabilities to the happiness and perfection of the others and enjoy peaceful existence of its own.[504] The first general obligation of the international society was to provide assistance in achieving perfection and preservation and to contribute to the happiness of other States.[505] By joining forces, the States would realize their self-perfection and self-preservation together.[506] Vattel's argument thus rested upon the logical assumption that States would have an interest in international order and coexistence as this would enable them to pursue their duty of self-perfection.

Vattel thus balanced what appeared as the subjectivism and individualism of his doctrine by projecting the anthropomorphic notions of good faith and duties of humanity upon the international society of States. For example, Vattel argued that the very possibility of commerce between States rested upon good faith in their interactions and the performance of promises.[507] If the State consistently contravened the precepts of justice and became a pariah State, the countermeasures were to be taken. This was a system well-adapted for the Concert of Europe, where the common interest could lead to the balance of power on the continent and to the colonial expansion abroad. In this system, treaties were seen as the means of adjusting individual pretensions which would rise among sovereign States.

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[503] Vattel, *Le Droit Des Gens, Ou Principes de La Loi Naturelle*, Préliminaires, §11.
[504] Ibid., §12.
[505] Ibid., §13-14.
[506] Ibid., Livre II, Chapitre I, §3
[507] Ibid., Livre II, Chapitre XII §163.

The first general law of nations of mutual assistance was balanced by the second law of liberty and equality of States as moral persons.[508] Here again we see the role played by the image of the moral person modeled after the natural 'Man.' In case of a conflict of duties, the State's duty of self-perfection and self-preservation would take precedence.[1] If a duty towards another State was to hamper State's own quest for self-perfection or preservation, the underlying service shall simply not be rendered.[509] Therefore, the question of what constitutes an external or an internal duty of a State-person constituted at the center of Vattel's system founded upon the balance between the natural liberty and coexistence of States.

Central to Vattel's thought was his conflation of intellect and will of the person of the State to provide basis for action in the international sphere. By adapting Wolff to the French language, Vattel built upon the notion of moral person of the State as a holder of rights and duties and combined it with the Leibnizian language of self-perfection. The concept of the moral person of the State and the language of facultative sovereignty were used to describe different types of duties and to prescribe the degree to which said duties were binding upon States *qua* persons. By treating States as the main subjects of the law of nations, guided by a conscience of their own, Vattel conceptualized personhood in a manner that was fundamentally different from the performative account of personhood employed by Hobbes. By doing so, Vattel allowed for a direct application of anthropomorphic notions directly to the State, seen as an autonomous member of the international society and the main subject of *droit des gens*.

The Cognitive Life of States?

In this chapter, we have studied the application of anthropomorphic vocabularies to the State as the subject of law. In their attempts to create an exact science of the law of nations, jurists have employed self-referential anthropomorphic vocabularies to explain the functioning of international obligations and the nature of law applicable to the State.

[508] Ibid., Préliminaires, §15.
[509] Ibid., §14.

The thinking about the State as a separate entity has reached its logical conclusion when the image of the State became abstracted from the figure of the Prince. In the hands of Wolff, the references to *conscience* and *will* of the State became a part of a theory about the subject of law and served to explain the basis of obligation under the law of nations. This process has reached its logical conclusion when the State became the main protagonist of Vattel's *Droit des gens*. As the mask of the State could no longer be reduced to the personal qualities of its bearer, the mask itself was ascribed a separate existence and anthropomorphic qualities necessary to explain the functioning of international obligations. In Vattel's work, the State was ascribed cognitive qualities that allowed it to be a conscious and responsible participant in the law of nations. The State, deemed capable of freely determining the course of action and of willingly consenting to be bound by law, acquired a 'conscience' of its own that would exist on a separate level from the cognitive capacities of its population. The arguments referring to the conscience of the State were then employed to explain the basis of obligation under the law of nations.

In order to explain the transition from the Prince to the State as the main subject of international obligations, we could have recourse to a literary allegory. Act IV of Shakespeare's *Richard II* features a mirror scene in which Richard, while looking into a mirror, realizes that he has lost his claim to royal majesty and that he can no longer be a considered a King. In the words of Kantorowicz:

> *The features as reflected by the looking-glass betray that he is stripped of every possibility of a second or super-body — of the pompous body politic of king, of the God-likeness of the Lord's deputy elect, of the follies of the fool, and even of the most human griefs residing in inner man. The splintering mirror means, or is, the breaking apart of any possible duality. All those facets are reduced to one: to the banal face and insignificant physis of a miserable man, a physis now void of any metaphysis whatsoever.*[510]

[510] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 2016, 40.

While Richard's transition concerns the demise of the body politic of the King, we could interpret it more broadly as an allegory of the processes described in this chapter: the fall of the Prince and the rise of the new ultimate subject of the law of nations, the sovereign State.

The aforementioned process can be analyzed through the lens of Lacan's theory of the mirror stage. The mirror stage denotes the moment when the child first recognizes itself as a unified and coherent subject. We could then say that, in their texts, the jurists of the law of nations held up a mirror to the abstract State. They pointed to the faculties, unity and coherent identity of the State which replaced the individual as the main subject of international obligations. The Prince gave way to the State as the ultimate subject of international obligations. We have then seen how jurists of the law of nations have applied anthropomorphic vocabularies in relation to the State. The anthropomorphic vocabularies could take the form of a direct analogy between the individual 'Man' and the moral person of the State. They could also manifest themselves in the attribution of human characteristics and faculties, such as will and intellect, to the abstract 'person' of the State. Clearly, this thinking rests upon a simplification, or, rather, a mystification.[511] To quote Kantorowicz: 'mysticism, when transposed from the warm twilight of myth and fiction to the cold searchlight of fact and reason, has usually little left to recommend itself.'[512] However, a question arises: how can we then explain the success enjoyed by anthropomorphic vocabularies in describing the identity and actions of the State?

The continuing appeal of anthropomorphic vocabularies

Anthropomorphic claims described in this chapter rely on an assumption that the State is a reified object of inquiry that exists throughout time and is capable of displaying intentionality: of consenting to law and of holding legal beliefs sustained by practice.

[511] For the discussion of how international lawyers create legal artifacts and how the mental 'map' overrides the material territory, see: Bruno Latour, "Scientific Objects and Legal Objectivity," in *Law, Anthropology, and the Constitution of the Social*, by Alain Pottage (Cambridge: Cambridge University Press, 2009).
[512] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 2016, 3.

The personhood of the State appears as a narrative frame which helps to rationalize the functioning of international obligations. To draw parallels between the patterns of the past and the present, it might be useful to see how anthropomorphic assumptions continue to play an important role in modern international legal discourse. I propose to look at the formation of customary law, not in order to draw any causal line but in order to illustrate how anthropomorphic assumptions about cognitive capacities of the State are necessary to the operation of international legal discourse.

The anthropomorphic vocabularies rely on a set of overarching assumptions about the nature of legal entities: that there exists a reified State which a) possesses a stable identity and continuity over time and which incurs obligations and to which actions can be attributed and b) that this State can possess a type of knowledge and intentionality necessary to hold legal opinions and to be a conscious actor in international law. Pierre Schlag's notion of objectivist and subjectivist aesthetics of law can help us dissect these assumptions.[513] In the objectivist aesthetic, law and legal artifacts, such as the State, are perceived to exist in the same objective manner as objects in physical reality. It is therefore assumed that law and legal entities have a stable, independent identity and a spatial dimension. In the subjectivist aesthetic, law and its artifacts possess agency and subjective powers that come with it. The law *determines, assigns* competences, it *binds* and *constrains.* The State can have *knowledge,* a *will* and an *intellect* of its own. International lawyers continue to rely on such anthropomorphic assumptions to rationalize the functioning of international law. Modern doctrines of sources and of responsibility, in particular, are based on the presumed capacity of legal entities to engage in cognitive life.

We have seen how Wolff and Vattel made references to the faculties of the State in order to explain the functioning of legal obligations. Under the law of nations, the State had perfect duties to its conscience to pursue self-preservation and self-perfection. The States could also consent to be bound to treaties and to the customary law of nations.

[513] Pierre Schlag, *The Enchantment of Reason* (Durham: Duke University Press, 1998), 100–106.

Now, let us look at how modern international law describes the formation and operation of customary law to highlight the continuing importance of anthropomorphic vocabularies with regard to faculties of the State. Art. 38(1)(b) of the Statute of the International Court of Justice provides that the Court shall apply 'international custom, as evidence of a general practice accepted as law.' In its jurisprudence, the ICJ has treated the aforementioned provision as including two elements: the objective element of State practice and the subjective element of *opinio juris.* In the North Sea Continental Shelf cases, the Court stated:

> *Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.*[514]

The subjective element has generated a lot of controversy in the academia.[515] However, as stated by International Law Association: '[i]f it can be shown that States generally believe that a pattern of conduct fulfilling the conditions set out in Part II is permitted or (as the case may be) required by law, this is *sufficient* for it to be law; but it is not *necessary* to prove the existence of such a belief.'[516] Indeed, if the practice has acquired a sufficient level of generality, such belief is 'likely to exist.' Therefore, in most instances, the analysis of *opinio juris* will end up being coterminous with determination of State practice. The advantage offered by the existence of the requirement of *opinio juris* has been said accrue from preventing the practice from counting towards the formation of a

[514] ICJ, *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, para. 77.
[515] International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law" (London Conference, 2000), 29–32. Henceforth: ILA Articles; H. W. A. Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (Leiden: A.W. Sijthoff, 1972), 47.
[516] Ibid.

customary rule.[517] In the Asylum case, the ICJ stated that: 'considerations of convenience or political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation.'[518] In the *North Sea Continental Shelf* Cases, the Court explained that, for customary law to exist:

> *the acts concerned […] must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. […] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.*[519]

Meanwhile, the rule of persistent objector refers to the objection on behalf of a State to the practice being regarded as binding international customary law. While governments may change, the source of the objection is within the State which willingly opposes formation of a new rule. This objection must be expressed, not merely held in private conscience ('not entertained purely privately within the internal counsels of the State') either verbally or through practice and must be upheld in a consistent manner.[520] This argument reproduces and inverts the Vattelian distinction between private and public parts of the 'conscience' of the State: while Vattelian duties were binding only in the realm of the private conscience of States, the modern discourse of international law puts emphasis on public communication of any objections with regard to the formation of customary law.

In both instances, we encounter a paradox: the State seems to be assumed to hold legal opinions, to be able to consent to law or oppose the creation of the new law through the exercise of its faculties. The doctrinal answer to this paradox is that individuals are the ones who really act on behalf of the State and who employ their intellectual faculties. But the doctrinal answer does not help us address the crux of the problem: if our accounts of subjective beliefs and mental stances displayed by States are mere literary

[517] ILA Art. 16, Comment (d)
[518] ICJ, *Asylum Case (Colombia/Peru)*, Judgment of 20 November, 1950, 286.
[519] ICJ, *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December, 1951, 44.
[520] ILA Art. 15, Comment (d).

fictions, then why have they been so useful and employed to explain the creation and functioning of international obligations in the early modern *droit des gens* and in the modern legal discourse?[521]

Intentional stances of international law

I propose that the notion of intentional stances, developed by Daniel Dennett, may be useful in addressing the paradox at the core of international legal theory.[522] Dennett defines intentional stances in the following way:

> *First you decide to treat the object whose behavior is predicted as a rational agent; then you figure out what beliefs that agent out to have, given its place in the world and its purpose. Then you figure out what desires it ought to have, on the same considerations, and finally you predict that this rational agent will act to further its goals in the light of its beliefs.*[523]

The notion of intentional stances has been applied by Tollefsen to collective entities analyzed by social sciences.[524] Tollefsen writes: 'In everyday discourse and in the context of social scientific research we often attribute […] beliefs, desires, and other intentional states to groups.'[525] In the discipline of international law, these attributions have been dismissed by the mainstream as metaphors symbolizing the intentions of individuals.

However, even if we were to assume that individuals are in fact the ultimate subjects of international law, the problem would remain that we still cannot even scan the brain of an individual in search for their true intentions.[526] Instead, in our judicial systems, we

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[521] In a broader fashion, Alexander Wendt writes: 'If state personhood is merely a useful fiction, then why does its attribution work so well in helping us to make sense of world politics? Why, in short, is the concept so 'useful'? If it were merely a fiction, then one might expect a more precise, realistic concept of state to have emerged over time, but it has not.' Alexander Wendt, "The State as Person in International Theory," *Review of International Studies* 30, no. 2 (2004): 290.
[522] Dennett, *The Intentional Stance*. Similar patterns of thought appear in the works of Durkheim and Wittgenstein.
[523] Ibid., 17.
[524] Tollefsen, "Collective Intentionality and the Social Sciences."
[525] Ibid., 26.
[526] Michael S. Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (Oxford: Oxford University Press, 2013), 79–94.

often make decisions about presumed intentions of an individual on the basis of his or her (completed) actions and contextual elements surrounding the latter; 'we all use folk psychology knowing next to nothing about what actually happens inside people's skulls […] our capacity to use folk psychology is quite unaffected by ignorance about brain processes—or even by large-scale misinformation about brain processes"'[527] In a similar fashion, we make up our mind about intentions of a group (say, a State), without inquiring too far into the decision making processes that happen *within* the State or the intentions of individual group members for that matter: just recall how, in international law, the objection to the formation of custom must be expressed publicly and not entertained purely privately within the internal counsels of the State. This seems to suggest that, both while referring to the individual and to the group, their state of 'mind' is (re)constructed ex post facto by looking back at context, by engaging in the interpretation of text and practice. Intentional states as we understand them are therefore not, as the Cartesian picture of the mind would dictate, internal entities within one's mind.[528] They are rather states or systems that are attributed to unified entities to make sense of their behavior retroactively through the prism of rationality. Both individual and group identities can thus be described as centers of narrative gravity.[529]

When we offer an explanation of an agent's behavior, we provide reasons for their behavior: 'explanation in terms of beliefs and desires is rationalizing explanation, not merely causal.'[530] Explanation of actions based on citing beliefs and desires tends to defend these actions as reasonable under the circumstances.[531] International actors could not be assumed to be subject to the same rational norms (of *droit des gens* or of modern international public law) if international lawyers did not assume that they

[527] Dennett, *The Intentional Stance*, 48; Tollefsen, "Collective Intentionality and the Social Sciences," 29.
[528] Tollefsen, "Collective Intentionality and the Social Sciences," 30.
[529] Dennett defines center of gravity as: '[…] a purely abstract object. It is, if you like, a theorist's fiction. It is not one of the real things in the universe in addition to the atoms. But it is a fiction that has nicely defined, well delineated and well behaved role within physics.' See: Daniel Dennett, "The Self as a Center of Narrative Gravity," in *Self and Consciousness: Multiple Perspectives*, ed. F. Kessel, P. Cole, and D. Johnson (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1992), 275–88.
[530] Tollefsen, "Collective Intentionality and the Social Sciences," 31.
[531] Dennett, *The Intentional Stance*, 48.

share a rational perspective that allows them to 'assess their beliefs, desires, and intentions for consistency, truth, and intelligibility.'[532] Therefore, when assessing behavior of States, international lawyers project upon them their own rational point of view, together with a set of anthropomorphic biases and assumptions. Once we project rationalist perspective upon a subject, we attribute to the actor the intentional stances that a rational subject ought to have.[533] Once created as an anthropomorphic subject, the State is attributed anthropomorphic qualities of its own.

Chapter conclusion

This chapter has followed the application of anthropomorphic vocabularies to the person of the State. We have seen how this moral person was assumed to possess faculties of its own, such as will, intellect and conscience. The evolution of anthropomorphic vocabularies used to describe the subject of the law of nations has been marked by contingency characteristic of the early modern attempts to create a demonstrable 'science' of the law of nations.

Pufendorf's contribution to the anthropomorphic legal thought was that he equated States and individuals in their status as moral persons. Just as physical substances interact within a physical space, moral persons were to operate within the moral or the legal realm. The State, as a moral person, was defined by the faculties of will (exercised by the King) and intellect (personified by the Council of the People). For this reason, Pufendorf can be seen as the father who provided the State with the very capacity for cognitive life.

Leibniz took a different approach: his optimistic rationality envisioned a human society and international life firmly embedded in the metaphysics of perfection. The universal human society served the purpose of attaining self-perfection and unity with God that was to be equated with the love of public good and rational order. Leibniz was the first

[532] Tollefsen, "Collective Intentionality and the Social Sciences," 32.
[533] Ibid., 33.

thinker to employ the term *persona jure gentium* which recognized for the actors within European diplomatic life, while simultaneously subjecting their powers to the limitations imposed by the sense of natural justice. Christian Wolff then adapted the ideas of his master and translated them into the conceptual language of Pufendorf and Hobbes. An important conceptual innovation of Wolff was that he claimed that natural law applied differently to States because of their nature *qua* moral persons. By accounting for different nature of States as moral persons, Wolff set international discourse on its liberal course – one which sees the State as an abstract entity and the main holder of natural rights. That train of thought was taken up and given its most comprehensive expression by Emer de Vattel, who took up and adapted the notion of moral personhood of the State, together with the rights and duties attached to it, and combined it with the Leibnizian metaphysics of perfection. In the writings of Vattel, international legal personality transitioned from being a personal attribute of the Prince to being a legal attribute of the State.[534] The State, seen through the mirror of its international obligations, became a cohesive image: a separate moral person with the conscience of its own and a capacity to determine its own best interest and a reasonable course of action. The State became the main subject of international legal obligations, as the mask subsumed the identity of its biological bearers. Paradoxically, the political philosophy of individualism ended up strengthening sovereign States understood as equal and free subjects of the law of nations.

Finally, I mentioned the continuing appeal of anthropomorphic vocabularies in the modern discourse on the formation of customary law. I did so to highlight the role of anthropomorphic vocabularies in explaining the functioning of international legal obligations. In the modern discourse, the subjective element of *opinio juris* seems to imply that the State possess a cognitive capacity for holding legal opinions and beliefs. The specter of 'Man' continues to haunt the legal discipline as it infuses subject of legal discourse with a capacity for cognitive life.

[534] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 110–11.

What seems to remain largely constant throughout time is the general power of anthropomorphic vocabularies and assumptions in explaining the nature and operation of international legal obligations. I proposed that the notion of intentional stance may help us understand the functioning of the faculties of the State and the process attribution of cognitive capacities to the main subject of international law. States are assumed to be rational agents and to hold certain beliefs that enable them to be conscious participants in the international legal discourse. This is particularly visible with regard to the notion of consent to be bound by law. Although anthropomorphic vocabularies differ in their design, they continue to play an important role in explaining the functioning of international obligations.

Where do these different conceptualizations of personhood leave us, as a discipline trying to make sense of the State as the subject of international law? In his recent book, Fleming proposes the categories of 1) 'performative' and 2) 'intrinsicist' conceptualizations of personhood of the State.[535] The Hobbesian theory, discussed in the previous chapter, is performative, because the fictitious person of the State needs an actor, the sovereign, to represent it and to act on its behalf. Pufendorf's account of the State is intrinsicist because the State qualifies for moral personhood by measure of possessing a separate intellect and will of its own. Fleming writes that subsequent notions of personhood, including those of Wolff and Vattel, were much more influenced by the intrinsicist thinking about the State as a moral person.[536]

The intrinsic thinking about the State can be associated with 'agential' theories of international legal personality and responsibility,[537] which tend to present the State as a moral agent displaying collective intentionality and responsibility for its actions.[538] Fleming contrasts this view with the 'functional' theory of personhood, which sees

[535] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*, 12; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), 170–73.
[536] Ibid.
[537] Wendt, "The State as Person in International Theory"; Alexander Wendt, "How Not to Argue against State Personhood: A Reply to Lomas," *Review of International Studies* 31, no. 2 (2005): 357–60.
[538] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*, 16–19.

States as principals in need of an agent to represent them. He cites the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) as an example of functional approach under international law.[539] The Draft Articles offer a *modus operandi* which does not require a foray into collective intentions of States, but instead propose a model of vicarious liability for the actions of state officials.

As shown in this chapter, modern international legal discourse remains more indebted to intrinsic theories of the State, such as those of Pufendorf, Wolff and Vattel than to the performative State theory represented by Hobbes. Nevertheless, we could follow Fleming in arguing that the Hobbesian strand of thinking about personhood can be revisited in search for a coherent theory of the subject of international obligations.[540] I would like to add that this argument can be expanded beyond the realm of state responsibility to address other areas of law, such as the formation of custom, interpretation of treaties and questions of international legal personality, which all necessitate a functional theory of the subject of international legal obligations. Seen in that light, the Hobbesian theory avoids the many traps of 'intrinsicist' anthropomorphism: while the intrinsic theories of the State rely on the language of facultative sovereignty, the performative theory of Hobbes, discussed in the previous chapter, allows us to conceptualize the State as a person 'by fiction' – an entity which prevails over time and continues to incur rights and duties, but which also needs to be represented by real actors. While intrinsic theories lend themselves to discussions of collective intentionality or the facultative configuration of the person of the State, the performative account of personhood offers a straightforward regime of attribution governing official actions. The purely mechanistic, performative account of personhood allows us to attribute rights and duties to the fictitious person of the State, while leaving the baggage of anthropomorphic assumptions about the faculties of the State behind.

[539] Ibid., 32–41.
[540] Ibid.

In this chapter, we have seen how the State, understood as an autonomous person with intrinsic qualities of its own, became the main subject of the law of nations. I now move to discuss the most extreme example of the use of anthropomorphism in relation to the State. In the next chapter, I proceed to study the treatment of the State as a metaphysical person envisaged by the organic theory of law. I propose to examine the organic theory and the images of embodiment of legal subjects which appeared in the legal and scientific discourses in the 19th century Germany.

Chapter III

Dangerous Embodiments
- The Discursive Creation of 'Bodies' in Imperial Germany

Was this the face that every day under his household roof
Keep ten thousand men? Was this the face
That, like the sun, did make beholders wink?

– W. Shakespeare, *Richard II,* Act IV, Scene I.

I am convinced that in the next century people will slaughter each other by the million because of a difference of a degree or two in the cephalic index. It is by this sign, which has replaced the Biblical shibboleth and linguistic affinities, that men will be identified…
And the last sentimentalists will be able to witness the most massive exterminations of peoples.

– Georges Vacher de Lapouge.[541]

Introduction

The modern discipline of international law rarely considers the significance of arguments organized around the 'body' of the subjects of law.[542] Mainstream legal scholarship tends to focus on the operations of the 'mind' of the subjects: the questions of consent, knowledge or intention discussed in the previous chapter of this dissertation. The mainstream legal discourse thus relies upon the Cartesian mind-body dualism and reproduces the universalizing vision of the rational subject of law.[543] However, by delegating the bodies of the subjects of law to the domain of pre-

[541] Dan Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," *Patterns of Prejudice, Institute for Jewish Policy Research* 35, no. 2 (2001): 33.
[542] The feminist legal scholarship constitutes a notable exception in this regard. See: Naffine, "The Body Bag"; Charlesworth, "The Sex of the State in International Law"; Epstein, *Birth of the State: The Place of the Body in Crafting Modern Politics*.
[543] Haraway, *Staying with the Trouble: Making Kin in the Chthulucene*; Rose Parfitt, *The Process of International Legal Reproduction* (Cambridge: Cambridge University Press, 2019); Butler, *The Force of Nonviolence: The Ethical in the Political*.

discursive 'brute facts,'[544] international legal scholarship tends to overlook the legal-political dimension of the 'body.'

In this chapter, I highlight the legal-political implications of the discursive creations of 'bodies' and embodiments by choosing to discuss organic theory of law and the colonial practices of embodiment. In particular, I will look at the role played by arguments about the body and personhood in legal discourses in Imperial Germany in the late 19th and early 20th century. I intend to show that the discourses organized around the 'body' of the subjects of law have played a particular role in the development of international law, in generating racialized and gendered assumptions and in sustaining imperial rule.

As discussed in the introduction to this dissertation, the notion of the King's Two Bodies and the subsequent reiterations thereof have played an important role in the construction of the hierarchy of legal subjects.[545] The phantom body of the King, described by Kantorowicz, would not perish with the death of the biological component: it prevailed over time and continued to provide a self-validating foundation to the law's hierarchy.[546] The political theory, iconography and legal arguments have been organized around the King's Two Bodies to nourish this foundational fiction of law.[547]

Foucault writes that at the opposite pole of that argument about the King's Two Bodies, one can imagine the body of the condemned, who symbolizes the lack of power.[548] 'In the darkest region of the political field, the condemned man represents the symmetrical, inverted figure of the King.'[549] The 'body of the condemned' understood

[544] Alexander Wendt, *Social Theory of International Politics.* (Cambridge: Cambridge University Press, 2001), 110.
[545] Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957.
[546] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy."
[547] Michel Foucault, "The Body of the Condemned," in *The Foucault Reader*, ed. Paul Rabinow (New York: Vintage Books, 2010), 176; Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 767, 771.
[548] Foucault, "The Body of the Condemned," 176.
[549] Ibid., 176.

in this way is a product of power: 'the individual is in fact a power effect.'[550] I propose to treat the relationship between the phantom body of the King and the body of the condemned as a theoretical frame for this chapter. I portray this relationship in the Figure 1 below.

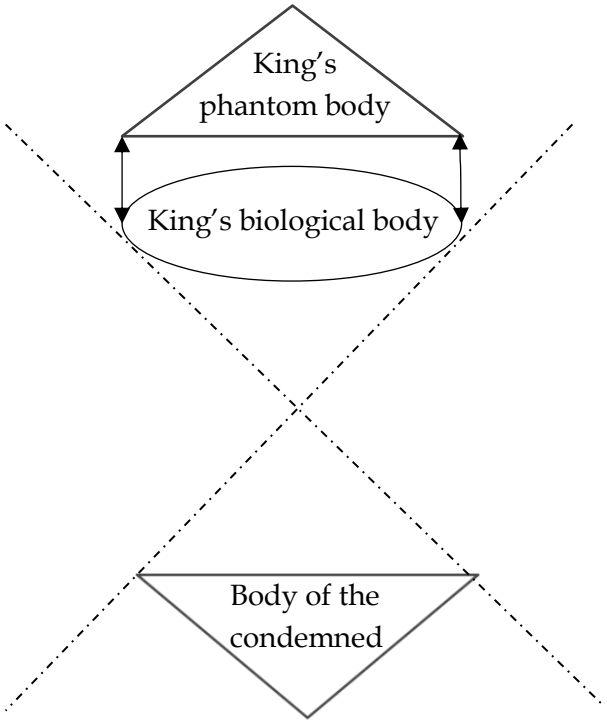

Figure 1

The paradoxical nature of sovereignty and its relation to the production of 'bare life' denuded of legal protection was further developed by Agamben:

> *Sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law (Schmitt), or the supreme rule of the juridical order (Hans Kelsen): it is the originary structure in which law refers to life and includes it in itself by suspending it.*[551]

[550] Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 30.
[551] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, California: Meridian, 1998), 28.

The figure of the sovereign, of the one who decides upon exception, is both internal and external to the legal system.[552] Sovereignty is the 'law beyond the law to which we are abandoned,' and the 'self-presuppositional power of *nomos*.'[553] Sovereignty operates upon and defines 'bare life' as the mirror image of the sovereign. Bare life, a life understood in purely biological terms, is meant to be external to politics. However, sovereign power continues to operate upon bare life in order to transform it. Agamben gives an example of the *homo sacer,* a figure under the Roman law used to designate a person who was condemned to death and who could be killed by anyone. Although Roman law ceased to apply to the homo sacer, the latter remained subjected to the power of law and characterized by his total exclusion from the legal order:

> *Here the structural analogy between the sovereign exception and sacratio shows its full sense. At the two extreme limits of the order, the sovereign and homo sacer present two symmetrical figures that have the same structure and are correlative: the sovereign is the one with respect to whom all men are potentially homines sacri, and homo sacer is the one with respect to whom all men act as sovereigns.*[554]

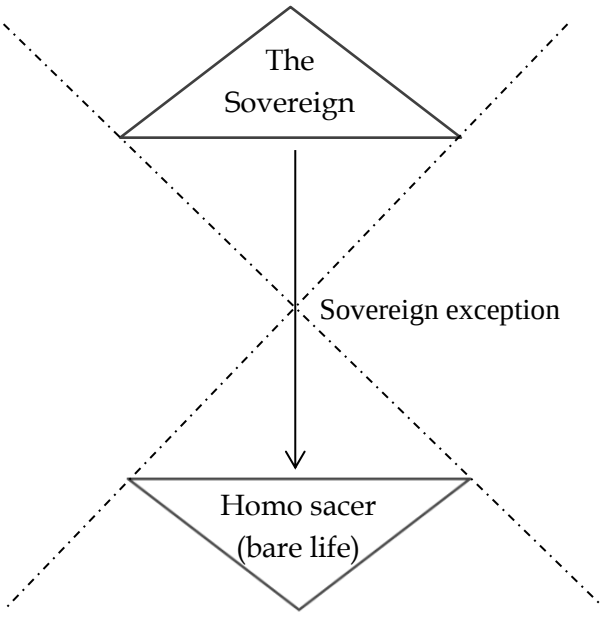

Figure 2

[552] Giorgio Agamben, *Homo Sacer: Le Pouvoir Souverain et La Vie Nue*, trans. Marilène Raiola (Paris: Seuil, 1997), 23.
[553] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, 59.
[554] Ibid., 84.

Building upon these conceptual frameworks, I propose to re-examine the role and relation of bodies and persons in legal theory. In this chapter, I propose to juxtapose the arguments about the sovereign and the bare life by analyzing the role of embodiment in discourses about the person of the sovereign and the body of the colonized in Imperial Germany, while paying particular assumption to the gendered and racialized assumptions about the bodies of the subjects of law. To do so, I propose to firstly look at the discourse of organic theory of the State. I then study the legal and scientific discourses employed by the colonizers in German South West Africa. This chapter can thus be read as a study of the reifying tendency of the legal discourse and of the role of reified entities in upholding the structures of power.[555]

The embodiment of the organic State

The theory of the State has traditionally been preoccupied with questions such as: 'what is the nature of the State?' and 'who is the bearer of the sovereignty of the State?'[556] These questions gained particular relevance in the context of the fragmented and unifying German nation in the 19th century. In this chapter, we shift the focus of our inquiry towards the matters of 'internal' constitution of the sovereign State. As we will see, German public and constitutional law tradition has relied upon a wide array of anthropomorphic assumptions. In this context, it is also worth restating the general importance of German public law tradition to the development of international law.[557]

Stolleis writes that in the Germany of the second half of 19th century, the contractual theory of the State was no longer acceptable;

> *Rather, a theoretically and practically satisfying explanation of the state had to meet a number of conditions: the constitutive interests of the state's purpose had to be "higher" interests, independent of the empirical popular will; monarch and*

[555] So-called 'objectivist aesthetic' of law discussed in: Pierre Schlag, *The Enchantment of Reason* (Durham: Duke University Press, 1998), 100–106; For the creation of the objects of inquiry, See: B. Latour, "Scientific Objects and Legal Objectivity."
[556] Bhuta, "The State Theory of Grotius," 6.
[557] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*; Koskenniemi, "Between Coordination and Constitution: International Law as a German Discipline."

> *parliament should not argue about status but rather work together as organs of a holistically understood whole; […] the state should [...] be cleansed of the remains of private law and constructed on the basis of public law.*[558]

Hence, the postulate of establishing the State as a true 'legal person' acquired a new socio-political relevance.[559] The understanding of the State as a legal person was originally designed to curb the personal power of the monarch by tying him to the embodied constitutional order.[560] The treatment of the State as a person and the use made of the anthropomorphic language allowed German jurists to use the language of the organic body to describe the rapidly changing political situation and the transition from loosely connected political entities towards the federal State.[561] Through embodiment, the State acquired a higher purpose, rendering the members of the parliament and the office holders as 'organs of the State' (and the German language continues to employ the word *Organe* to refer to State institutions and offices). In the process, the State organs acquired duties to a higher whole, and ceased to be perceived as merely territorial, private law estates of the *ancien régime*.[562] Otto Mayer summed up these developments when he ironically remarked that 'the German professors have, without any help at all, made the state into a legal person.'[563] However, the treatment of the State as an embodied legal person, originally designed to curb the power of the monarch, was to transform into a concept which played a role in upholding and explaining the imperial rule.

As we have seen in previous chapters, the concept of the State gradually transformed from the representation of a covenant between the people and the sovereign, towards

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[558] Michael Stolleis, *Public Law in Germany, 1800-1914* (Oxford: Berghahn Books, 2001), 65.
[559] Stolleis situates the origin of the conceptualization of the State as a legal person with organs in the works of Wilhelm Eduard Albrecht. See: Ibid., 344.
[560] Ibid., 65.
[561] Ibid., 341–45.
[562] Ibid., 66.
[563] Otto Mayer, "Die Juristische Person Und Ihre Verwertbarkeit Im Öffentlichen Recht," in *Festgabe Für Paul Laband* (Tübingen: J.C.B. Mohr, 1908); Stolleis, *Public Law in Germany, 1800-1914*, 344.

the vision of the State as an independent, meta-juridical person.[564] The anthropomorphism of the State has reached its logical conclusion in the 19th century's organic theory of the State, which grew from the seeds of Hegelian thought. Hegel wrote that 'the state has an individuality, which exists essentially as an individual, and in the sovereign is a real, direct individual.'[565] According to the organic theory of the Hegelian kind, the State was not a mechanistic entity, but a singular, embodied and living organism with its constituent parts operating as organs within a single body. In the words of Robbie Shilliam, 'Hegel […] effectively anthropomorphized the state into an individual.'[566] The State so understood was seen as 'the absolute power on earth,'[567] and 'the march of God in the world.'[568] Internationally, the competition between States played out in accordance with *Geist,* the world spirit. War and geo-political contestation provided an opportunity to test national spirits of different peoples. Tested by the force of arms, the world spirit would abandon decaying States and move on to inhabit young States, marking a new stage in development of the world spirit.[569] Internally, individuals were to be subsumed by the State, as the only way to achieve 'freedom' and self-realization was through the participation in the organic State. The State, understood in the idealist mode, did not depend on performative acts of individuals to exist within the world. Rather, in line with the Hegelian philosophy, individuals depended upon the State to realize their freedom.

The organic theory of law constituted an attempt to found the State on a new conceptual basis. The organic theorists, such as Johann Kaspar Bluntschli and Otto von Gierke, saw the State as an embodied entity, a product of a historical evolution whose features would be comparable to a natural organism. Bluntschli, who taught at

[564] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 112.
[565] Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, trans. S.W. Dyde (Kitchener, Ontario: Batoche Books, 2001), §321.
[566] Robbie Shilliam, *German Thought and International Relations: The Rise and Fall of a Liberal Project* (New York: Palgrave Macmillan, 2009), 110.
[567] Georg Wilhelm Friedrich Hegel, *The Philosophy of Right*, trans. T. M. Knox (Oxford: Clarendon Press, 1952), Third Part: Ethical Life, III. The State, §331.
[568] Ibid. § 258.
[569] Shilliam, *German Thought and International Relations: The Rise and Fall of a Liberal Project*, 111.

prominent German universities, saw the State as a metaphysical person *par excellence* with a body of its own.[570] I analyze the anthropomorphic, gendered and racialized language that Bluntschli employed to describe the organic State in his *Lehre Vom Modernen Staat: Allgemeine Staatslehre* (the sixth edition thereof has been published in English as *The Theory of the State*).[571] I then turn to Gierke's search for the real organic person of the State in his *Das deutsche Genossenschaftsrecht* (originally published in four volumes from 1868 to 1913).[572] I trace Gierke's 'Germanic' response to contractual theories of the State, his focus on *Genossenschaft* and *Rechtsstaat*, and the inspiration he derived from medieval ideas in his study of associations.

The anthropomorphic and metaphysical language of the two theorists constituted an organic response to early modern social contract theories discussed in the first chapter of this thesis. Social contract theories were marked by their formal and mechanistic outlook and performative conceptualization of sovereignty. Both Bluntschli and Gierke were not satisfied with the contractual vision of the State. They pushed the anthropomorphic analogy further, towards the point where the State became the *real* person of the law, without a need to be represented by another actor.

Bluntschli and Gierke were influenced by their *Zeitgeist:* the philosophy of Hegel, romanticism, the political context of the unification of Germany and colonialism. What connected their works was the belief in a historically-grounded organic compromise and the use of anthropomorphic language to describe the 'person' of the State, together with the 'organs' operating within its 'body.'[573] Both Bluntschli and Gierke could thus be said to have embodied the metaphysical person of the State by presenting it as an

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[570] Johann K. Bluntschli, *The Theory of the State*, Authorised English Translation from the Sixth German Edition (Kitchener: Batoche Books, 2000), 27.
[571] Ibid.
[572] I rely on the following editions of Gierke's monumental work: Otto von Gierke, *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht (The German Law of Fellowship)*, ed. A. Black, trans. M. Fisher (Cambridge: Cambridge University Press, 1990); von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*; Otto von Gierke, *Political Theories of the Middle Age*, trans. F. W. Maitland (Cambridge: Cambridge University Press, 1900); Otto von Gierke, *Das Deutsche Genossenschaftsrecht. Erster Band: Rechtsgeschichte Der Deutschen Genossenschaft* (Berlin: Weidmannsche Buchhandlung, 1868).
[573] Stolleis, *Public Law in Germany, 1800-1914*, 66.

organism and by using the allegory of the body to describe its functioning. Their theories were also underpinned by strong racial views: while Bluntschli saw the State as a matter of technical achievement and saw it natural for the Aryans (Europeans) to dominate the others, Gierke sought to recover the authentic Germanic legal theory from foreign ('Roman') influence.

The second half of the 19th century was a time of big political change in Europe and the world. The fragmented German nation became unified under the banner of a single Empire. It was also quick to join the colonial race. In 1884, the Conference of Berlin recognized German claims on South West Africa. These changes reverberated through German legal and scientific discourses. The new configurations of power necessitated new discourses about the 'body,' as the new type of the body of the condemned was introduced into the discourse: the body of the colonized.

Colonial embodiments

In the second part of this chapter, I turn my attention away from constitutional legal theory. Instead, I dedicate the second part of this chapter to the case study of the role played by legal and scientific discourses in embodying the subjects of German colonial rule. I propose to analyze the case study of German South West Africa from 1884 to 1908, where I look at the embodiment of the colonized peoples, the Herero and the Nama, by the colonizers – German colonial administrators and anthropologists. In particular, I focus on how legal and scientific discursive formations organized around the 'body' of the colonized were summoned by colonial administration and anthropologists to sustain the colonial rule, to classify the colonized peoples and to deny them personhood. I then look at how the colonial language about the 'body' was employed in relation to legal justifications of the Herero and Nama genocide. The time span chosen for this chapter corresponds to the formation of the German Empire and to

the evolution of German colonial policy in South West Africa from 'native policy' to outright exterminationism.[574]

As Steinmetz notes, representations of the Other can only be determinative for practice if they are taken up by actors in the 'field' (in Bourdieu's sense of the term) of colonial action.[575] Steinmetz proposes a theory of 'the ways in which the internal social dynamics of the colonial state mediated the effects on policy of even the more univocal ethnographic representations.'[576] I propose to extend Steinmetz's argument to physical anthropology, to study the role of racialized anthropological representations and embodiments in the colonial 'field.'[577] To paraphrase Bourdieu, what concerns us here is 'a structured body, a body which has incorporated the immanent structures of a world or of a particular sector of that world - a field - and which structures the perception of that world as well as action in that world.'[578] Therefore, I study how the colonized Herero were embodied by German colonial administration and anthropology through legal and scientific discourses which went on to shape colonial policy. The shifts in the discourse employed by colonial administration were charged by presumptions about indigenous peoples and ultimately found their conclusion in the disaster of the Herero and Nama genocide. The role of law in sustaining imperial rule and the legal justifications employed in relation to the genocide link us thematically to the discipline of international law.

The German colonial project has been largely overlooked by international legal scholarship. Meanwhile, the German colonial experience culminated in the first genocide of the 20th century and it provided the testing ground for legal and scientific

[574] George Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," *UCLA: Department of Sociology*, Theory and Research in Comparative Social Analysis, 2005, https://escholarship.org/uc/item/11z1k021.
[575] Ibid., 19.
[576] Ibid., 20.
[577] Ibid., 19; Pierre Bourdieu, *Habitus and Field*, trans. Peter Collier, vol. Vol. 2, General Sociology. Lectures at the College de France (1982-1983) (Cambridge: Polity Press, 2020).
[578] Pierre Bourdieu, *Practical Reason* (Cambridge: Polity Press, 1998), 81.

discourses which went on to shape German policy and practice and which were subsequently taken over by the Nazi regime.[579]

Method

The two parts of this chapter dealing with 1) the organic theory of law and 2) the case study of embodiment in German South West Africa are to be read as two entries into the conceptual framework discussed in the beginning of this chapter (see: Figures 1 & 2). Although the connection between the organic conceptualizations of sovereign power and the treatment of the colonized bodies will be drawn, it goes beyond the scope of this chapter to seek direct causal connection between the organic theory of law and events in the colonies.[580] What connects the two parts of this chapter is the common theme of the embodying, reifying, productive and classifying properties of the legal discourse.[581] The study of the 'body' as the product of power is meant to allow us a peek into underlying regimes of truth and hierarchies of subjects within the single linguistic space of Imperial Germany.

This chapter can be understood as a study of discursive creation of bodies and of the corresponding decisions of whether to allocate or to deny them personhood. More generally, it can be read as a study of the role of the 'body' in the legal discourse and an invitation to think about the relation between the 'body' of the sovereign and the 'bodies' of the colonized. Both organic theory and colonial practices have been linked to the rise of Nazism in Germany – I discuss these claims in the analytical sections located at the end of respective parts of this chapter.

I now turn to the discussion of the 'body' of the State in the organic theory of law.

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[579] Hannah Arendt, *The Origins of Totalitarianism*, Later Edition reprint (London: Penguin Classics, 2017), Part Two: Imperialism, Chapter 7: Race and Bureaucracy; Benjamin Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," *European History Quarterly* 35, no. 3 (2005): 429–64; Jürgen Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination," *Patterns of Prejudice* 39, no. 2 (2005): 197–219.

[580] Jan-Bart Gewald, Marianne Bechhaus-Gerst, and Reinhard Klein-Arendt, "The Herero Genocide: German Unity, Settlers, Soldiers, and Ideas," in *Die (Koloniale) Begegnung : AfrikanerInnen in Deutschland (1880-1945), Deutsche in Afrika (1880-1918)* (Frankfurt: Peter Lang, 2003), 109–27.

[581] Schlag, *The Enchantment of Reason*, 100; Latour, "Scientific Objects and Legal Objectivity."

Part I: The Sovereign Body

The Embodiment of the State in the Organic Theory

Bluntschli's metaphysical person of the State

Johann Kaspar Bluntschli (1808–1881) was born and raised in German-speaking Zurich.[582] Having been defeated in the race for the office of the mayor of his hometown, Bluntschli left Switzerland for Munich, where, in 1848, he became professor of German private and constitutional law.[583] In 1861, Bluntschli moved to the University of Heidelberg where he taught constitutional law. Bluntschli never gave up his political ambitions; having obtained the German citizenship, he continued to actively participate in German political life and was given the seat in the parliament of Baden.[584] These facts testify to Bluntschli's connection and relevance to the German intellectual tradition of State theory, which went on to exert significant influence in the development of international law.[585]

In his *Allgemeines Staatsrecht* (translated as *The Theory of the State*) Bluntschli wrote that the State is a person *par excellence,* which, 'having spirit and body, possesses and manifests a will of its own' and who can hold and acquire rights under public law (*Staatsrecht*) and international law (*Völkerrecht*) alike.[586] The organic State so-understood was the holder of sovereignty and was the highest personality recognized by the law.[587] Sovereignty of the State entailed that the State had complete power over its territory to enforce laws and exercise jurisdiction.[588] Bluntschli defined the State as 'a combination or association of men, in the form of government and governed, on a definite territory,

[582] For author's own account of his experiences, see: Johann K. Bluntschli, *Denkwürdiges Aus Meinem Leben*, vol. I&II (Norderstedt: Hansebooks, 2017).
[583] Stolleis, *Public Law in Germany, 1800-1914*, 426.
[584] Ibid., 425–27; Christian Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," *Administrative Theory & Praxis* 36, no. 1 (2014): 96–97.
[585] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*; Koskenniemi, "Between Coordination and Constitution: International Law as a German Discipline."
[586] Bluntschli, *The Theory of the State*, 27.
[587] Duncan Kelly, "Revisiting the Rights of Man: Georg Jellinek on Rights and the State," *Law and History Review* 22 (2004): 512.
[588] Bluntschli, *The Theory of the State*, 202.

united together into a moral organised masculine personality.'[589] The State, understood in this way, constituted a unity of the people (the government and the governed) in the 'ethical-organic, masculine person.'[590]

'The State,' Bluntschli wrote, 'is in no way a lifeless instrument, a dead machine: it is a living and therefore organised being.'[591] He saw this as a merit of the German historical school to have refuted the formal, mechanistic views of the State represented by early modern contract theorists discussed in previous chapters. Bluntschli supported his argument with the following allegory:

> *An oil-painting is something other than a mere aggregation of drops of oil and colour, a statue is something other than a combination of marble particles, a man is not a mere quantity of cells and blood corpuscles; and so too the nation is not a mere sum of citizens, and the State is not a mere collection of external regulations.*[592]

Even though the State is not a direct product of nature, it is indirectly a product of the work of 'Man' and thus, of human nature.[593] The State, summoned into life by the labor of men, thus becomes a 'copy of a natural organism.'[594]

Building upon Aristotle, Bluntschli wrote that the *Volksperson* of the State, as an organism and an imitation of the human body, consisted of the union of the soul and the body.[595] The State so-understood consisted of an amalgam of psychological and bodily components. The State, just like individuals, could be animated by passion.[596] It was characterized by external growth, with different body parts united for common needs and purposes.[597] The constitution, being the emanation of the body politic,

[589] Ibid., 28.
[590] Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," 98.
[591] Bluntschli, *The Theory of the State*, 24.
[592] Ibid., 25.
[593] Ibid.
[594] Ibid.
[595] Ibid., 31.
[596] Ibid., 37.
[597] Ibid., 25.

provided structure to State institutions and offices, whose precise arrangement determined by historical processes.[598] The constitution had to accord with the needs and capacities of the nation, lest it became an 'unnatural and incapable' body.[599] The offices prescribed by the constitution were seen as possessing a spiritual nature, for 'they serve life, and are themselves living.'[600] The offices were animated by the State's soul, influencing the behavior of biological persons who exercise public functions. For example, Bluntschli wrote that 'the office of judge is so sacred, so consecrated to justice, that even a weakling when appointed to it has his mind ennobled and his determination aroused to maintain the right.'[601] We could thus say that the organic State was channeled through the biological individuals, as it elevated them and modified their behavior.

At the core of Bluntschli's organic conceptualization of the State was its anthropomorphism, associated with the influence of Hegel. Indeed, Hegel wrote that the nation constituted a 'mind in its substantive rationality and immediate actuality' and was therefore 'the absolute power on earth.'[602] The State as an organism possessed a 'personality not very much unlike human persons, albeit of a qualitatively higher kind.'[603] The State was to be 'interpreted anthropomorphically, and many bodily and mental functions of humans were ascribed to it.'[604]

While Bluntschli's thought was certainly influenced by the philosophy of Hegel, Bluntschli also criticized the German philosopher for his failure to demonstrate that the State was a living organism and not a purely metaphorical entity.[605] Bluntschli wrote:

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[598] Ibid., 26.
[599] Ibid., 95.
[600] Ibid.
[601] Ibid.
[602] Hegel, *The Philosophy of Right*, §331.
[603] Patrick Overeem, *The Politics-Administration Dichotomy: Toward a Constitutional Perspective*, 2nd Edition (Boca Raton: CRC Press, 2012), 41; Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," 99.
[604] Ibid.
[605] Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," 99.

> *Hegel's State is however only a logical abstraction, not a living organism, a mere logical notion, not a person. Hegel, by founding the State and Law upon will, overlooks the fact that in the State not merely is the collective human will operative, but all the powers of human spirit and feeling together.*[606]

Bluntschli, who disliked the excesses of authoritarian monarchy and the tumult of progressive revolutions alike, labored to find a 'historically grounded, organic compromise'[607] between the demands of monarchical and liberal political forces.[608] Bluntschli's State thus surpassed the bounds of the mechanistic contract theories and of Hegel's collective will. It was instead grounded in a collective pursuit of a coherent set of substantive purposes.[609]

Bluntschli's living and anthropomorphic State could then be described with the same terms one would use to measure any other living organism and its body. The State, just like individual men, would go through different periods of life, with a difference that the age of the State is counted in centuries rather than years.[610] Every period of State's evolution would have its specific character: 'the childhood of nations has a different character from their maturity,' but the entirety of this collective history forms a coherent whole.[611] The highest development of the Nation, just like that of individuals occurs in the middle of its life.[612] While plants, animals and men follow regular patterns of grow and decay, the development of the State may appear less regular, for it may be deviated by the free will of great individuals or by the collective desires of the nation.[613] Just like individuals who share the same organs may change their physical appearance, the exact

[606] Bluntschli, *The Theory of the State*, 69.
[607] Stolleis, *Public Law in Germany, 1800-1914*, 133.
[608] Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," 99.
[609] Ibid., 100.
[610] Bluntschli, *The Theory of the State*, 26.
[611] Ibid., 26.
[612] Ibid., 83.
[613] Ibid., 27.

structure of the State may be subject to historical change and decay.[614] 'Nations no less than men appear to be mortal.'[615]

According to Bluntschli, the State remained distinct from other life forms.[616] Bluntschli understood the State as an organism of a superior kind, 'a moral and spiritual organism, a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realizing them in acts.'[617] The State translated the will of the nation and reified it through legislation and legal acts.

Bluntschli saw the sovereign State as a product of technical achievement: this metaphysical person could only be fully recognized by the will of the 'free people' in the 'civilized nation-state.'[618] Bluntschli's conceptualization of the State was founded upon a race theory which saw the 'Aryan' (European) race as superior and naturally dominant over others:

> *Unter den verschiedenen Völkern, welche sich den Besitz der Erde geteilt haben, nimmt die arische Völkerfamilie den ersten Rang ein [...]. Alle anderen stehen tief unter ihr [...]. Der arische Geist, von der Schöpfung her am reichsten ausgestattet [...] hat die Bestimmung, die Menschheit mit sei- nen Rechts- und Staatsideen zu erleuchten und die Herrschaft der Welt [...] zu übernehmen und durchzuführen, indem er die ganze übrige Mensch- heit zur Zivilisation erzieht.*[619]

Bluntschli then stated that 'there are many thinkers who, in theory, deny the mental inequality of these races, but scarcely one who does not constantly recognize it in practical life.'[620] He went on to say that each race is 'endowed' differently. According to

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[614] Rosser, "Johann Caspar Bluntschli's Organic Theory of State and Public Administration," 105.
[615] Bluntschli, *The Theory of the State*, 83.
[616] Ibid., 27–28.
[617] Ibid., 27.
[618] Ibid., 28.
[619] Johann K. Bluntschli, "Arische Volkerund Arische Rechte," in *Deutsches Staats-Wörterbuch* (Stuttgart: Giesecke & Devrient, 1857), s. 319 & 331; Daniel-Erasmus Khan and Lando Kirchmair, ""All's Well That Ends Well?" Zum Verbot Der Rassendiskriminierung Im Völkerrecht," in *Rassismus in Geschichte Und Gegenwart: Eine Interdisziplinare Analyse. Festschrift Für Walter Demel*, ed. Sylvia Schraut and Ulrike Paul (Frankfurt: Peter Lang, 2018), 338.
[620] Bluntschli, *The Theory of the State*, 75.

Bluntschli, the 'Ethiopian' race, which belonged to Africa, attained only a moderate level of political and legal development and it had no real history.[621] Bluntschli saw them as childish in nature, characterized by a weak will, excitable passions and luxuriant fancy. Their destiny was to be ruled by 'higher nations.' Bluntschli argued that even in antiquity, the black races would be ruled by 'the white Aryans and Semites':

> *To the present day the old Negro monarchies of Africa are not proper States, but arbitrary and capricious despotisms. […] The attempts of the Negroes of Hayti and Liberia to imitate the governments of the French Empire and the United States are burlesques of the life of political nations.*[622]

According to Bluntschli, human history that was worthy of recounting only started with the appearance of a 'higher race' – the white races.[623] To him, the 'inferior races' naturally gave in when they encountered white men; they only served as a material cause for the appearance of the 'higher forms of humanity.'[624] Bluntschli saw the 'European family of nations' as superior to the rest of the world.[625] Bluntschli argued that white races determine the history of the world and that the global progress depended upon the recognition of the superiority of the European race by the rest of the world.[626] While the territory of the European State was seen as inalienable and indivisible and could only be ceded by international accords, territories and peoples falling outside Western conceptualization of the State were presented as being prone to subjugation and as possessing negotiable boundaries.

> *On this rests the claim of these Aryan nations of Europe to become, by their ideas and institutions, the political leaders of the other nations of the earth, and so to perfect the organization of mankind*.[627]

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[621] Ibid.
[622] Ibid.
[623] Ibid., 55.
[624] Ibid., 56.
[625] Ibid., 203.
[626] Ibid., 35 & 76.
[627] Ibid., 77.

In his treatment of the relationship between history and race, Bluntschli echoed Hegel who wrote that:

> *The Negro, as already observed, exhibits the natural man in his completely wild and untamed state. […] From these various traits it is manifest that want of self-control distinguishes the character of the Negroes. This condition is capable of no development or culture, such have they always been. […] [Africa] is no historical part of the world; it has no movement or development to exhibit. […] What we properly understand by Africa, is the Unhistorical, Undeveloped Spirit, still involved in the conditions of mere nature, and […] on the threshold of the World's History.*[628]

Bluntschli argued that the language of the developed civilizations should be taught at school so that 'the children of a still unformed people may share in a heritage of a noble literature.'[629] The colonized people retained the right to observe their customs, as long as they did not interfere with the higher moral law of men or with the rights of the State.[630] However, in the end, it was essential for a State to 'include the whole population in its laws, and transform or abolish the rights of individual peoples.'[631] According to Bluntschli, it was only natural for the stronger element to dominate the minorities and to subsume them within the organic nation State: the 'wilderness of traditional statutory rights' had to give way to the unity of the law and the State.[632]

Bluntschli also used a gendered language to describe the person and the body of the State. He argued that there were no 'abstract' persons and that all persons could be ultimately characterized by the Aristotelian notions of 'femininity' and 'masculinity.'[633] In a display of racialized and gendered assumptions about the body politic, Bluntschli

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[628] Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, trans. John Sibree (Kitchener, Ontario: Batoche Books, 2001), 111, 116–17; Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination," 205.
[629] Bluntschli, *The Theory of the State*, 86.
[630] Ibid.
[631] Ibid.
[632] Ibid.
[633] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 80.

gave an example of Alexander the Great, who attempted to 'wed the manly spirit of the Greeks with the feminine quickness and susceptibility of the Asiatics.'[634] He wrote that:

> *Strictly speaking, only those people in which the manly qualities, understanding and courage predominate are fully capable of creating and maintaining a national State. Peoples of more feminine characteristics are, in the end, always governed by other and superior forces.*[635]

Bluntschli then compared the 'masculine' State against the 'feminine' Church. According to Bluntschli, while the religious community may display all the other characteristics of a political community, the Church remains feminine and passive because 'she does not consciously rule herself like a man, and act freely in her external life but wishes only to serve God and perform her religious duties.'[636] Indeed, Bluntschli saw the woman's 'timid nature' as unsuitable for politics.[637] Bluntschli went on to proclaim that 'the State is the Man,'[638] the 'humanity organized, but humanity as masculine, not as feminine.'[639] The State so-understood was 'a combination or association of men, in the form of government and governed, on a definite territory, united together into a moral organized masculine personality.'[640] O'Donoghue writes that such personifications serve the goal of associating masculine stereotypes with the government; 'the masculine State, just as the male body is bounded and not subject to childbirth or penetration, does not allow for emissions or entries being in complete control of its borders and governance.'[641]

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[634] Bluntschli, *The Theory of the State*, 31.
[635] Ibid., 93.
[636] Ibid., 28.
[637] O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law."
[638] According to Bluntschli: 'The French expression, *L'ętat c'est l'homme*, does not merely signify 'the State is Man in general' (*der Mensch im Groszen*), but 'the State is the man, the husband (*der Mann*) in general,' as the Church represents the womanly nature in general, the wife (*die Frau*).' In: Bluntschli, *The Theory of the State*, 29.
[639] Ibid., 35.
[640] Ibid., 23.
[641] O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law," 13.

Characteristic to Bluntschli's project was the anthropomorphic character of the metaphysical person of the State. The State became the real organic person of the law with bodily characteristics of its own. This 'great body' would be channeled through individuals; it would reify the will of the nation through legislative acts. For Bluntschli, it was possible to describe the State with the same language one would use to describe other living organism. Accordingly, he drew from the baggage of anthropomorphic and gendered presumptions and applied them to the person of the State. The notion of the 'body' served to underline the nation's unity and continuity throughout time. The State translated the will of the people and reified it in its laws and constitution.

Let us now move to discuss the works of another exponent of organic theory of the State, who sought to provide an organic alternative to contract theories of the State.

Otto von Gierke and the *Genossenschaft*

Otto von Gierke (1841-1921) was one of the greatest representatives of the German historical school of jurisprudence. Influenced by the philosophy of Hegel and Schelling, the Germanist legal scholars based at the University of Göttingen saw history as 'the revelation of the absolute in time,' a passage of successive stages of history in an organic process in which absolute spirit realized itself.[642] According to this conceptualization, the law had to reflect the spirit of the people. The *Göttinger Rechtsschule,* to which Gierke belonged and which he helped to define, attempted to excavate the authentic 'Germanic' legal theory and to sideline what it saw as 'Roman' intrusions into the German jurisprudence.[643] In particular, Gierke criticized the Roman theory of corporations which were seen as mere fictions of law. He also criticized the distinction between private rights of individuals and public rights of the State which resulted in the conflict of rights. Gierke saw the resulting conflict of rights as foreign to Germanic thought; he strove to find a distinctly German theory of associations that would allow the political community and individuals to bear the same subjective rights. In its

[642] Ben Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory," *Journal of International Political Theory* 8, no. 1–2 (2012): 50.
[643] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 188.

capacity as a bearer of rights, the State was then to be understood as the real person of the law.

In his *Das deutsche Genossenschaftsrecht*, Gierke narrated the rise and fall of the concept of group personality.[644] The concept of 'personality' was understood by Gierke in terms of rights. In German jurisprudence, rights could only be borne by persons and sovereignty was one of the rights of public law.[645] Thus, the single sovereignty required a unified 'person' to bear it. For this reason, Gierke reified the legal personality of the State; he considered the State as a real embodied entity, a living organism with a will of its own.[646] The concept of the 'body' played a particularly important role in the thinking of Gierke. In order to become free, individuals needed to form collective consciousness. This consciousness took the form of *die Staatsseele* (the State's soul) and was embodied through conversion into a physical presence, the *Staatskörper* (the body of the State).

Gierke used the language of the body to describe the plurality-in-unity of the State.[647] Gierke criticized the view of the State as a top-down form of domination; instead, his organological approach allowed him to see the State as a 'dialectical mutuality of dominating and collective principles.'[648] While Bluntschli followed the likes of Gerber and Laband in treating the State as a monolithic person, Gierke saw the need for recognition of particular identities as organs within the overarching body of the State.[649] Gierke hoped that the process of German unification and the establishment of the North German Confederation would lead to the establishment of the unified Empire, where constituent states would renounce their sovereignty, but retain their 'basic state nature'

[644] The following translation will be used: von Gierke, *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht (The German Law of Fellowship)*.
[645] Runciman, *Pluralism and the Personality of the State*, 39.
[646] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 113.
[647] Runciman, *Pluralism and the Personality of the State*, 37.
[648] Stolleis, *Public Law in Germany, 1800-1914*, 338.
[649] Ibid., 319, 337.

explained by the organological conceptualization of the State.[650] Stolleis puts Gierke's ideas in their historical context:

> *Gierke's dialectic between the past and the future, Teutonophile and modern, domination and collectivity, individualism and socialistic activity […] reflected exactly the problematic of legal sciences during the Empire period. The dilemma arose from the fact that the middle-class society now unified into a nation as a subject of domination had to be stabilized and at the same time flexible to overcome social tensions.*[651]

In his search for a suitable theory of associations, Gierke studied the conceptual problems encountered by natural law and social contract theorists. Social contract theory has been riddled with a tension between unity and plurality of the contracting parties. As discussed in Chapter I, the social contract theory assumed the existence of two distinct personalities: that of the people, on the one side, and of the ruler, on the other side.[652] However, if we were to assume that the people simply contract with their rulers, this would mean that each of the sides would be equal partners in a contract and would hold certain rights against the other party.[653] The result would have been even greater disunity and a flurry of rival claims between the contracting parties.

While Gierke credited Hobbes with mending the longstanding conceptual problems of social contract theory, he was also dissatisfied with the vision of the State obtained as a result.[654] In the end, Hobbes's argument was to be understood in purely mechanistic terms of a social contract.[655] Even though Hobbes opted for the image of a living body for the frontispiece of the *Leviathan,* his concept of personality of the State remained contractual and formal in nature. Gierke wrote that 'an organism of this nature,

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[650] Ibid., 337; von Gierke, *Das Deutsche Genossenschaftsrecht. Erster Band: Rechtsgeschichte Der Deutschen Genossenschaft*, 843.
[651] Stolleis, *Public Law in Germany, 1800-1914*, 339.
[652] Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory."
[653] Runciman, *Pluralism and the Personality of the State, 38; von Gierke, Natural Law and the Theory of Society: 1500 to 1800*, 56.
[654] Ibid., 40; von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, 52.
[655] Runciman, *Pluralism and the Personality of the State*, 40.

destitute of any Ego, was after all only a simulacrum of a living being.'[656] While writing about the State, Hobbes:

> *Proceeded to expound, in the minutest detail, its analogies with a living being […] ended by transforming his supposed organism into a mechanism, moved by a number of wheels and springs, and his man-devouring monster turned into an artfully devised and cunningly constructed automaton*.[657]

The Hobbesian State was thus a 'bloodless category'[658] because it was not a real person in its own right.[659]

Gierke was equally skeptical of the language of 'moral personhood' employed by Pufendorf. While the notion of moral personhood allowed Pufendorf to enter the new world of thought,[660] Gierke still found it to be 'a purely formal assimilation of the group-person to the individual.'[661] As discussed in Chapter II, Pufendorf equated 'will' of the State with the person of the King, while 'intellect' of the State was to be exercised by the Council of People. The faculties of the moral person of the State were thus dependent upon the existence of natural persons choosing to act or to manifest their will. This led Gierke to see Pufendorf as a continental exponent of the contractual theory of Hobbes, whose concept of the State continued to depend upon the performative acts of natural men.[662]

The theories of Hobbes and Pufendorf were insufficient for the purposes of Gierke, who attempted to theorize a real organic unity within the body of the State. Gierke was interested in conceptualizing how a collective entity could possess a 'real,' organic

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[656] von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, 52.
[657] Ibid.
[658] Ibid., 56.
[659] Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory."
[660] von Gierke, *Natural Law and the Theory of Society: 1500 to 1800*, 120-121.
[661] Ibid.; Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities, 199.*
[662] Holland notes that Gierke, while noticing the limitations upon sovereign power imposed by Pufendorf's theory of facultative sovereignty, failed to take these limitations seriously. In: Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 205; von Gierke, *Natural Law and the Theory of Society*: 1500 to 1800, 118.

group personality which would be autonomous from the sum of personalities of its members and from the figure of the sovereign.[663] It did not suffice for the State to be mechanistically unified through contract, for the State also needed to be vital and bound together like a true living organism. Gierke thus turned his attention back to the political theory of the Middle Ages.

Gierke wrote that 'Political Thought, when it is genuinely medieval, starts from the Whole, but ascribes an intrinsic value to every Partial Whole down to and including the Individual.'[664] In medieval thought, God was seen to provide unity to the universe and 'a divinely instituted Harmony which pervades the Universal Whole and every part thereof.'[665] The social realm was understood to reflect the underlying harmony and unity of the universe as 'a Community which God Himself had constituted and which comprised all Mankind.[666] This conceptualization naturally lent itself to organic imagery which would compare the harmonious organization of the universe to the arrangement of organs within a living body.[667] Any social theory would have to reflect the harmonious organization of the universe and of the body.[668] This form of organization was reflected in the medieval theory of corporations, which relied on two discourses: the notion of the unity of the State as a *societas* (a mechanistic union) and the notion of *universitas* (the language of the organism represented by its head) employed to prevent the body from falling apart. [669]

Christianity's promise was to unite humanity in one community headed by God, 'One Organism, animated by One Spirit, fashioned by One Ordinance.'[670] Even if men could be subdivided into different political bodies, all mankind was ultimately unified by 'the

[663] Ibid., 37.
[664] von Gierke, *Political Theories of the Middle Age*, 7.
[665] Ibid., 4, 8.
[666] Ibid.
[667] Runciman, *Pluralism and the Personality of the State*, 48.
[668] Ibid., 8.
[669] Otto von Gierke, *Political Theories of the Middle Age*, 7–10; David Runciman, *Pluralism and the Personality of the State*, 35–39.
[670] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 194; von Gierke, *Political Theories of the Middle Age*, 8.

existence of its Heavenly Head.'[671] The true unity consisted of coordination of the constituent parts by God's reason gifted unto mankind.[672] However, as medieval writers have increasingly 'took the State's side' in the debates concerning the primacy of secular power over religious authority, the argument ultimately transformed into a tendency to see the sovereign as the God-ordained head of the body politic and the sole representative of the State.[673] According to Gierke, Christian political theology ultimately failed, in that it paved way to monarchy headed by the sovereign, the holder of the divine right.[674]

The dissatisfaction with the above-described theories led Gierke to turn to the old Germanic notion of the fellowship (*die Genossenschaft*) instead.[675] The concept of the fellowship originated in relation to medieval towns and it was also applied to other forms of associational life.[676] Gierke argued that fellowships were real, living entities, rooted in the historical development of Germanic associational life.[677] The fellowship had an existence independent of its members; it also accommodated separate aims of the individuals who made up its constituent parts. Gierke saw fellowship as a way of preserving plurality within the unity of the person of the State. It allowed persons (which could be groups) to exist within other (collective) persons as organs within the body, while retaining their particular identities. Human persons could thus be incorporated into different levels of the 'living organism' of the group without eroding

[671] von Gierke, *Political Theories of the Middle Age*, 22–23.
[672] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 195.
[673] von Gierke, *Political Theories of the Middle Age*, 18–21.
[674] 'Human Lordships proceeds from, is controlled by, and issues in, divine Lordship' in: von Gierke, 30; Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory."
[675] von Gierke, *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht (The German Law of Fellowship)*. Volume I deals with the history of German fellowship. Volume II describes the relationship between the notions of fellowship and corporation.
[676] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 190–91.
[677] Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013), 80–81.

the identity of either. The personalities of the whole and of its constituent parts were reciprocally bound through the organic link.[678]

Gierke then employed the old Germanic idea of the *Rechtsstaat* as a legal framework for his conceptualization of the State as a unity whose parts exist in constant organic relation to each other.[679] The *Rechtsstaat* formed the apex collective person, the highest universality in the link of collective persons.[680] 'It was the idea of a State which existed only in the Law and for the Law, and whose whole life was bound by a legal order that regulated alike all public and all private relationships.'[681] The *Rechtsstaat* exercised sovereignty by translating the consciousness of the people into the law.[682] There was to be no distinction between the rulers and the ruled: all persons within the *Rechtsstaat* were 'public parts as well as private wholes.'[683] No-one could then be denied a public function or claim the public right as their own.

Gierke's *Rechtsstaat* was not a body which could be regulated or managed from the outside; rather, it marked the relation of independent organs necessary for the functioning of the body as a whole. Here the embodiment of the State appears in full sight: the figures of the 'sovereign' or 'the people' could not be separated from the whole; they form reified parts of the organic unity that is the body of the State.[684] The very personality of the State resided in the totality of its public laws.[685] The State was not to be 'merely subservient and receptive' in relation to Law, but 'creative and dominant' upon it.[686] The common purpose of men united into a group constituted the condition of and the restriction upon the operation of the organic State. Different

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[678] von Gierke, *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht (The German Law of Fellowship)*, Volume II, 243.
[679] It is difficult to faithfully translate the concept of Rechtsstaat into English. Maitland uses the term 'Right-State' (while referring to the 'Reign of Law') in: von Gierke, *Political Theories of the Middle Age*, 73.
[680] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 191.
[681] von Gierke, *Political Theories of the Middle Age*, 73.
[682] Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory," 51.
[683] Runciman, *Pluralism and the Personality of the State*, 53.
[684] Ibid., 53.
[685] Holland, *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*, 192.
[686] von Gierke, *Political Theories of the Middle Age*, 74.

interest groups, while they retained particular identities, were not separate from the State, but operated as organs within the single organism.

This leads us to the role played by associations and communal life in the *Rechtsstaat.* On the one hand, the associations (such as Germanic fellowships) constituted the source of power of the State. On the other hand, associations displayed separate identities and, thus, constituted a challenge to the State's power. This led Barkan to write about the 'corporate' character of Gierke's conceptualization of sovereignty: strictly speaking, sovereignty rested with the organic community and not with some abstract person of the State.[687] However, by giving precedence to the organic community as the life force which invigorates the State, Gierke made it precisely that element which 'must be defended' through the biopolitics of the State apparatus.[688] The State thus became 'the protector of the integrity, the superiority, and the purity of the race.'[689] By making the associational life the source of community's strength and sovereignty, the floodgates were open for the body politic to be permeated with the new type of power: that of biopolitics based upon the exclusionary ideas of racial hygiene. Seen from this perspective, Gierke's enchantment with the idea of the authentic German fellowship strikes worryingly close to the corporatist legal doctrines which were later employed by the ideologues of fascism.[690] Gierke himself was borne by the nationalist tide: while he respected the freedom of association in principle, in practice he identified the fellowship with the fortunes of the German nation State.[691] He joined the ultra-conservative German National Party and advocated for the establishment of the *Volksstaat* that would permeate the consciousness of all social classes.

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[687] Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, 81.
[688] Ibid., 81; Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, 61.
[689] Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, 81.
[690] Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, 81.
[691] Antony Black, "Fellowship and Community: Gierke and Tönnies," in *Guild & State European Political Thought from the Twelfth Century to the Present* (New York: Routledge, 2003), 216.

It is then not difficult to see the parallels between the work of Gierke and the historical narratives which generated the justifications of State racism.[692] In Gierke's works, one encounters essentialist conceptualization of what it means for the thought to be 'German.' Despite the negative influence of Roman ideas which infiltrated the modern society, the 'Germanic Spirit' survives throughout the ages and continues to do a 'mighty work both among the political ideas of the Reformation and also in the construction of the […] Doctrine of the State.'[693] Indeed, the very notion of Germanic culture employed by Gierke was characteristic of the organic treatment of culture as a natural phenomenon emanating from the nation based on the ideas of racial purity.[694] The natural imagery employed by Gierke in relation to Germanic culture and associational life displayed some of the 'overtones of struggle in the era of Social Darwinism.'[695] The heightened anti-French and anti-Polish sentiment, expressed in the language of German racial purity, as well as the radicalization of German colonial policies, can be viewed through the lens of increasingly organic imagery of the nation-State and the rise of State racism.[696]

It needs to be noted that Gierke was not particularly interested in the international dimension of his *Rechtsstaat*.[697] The organic State could not have legal relations outside of itself, as it constituted the ultimate juristic Whole and the apex person of the law. Nevertheless, the organic vocabularies and conceptualizations of the State continued to play an important role in the development of international law and they have been criticized for their complicity in imperial rule and the rise of totalitarianism.

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[692] Ibid.
[693] von Gierke, *Political Theories of the Middle Age*, 6.
[694] Brian Vick, "The Origins of the German Volk: Cultural Purity and National Identity in Nineteenth- Century Germany" 26, no. 2 (2003): 249.
[695] Ibid.
[696] Ibid.
[697] Holland, "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory," 51.

Analysis and legacy of the organic theory

The anthropomorphism of the State reached its apex in the metaphysical person of the State posited by organic theory. The organic State was not an abstract or fictitious person, but a real person with a mind and body of its own.[698] Contrary to the performative theories of the State discussed in Chapter I, the organic State could act by itself and through its organs: 'it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand.'[699] Sovereignty of the organic State was to be understood as 'an attribute, not of some part of the State, but of the *Gesammtperson*, the whole organized community.'[700] As the apex person of the law, the organic State thus replaced the phantom body of the King as the ultimate source of legal authority (See: Figure 1 above).

The jurists discussed in this chapter have played an important role in legal history and in the development of international law. Bluntschli was one of the founding members of the *Institut de Droit International* and later served as its president. He also contributed to the early efforts at codification of international law; Bluntschli's 1868 book on the code of international law became the most consulted and most cited international legal publication of the time.[701] In that book, Bluntschli argued that wars were fought between States and not between sovereigns or private individuals, which reflected the organic focus on the person of the State. It followed that the warring States could, for example, take hostages and starve or expel non-combatants in order to hasten the surrender of the enemy.[702] A warring State could also remove property belonging to the enemy State, but not the private property of individuals. While Bluntschli's organicism

[698] Frederic W. Maitland, "Translator's Introduction," in *Political Theories of the Middle Age*, by Otto von Gierke (Cambridge: Cambridge University Press, 1900), xxvi.
[699] Ibid.
[700] Ibid., xliii.
[701] Johann K. Bluntschli, *Das Moderne Völkerrecht Der Zivilisierten Staaten Als Rechtsbuch Dargestellt* (Nördlingen: C.H. Beck, 1866); Dietrich Schindler, "J.C. Bluntschli's Contribution to the Law of War," in *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International*, ed. Marcelo Kohen (Leiden: Brill, 2006), 440.
[702] Schindler, "J.C. Bluntschli's Contribution to the Law of War," 446.

certainly contributed to his vision of international warfare, it must be noted that Bluntschli's ideas were relatively liberal for the time and they were shared by some of his prominent contemporaries, such as Francis Lieber.[703] Meanwhile, Gierke's work on theory of associations was a major influence on Maitland, who translated *The Political Theories of the Middle Age* into English.[704] In the translator's introduction, Maitland wrote of the importance of Gierke's research to the theory of the State and of corporations.[705] He also credited Gierke as the main source of inspiration for his study of the 'Crown as Corporation.'[706] Gierke's theory of associations, with its recognition of particular interests and identities, went on to influence British pluralists such as John Neville Figgis, G. D. H. Cole and Harold Laski.[707]

Other scholars proved less enthusiastic. Barthélemy criticized the organic theory of the State for its monarchical and antidemocratic bent.[708] The organic assumption that the State acts through its organs inevitably led to the dislocation of responsibility for the acts of the State: 'derrère le représentant, il y a la personne représentée ; derrière l'organe, il n'y a rien.'[709] Wolfgang Friedmann saw Gierke's organic concept of the State as 'an important stepping-stone towards that merger of the individual in the collective, which is an essential and vital aspect of modern totalitarian government.'[710] Friedmann accused the organic theory of the 'complete absorption of the individual' as he drew parallels between Gierke's theory and modern fascism.[711]

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[703] Ibid.
[704] von Gierke, *Political Theories of the Middle Age*.
[705] Maitland, "Translator's Introduction."
[706] Frederic W. Maitland, "The Crown as Corporation," in *Maitland: State, Trust and Corporation*, ed. David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2012).
[707] Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, 81.
[708] Joseph Barthélemy, *Le Rôle Du Pouvoir Exécutif Dans Les Républiques Modernes* (Paris: Giard et Brière, 1906), 28.
[709] Ibid., 28.
[710] Wolfgang Friedmann, *Legal Theory*, 5th edition (New York: Columbia University Press, 1967), 238; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 113.
[711] Friedmann, *Legal Theory*, 226, 559.

Although the criticism levelled against the works Bluntschli and Gierke would benefit from more nuance, it is undeniable that both jurists had a problematic relationship with nationalism and collectivism in practice. Bluntschli himself wrote that:

> *The glory and honour of the State have always elevated the heart of its sons, and animated them to sacrifices. For freedom and independence, for the rights of the State, the noblest and best have in all times and in all nations expended their goods and their lives* […] *The whole great idea of the Fatherland and love of country would be inconceivable if the State did not possess this high moral and personal character.*[712]

While reminiscing about the conduct of the Franco-Prussian war in one of his lectures, Gierke stated that:

> *There are times when the spirit of the community reveals itself to us with an elemental power, in an almost visible shape, filling and mastering our inward being to such an extent that we are hardly any longer conscious of our individual being as such. Here, in Berlin, in the Unter den Linden, I lived through such an hour of consecration on the 15th July, in the year 1870.*[713]

These excerpts are in line with Kantorowicz's argument that the conceptualization of the State as a mystical body has served as an incentive to sacrifice's one's life for the State, an argument which privileged collectivism at the expense of individual life.[714] Vested with a mystical body and spirit, 'the state as a juristic person finally achieved its semi-religious or natural-religious exaltation.'[715] The incentive for the individuals to sacrifice their lives and to annihilate the lives of others for the 'terrestrial metaphysical

[712] Bluntschli, *The Theory of the State*, 27.
[713] Ernest Barker, "Introduction," in *Natural Law and the Theory of Society: 1500 to 1800*, by Otto von Gierke (Boston: Beacon Press, 1957), 69.
[714] Kantorowicz, "Pro Patria Mori in Medieval Political Thought"; Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology*, 1957, 259.
[715] Kantorowicz, "Pro Patria Mori in Medieval Political Thought," 490.

community'[716] has reached culmination in the organic theory, which saw the State as the ultimate metaphysical person on earth.

The conceptual problem at the core of organic theory remained that the limits of State power were to be determined from the inside of State's will, paving the way towards the 'lonely wilderness' of totalitarianism.[717] However, it must be noted that, to some extent, both Bluntschli and Gierke seemed aware of the dangers of unlimited sovereign power: their theories accommodated for the need to seek social equilibrium and peaceful continuity based upon historical arrangements.[718] Bluntschli saw the principle of humanity as the cornerstone of international law and argued that binding law had to arise from human legal consciousness.[719] While Bluntschli argued that wars of annihilation were illegal under international law only insofar as they targeted the peoples 'capable of life and culture,' he did criticize the lack of protection and denial of human rights to the Africans in the colonies.[720] His objective was to establish a European confederation, with a long-term plan to achieve a World State, this 'perfect State […] the visible body of Humanity' and the embodiment of the idea of progress.[721] Of course, the problem remained that the proposed solution relied upon the European idea of progress and domination. Meanwhile, the organic theory of the type practiced by Gierke was sensitive to different class positions, individual identities and internal arrangements within the State. The analogy of the 'body' allowed Gierke to account for the existence of a plurality of interests groups with their particular identities, operating as if they were organs in the body of the State. For example, Gierke argued that

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[716] Ibid., 491.
[717] Albert Salomon, "Review: Otto Gierke: Natural Law and the Theory of Society, 1500-1800 with a Lecture on the Ideas of Natural Law and Humanity," *American Journal of Sociology* 48, no. 2 (1942): 257–58.
[718] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 184; Salomon, "Review: Otto Gierke: Natural Law and the Theory of Society, 1500-1800 with a Lecture on the Ideas of Natural Law and Humanity," 257.
[719] Schindler, "J.C. Bluntschli's Contribution to the Law of War," 443; Kelly, "Revisiting the Rights of Man: Georg Jellinek on Rights and the State," 515.
[720] Johann K. Bluntschli, *Das Moderne Völkerrecht Der Civilisirten Staten* (Nördlingen: Beck, 1878), 299–300; Rachel Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany," *California Law Review* 93, no. 4 (2005): 1169.
[721] Bluntschli, *The Theory of the State*, 31; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 216.

corporations could be seen as legitimate and spontaneous counterweights to the centralizing economic policy of the German State. Gierke thus advocated for leaving the room for the clustering of groups around freely determined purposes and for the criticism and adjustment of these purposes by the State, as in a well-regulated organism.[722] The State's role was to give due consideration to differing interests and to translate them into an action beneficial to the national community.

The importance of 'internal' processes within the State was later acknowledged by the interbellum scholarship. Inspired by the works of Freud, international lawyers such as Brierly and Butler discussed the importance of social consciousness of States in international law.[723] Geoffrey Butler, whose project it was to erode the divisions between internal and external sovereignty, wrote that 'interests within the subconscious sphere will demand admittance into the conscious sphere in ways that finally will find expression in international affairs, thus justifying international organization.'[724] International lawyers of the inter-war period were aware that a form of government and internal political processes within the State shaped international behaviour and the possibility of international cooperation; the very project of international law was deemed to depend on the prevalence of a constitutional form of government.[725]

Some of the ideas associated with organic theory have also made their way into modern international law. For example, the International Law Association's (ILA) study of customary law found Art. 38(1)(b) of the ICJ Statute to be a reflection of the influence of the German historical school, which 'held that law, and customary law in particular, was an emanation of the *Volksgeist* (national spirit) and the embodiment of the nation's "juridical consciousness" - one possible interpretation of the phrase *opinio juris (sive*

[722] Barkan, *Corporate Sovereignty: Law and Government under Capitalism*, 81.
[723] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 134.
[724] Geoffrey Butler, "Sovereignty and the League of Nations," *British Yearbook of International Law* 35, no. 1 (1920): 44.
[725] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 134–35.

necessitatis).'[726] We can thus see that language pertaining to embodiment in the organic theory continues to, in the words of ILA, 'muddy the waters of customary international law.'[727]

The logic of the State as a person with a 'body' of its own is also reflected in the principles of sovereignty, territoriality and non-intervention. Art. 1(b) of the Montevideo Convention states that the State as a person of international law should possess a defined territory. As stated by the PCA, 'Sovereignty in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[728] This conceptualization of sovereignty echoes the self-referential and self-validating argument of the King's Two Bodies which was transferred upon the person of the organic State and influenced the development of international law.[729] Sovereignty understood in this way is founded upon the 'fact' of the territory; just as the 'body' in common parlance, the territory appears as a pre-discursive fact, which qualifies an entity for statehood.

A related principle is that of 'territorial integrity.' The concern for integrity relies upon the vision of the State's territory as a bounded, masculine and self-sufficient body.[730] States are seen as masculine, bounded entities, whose physical boundaries should not be violated. Just as the male, heterosexual individual can be described as a 'body bag,' the State can be seen as an 'essentially separate and distinct' embodied person, whose dignity is 'dependent on a respect for the physical integrity of the self and the integrity of others.'[731] The unwanted entry upon the body-territory of a State warrants a breach of international law. The principal concern for the law is thus to police boundaries of the masculine body-territory of the State and its jurisdiction. Clearly, with statehood viewed as a matter of technological achievement, only select States can effectively

[726] International Law Association, "Statement of Principles Applicable to the Formation of General Customary International Law," 32.
[727] Ibid.
[728] PCA, *The Island of Palmas case*, 2 RIAA, 838 (1928).
[729] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy."
[730] Charlesworth, "The Sex of the State in International Law," 258.
[731] Naffine, "The Body Bag," 83; Charlesworth, "The Sex of the State in International Law," 259.

monitor their borders and fully exercise their sovereignty. States which were seen as less 'developed,' 'fragile' or 'failed,' as well as groups which could not assert their supremacy over a territory (for example, indigenous peoples and minorities), were presented as possessing penetrable, negotiable, governable and submissive boundaries and identities.[732] Some bodies were perceived as more impenetrable, unified and solid than others.

This brings us to the second part of this chapter, which deals with embodiment of the colonized people by the legal-scientific discourses employed by colonial administrators and anthropologists in German South West Africa.

Part II: The Body of the Condemned

Colonial Embodiment in German South West Africa

The late 19th century witnessed another wave of European colonialism in the Scramble for Africa. Among the latecomers to the club of colonial States was the German Empire, established in 1871, which sought the prestige that came with the status of a colonial power. Since its unification, the imperial German State increasingly took the form of the *Kaiserreich*: an authoritarian State with a strong role reserved for a ruthless military elite responsible directly to the throne and isolated from political scrutiny.[733] 'Self-discipline' or self-limitation was to constitute the only constraint upon military action in the colonial setting.[734] In the late 19th century, a notion of *Lebensraum* was also conceived in relation to German colonial enterprise in South West Africa.[735] Inspired by idealized

[732] Charlesworth, "The Sex of the State in International Law," 259; O'Donoghue, "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law." For the implication of the notion of race in this process, see: Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, Lecture 11, 17 March 1976.

[733] Jeremy Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers* (Cape Town: Boydell & Brewer, 2011), 7; Jonathan Hyslop, "The Invention of the Concentration Camp: Cuba, Southern Africa and the Philippines, 1896–1907," *South African Historical Journal* 63, no. 2 (2011): 265.

[734] H. G. Ritter-Petersen, *The Herrenvolk Mentality in German South West Africa 1884–1914*, Doctoral Dissertation (Pretoria: University of South Africa, 1991), 79–80; op. cit. Sarkin, *Germany's Genocide of the Herero Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 7.

[735] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 432–33; Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 5.

images of Germanic medieval migrations, it postulated that Germany was a nation with 'insufficient living space' at its disposal that needed to expand territorially to guarantee healthy conditions of life to its population. To do so, the German nation needed to physically destroy the indigenous inhabitants of these lands, deemed to be culturally 'inferior.'[736] German South West Africa, with the biggest settler population among German colonies, played a crucial part in these projects.

Since 1884, when Conference of Berlin recognized German claims on South West Africa, the objective of the Empire was to create a new 'Germany in Africa' through settler migration.[737] The goal of colonial administration was to attract settlers and to allow them further acquisition of available farmland. However, most of the available land in the colony was not owned by German settlers or companies, but belonged to the indigenous Herero people. This created a tension between the colonial settlers and the local Herero population. And while economic forces were certainly at play in influencing German colonial policy, they were not the only determining factor thereof. Rather, the acquisition and administration of colonies often followed a non-economic or even an anti-economic logic which saw the colonizers destroy the available source of labor.[738] The anti-economic logic and the colonial brutality which found its culmination in the genocide have led some historians to argue for the *Sonderweg* thesis, the argument that German colonialism was exceptionally brutal and exterminationist at its core.[739] However, rather than starting from the assumption that there was something exceptional about German colonialism, I propose to look at the role of scientific and legal discourses in relation to the 'body' of the colonized to cast a new light on the

[736] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 433.
[737] Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 8.
[738] Steinmetz gives an example of how more economically profitable outposts were rejected in favor of colonies towards which the Kaiser and the Navy displayed emotional attachment. In: Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 12.
[739] The early and politically-motivated version of this argument was put forth by the British when they published a 'Blue Book' of German atrocities in their colonies. However, different versions of the argument have been taken up by historians to cast new light on German colonial policy. Steinmetz traces the variations of the Sonderweg argument in: Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective."

justifications of imperial rule and genocide in German South West Africa. In particular, I propose to look at the embodiment of the colonized by German settlers and anthropologists.

By the mid-19th century, the German discipline of anthropology has enjoyed a long tradition, largely distinct from its English or French equivalents. It was marked by early liberalism and provincialism of German intellectual life.[740] However, as the Empire became unified and acquired colonies, German anthropologists increasingly turned towards Darwinism and racial theories, as they attuned their projects to the needs of the German colonial enterprise.[741] Following the establishment of the colonies in the second half of the 19th century, German anthropology abandoned its early liberalism and increasingly adopted *völkisch* vocabularies of race to explain and perpetuate the colonial rule.[742] This transformation was epitomized by the figure of Otto Ammon (1842-1916) who was a member of the pro-colonial *Alldeutsche Verband* and who represented a form of social Darwinism based upon the notions of race and natural selection.[743] He saw 'the German type' to be marked by cold-bloodedness, breeding and tenacity, as he advocated for racial purity and the prohibition of 'race-mixing.'[744] Eugen Fischer, who was to become a pro-Nazi head of scientific institutions, also learned his trade in German South West Africa.[745] Figures such as Ernst Rodenwaldt, Otto Reche, Philalethes Kuhn and Theodor Mollison, would later combine their 'experience in the colonies with keen enthusiasm for National Socialism and active participation in its racial and extermination policies.'[746]

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[740] H. Glenn Penny and Matti Bunzi, eds., *Worldly Provincialism: German Anthropology in the Age of Empire* (Ann Arbor: The University of Michigan Press, 2003).
[741] Ibid., 17; Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 35.
[742] Penny and Bunzi, *Worldly Provincialism: German Anthropology in the Age of Empire*, 1–2, 17.
[743] Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 38.
[744] Ibid.
[745] Ibid., 43; Robert Gordon, "The Rise of the Bushman Penis: Germans, Genitalia and Genocide," *African Studies* 57, no. 1 (1998): 27.
[746] Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination," 213.

This disciplinary shift was reflected in the treatment and embodiment of the Herero in German South West Africa. Before 1900 the Herero could be portrayed as a proud noble warrior race, whose cattle-breeding distinguished them from Bushmen and the Nama.[747] However, after the Germans became increasingly frustrated with Herero's refusal to sell their land and cattle, the Herero came to be associated with childlike features, unpredictability, ferocity, laziness and arrogance.[748] The descriptions of the physical appearance of the Herero underwent a change, with some commentators drawing comparisons to Semitic traits.[749] The official history book of the German General Staff on the subject of Herero uprising infamously noted that, before German colonization, the Herero led a 'wild' and 'wretched and contentless existence,' with their bodies characterized by 'considerable bodily strength, stamina and nimblesness' hardened in battles with other ethnic groups.[750] Theodor Leutwein, the colonial administrator of German South West Africa from 1894 to 1904, wrote of the 'higher culture of the whites,' while missionary Heinrich Vedder wrote of their 'undoubted' racial superiority.[751] The image of the colonizer and the colonized informed each other as polar opposites.[752]

The de-humanization of the Herero was reflected in the operation of the colonial legal and economic system. The European traders imposed high interest rates and often profiteered from the Herero's disadvantaged position: they tricked the Herero into disadvantageous deals and extracted payments with force or trickery, sometimes even

[747] Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 39.
[748] Ibid.
[749] Ibid., 40.
[750] Große Generalstabe Kriegsgeschichtliche Abteilung, *Die Kämpfe Der Deutschen Truppen in Südwestafrika. Band I: Der Feldzug Gegen Die Hereros* (Berlin: Ernst Siegfried Mittler & Sohn, 1906). Cited in: Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 41.
[751] Theodor Leutwein, *Elf Jahre Gouveneur in Deutsch Südwestafrika* (Berlin: Ernst Siegfried Mittler und Sohn, 1907), 415; Henrich Vedder, *South West Africa in Early Times: Being the Story of South West Africa up to the Date of Maharero's Death in 1890*, trans. Cyrill Hall (London: Routledge, 1966), 229; Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 436.
[752] For a study of how the construction of the images of the colonizers and the colonized in relation to intimacy and sexual practices, see: Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2010).

dressing as police officers to collect debts.[753] The police uniform represented a foreign socio-economic order that was based upon the imbalance of power and exploitation of the Herero. The Herero were forced to salute the Whites and they could not use the same footpaths or ride horses; such everyday humiliations were eagerly enforced by the colonial police.[754]

The gender imbalance between German settlers in the colony also led to series of rapes of Herero women by white men.[755] The practice occurred so frequently that German settlers have developed names for it: *Verkafferung* (to go native) and *Schmutzwirtschaft* (the dirty trade).[756] To paraphrase Ann Laura Stoler's study of race and the intimate in colonial rule, racial membership was determined by private conduct of an individual.[757] Cohabitation with an indigenous person would normally be seen crossing a racial boundary; therefore, sexual practices were presented as temporary in nature and relied upon asymmetry of power which often resulted in the violence of rape. One incident has particularly enraged the Herero. A German settler called Dietrich tried to make sexual advances towards Louisa Kamana, the wife of the son of Chief Zacharias.[758] When he was met with resistance, the settler shot and killed the woman. He was initially acquitted by the German colonial court and, after an appeal, sentenced to three years in prison. According to the colonial administrator Theodor Leutwein, 'everywhere people asked themselves if the whites then had the right to shoot native women' and 'racial hatred has become rooted in the very framework of justice'.[759] The sentiment was certainly shared by a former Swakopmund District Judge, who

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[753] Gerhardus Pool, *Samuel Maharero* (Windhoek: Gamsberg Macmillan, 1990), 182; Benjamin Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," *Journal of Genocide Research*, 6, no. 2 (2004): 183.
[754] Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination," 206.
[755] Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 183.
[756] Ibid; Paul Rohrbach, *Deutsche Kolonialwirtschaft*, (Berlin and Scho¨neberg: Buchverlag der Hilfe, 1907), 243.
[757] Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, 6.
[758] Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 183.
[759] Ibid., 184; Leutwein, *Elf Jahre Gouveneur in Deutsch Südwestafrika*, 223; Helmut Bley, *South West Africa under German Rule, 1898–1914*, trans. Ridley Hugh (Evanston, Illinois: Northwestern University Press, 1971), 140.

stated that 'a single drop of white blood was just as precious to me as the life of one of our black fellow-citizens.'[760]

Against this background, German physical anthropology both sustained, and was sustained by the colonial rule and legal order.[761] German anthropology simultaneously created and presupposed a relationship between the colonizing and the colonized bodies. Both colonial administrators and colonial anthropologists tended to see the colonized as a powerless body, an object upon which the legal power of regulation and scientific power of measurement were to be inscribed.[762] Physical anthropologists in the colonies were particularly interested in the body as a source of objective data that would be immune to subjective misinterpretations.

The tendency to see the colonized as objects of scientific inquiry manifested itself in the fetish of scientific measurement. This was firstly done by collecting photographs, casts of the bodies of the colonized peoples or by collecting the skulls and skeletons of deceased persons.[763] The data was obtained through practices that were painful and asymmetrical in nature, in that they relied upon colonial dynamics of power and upon forms of legality which allowed the scientists to bypass any considerations of consent. Colonial anthropologists took care to choose persons who did not have any right to resist the (often painful) experiments: most of the data was collected in the hubs of colonial infrastructure, such as prisons and forced labour camps, where docile bodies were coerced by the colonial law to become unwilling participants in 'scientific experiments' aimed to ground the colonial domination in the language of scientific facts.[764] Legality and science thus played parallel roles in perpetuating the colonial rule.

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[760] Alfred Hanemann, *Wirtschaftliche Und Politische Verhältnisse in Deutsch-Südwest-Afrika* (Berlin: Akademie Verlag, 1905), 46.
[761] Andrew Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," in *Worldly Provincialism: German Anthropology in the Age of Empire* (Ann Arbor: The University of Michigan Press, 2003), 156.
[762] Ibid., 158.
[763] Ibid., 162–65.
[764] Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality."

The treatment of the colonized as mere objects of measurement and regulation was translated into the denial of legal personhood to the indigenous inhabitants of the colonies. Within this frame, the colonized could never become human persons in the way that European colonizers thought of themselves as 'white,' 'rational,' Cartesian minds in total control of their bodies.[765] Colonial law and science did not treat indigenous habitants as self-legislating subjects: as late as 1909 debates have taken place whether the colonized could be allowed to give testimony under oath.[766] In the 1906 wildly popular novel, *Peter Moor's Journey to South West Africa,* the protagonist concluded that the Herero 'are not our brothers, but our slaves.'[767] In a debate at the German Reichstag, delegate zu Reventlow presented the Herero as 'beasts in the form of humans.'[768] Meanwhile, German anthropology presented the Herero as *Naturalvölker,* natural peoples without history or civilization, frozen in time and incapable of development or progress.[769]

The Herero, who were not considered to inhabit the same social organism as the German colonizers, were banished from the law. Colonies were seen as a place of exception, where normal rules of civilization were less or not applicable, 'in which superego controls and barriers to the expression of unconscious fantasies were lifted' and where sovereign power operated upon bare life.[770] We see parallels between the treatment of the Herero and Agamben's conceptual framework mentioned in the introduction (Figure 2): denuded of legal protection, the Herero became perceived as *homines sacri*, bare life which could be destroyed by anyone. With the escalation of the colonial policy, the exception became the norm, as sovereign power served to legitimize

[765] For the commentary on different traditions of rights, see: Siba N. Grovogui, "To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions," *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 41–63; Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 160–61.
[766] Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 171.
[767] Gustav Frenssen, *Peter Moor's Journey to South West Africa*, trans. Margaret May Ward (Boston: Boughton Mifflin Company, 1908), 78.
[768] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 440.
[769] Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 161.
[770] Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 34.

practices of outright exterminationism towards the colonized people.[771] Deprived of their voice and personhood, the Herero were excluded from the body politic of the colonial settler-State, seen as alien intruders upon the 'Germany in Africa.' The colonized were denied any political agency and ascribed anti-human qualities. The late 19th century German missionary reports portrayed the Herero as characterized by 'Satanic hardheartedness,' crudest or demonic cruelty, and 'lack of feelings.'[772] Peter Scheuler's study of colonial journals reveals that such descriptions were taken up by men who were later involved in the execution of the genocide.[773] Captain Maximilian Bayer wrote that God ordained the destruction of the Nama and that they were 'all born robbers and thieves, nothing more.[774]' The German commentators were eager to produce accounts (not backed by evidence) of excessive cruelty, and even cannibalism, among the colonized that would later be used to justify the violence of the colonizers against the colonized.

It is worth noting that Herero were not the only victims of embodiment and dehumanization in the region. The most sympathetic representation of the colonized available at the time was the paternalistic treatment of the Witboois as 'noble savages' (in a manner of *The Last of the Mohicans*), portrayed as intrinsically pure and closer to nature.[775] However, in most of the German descriptions available at the time, the colonized peoples and their physical features were portrayed in a negative light. Hugo von François, a German officer and the author of an influential text on the native groups, described the inhabitants of a Witbooi settlement as 'savages, mostly small creatures, many gallows- and rascal faces amongst them, a collection of throat cutters

[771] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, §1 The Paradox of Sovereignty.
[772] Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 35–36.
[773] Peter Scheuler, *Die 'Eingeborenen' Deutsch-Südwestafrikas: Ihr Bild in Deutschen Kolonialzeitschriften von 1884 Bis 1918* (Cologne: Rüdiger Köppe Verlag, 1998); Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 39–40.
[774] Maximilian Bayer, *Der Krieg in Südwestafrika Und Seine Bedeutung Für Die Entwicklung Der Kolonie* (Leipzig: erlag von Friedrich Engelmann, 1906), 11.
[775] Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 29.

such as one would hardly ever find again.'[776] Sarah Baartman, 'the Hottentot Venus,' was exhibited at freak shows in Europe, with her buttocks fetishized by European spectators.[777] The physiognomy of the hunter-gatherer Bushmen was sometimes presented as 'effeminate on account of their unmanly softness and delicacy.'[778] The anatomic features of the Bushmen were sometimes compared to Jewish traits.[779] The external appearance was understood to reflect the internal predispositions:

> *The reason why they lived the way they did was because they lacked the central European masculine values of moderation, honour and self-control. They were creatures of emotion and passion and thus lacked true creativity. Moreover, they were 'arbeitscheu.' They lacked the ability to undertake sustained work which was the mark of bourgeois respectability.*[780]

The Bushmen were thus seen by the German colonizers as incapable of development and sustaining complex social structures. German and Austrian anthropologists were not above collecting Bushmen corpses, skulls and genitalia in their 'studies of racial hygiene.'[781] One could hardly doubt that such descriptions and practices influenced colonial policy.

In relation to the Herero, the best 'defense' that could be conceived within this frame of thought was to present their existence as beneficial in purely economic terms: as bodies of labour.[782] The Reichstag Vice President Hermann Paasche spoke of the Herero as 'laboring animals.'[783] In the colonies, even those arguing for more lenient policies than outright extermination, did so on the basis of the view of the Herero as embodied

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[776] Hugo von François, *Nama Und Damara* (Magdeburg: Bänsch, 1896). Cited in: Gewald, Bechhaus-Gerst, and Klein-Arendt, "The Herero Genocide: German Unity, Settlers, Soldiers, and Ideas," 121.
[777] Anne Fausto-Sterling, "The Comparative Anatomy of 'Hottentot' Women in Europe, 1815-1817," in *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, ed. Jennifer Terry and Jacqueline L. Urla (Bloomington: Indiana University Press, 1995).
[778] Gordon, "The Rise of the Bushman Penis: Germans, Genitalia and Genocide," 42.
[779] Ibid., 43–44.
[780] Ibid., 42.
[781] Ibid., 1, 38.
[782] Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 42.
[783] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 448.

commodities necessary for the functioning of the colonial economy: the 'human material'[784] whose extermination was considered 'wasteful'[785] by the colonial economists. Thus, when Theodor Leutwein tried to argue against the annihilation of the Herero, he did so in purely economic terms: 'we still need the Herero as breeders of small livestock and especially as workers. We only have to kill them politically.'[786] Denied legal protection, political agency and personhood, the Herero were effectively reduced to the role of embodied objects – bare life which could be destroyed by anyone. Paradoxically, we can also observe a situation where, within the juridical confines of a single Empire, the State was conceptualized as a 'real' legal person, while those colonized by this State were deprived of any functional legal personhood. The body of the colonized thus existed in an asymmetrical relation with the body of the sovereign: the imperial State of Germany.

The process of dehumanization ultimately opened the way for genocide of the Herero. In 1904, when Herero revolted against the colonial rule, the attacks on German settlers were treated as an attack on the German nation itself. The conflict quickly 'took on the emotional overtones of a full-scale national war, rather than a conflict of colonial suppression.'[787] In 1904, on the orders of Kaiser Wilhelm II to 'crush the rebellion by all means necessary,' General von Trotha arrived in the colony to quell the Herero uprising by genocidal tactics.[788] Von Trotha presented his genocidal strategy as a 'race war.'[789] He claimed to possess 'intimate knowledge' of African tribes, which led him to

[784] Ibid.; Helmut W. Smith, "Talk of Genocide," in *The Imperialist Imagination: German Colonialism and Its Legacy*, ed. Sara Friedrichsmeyer, Sara Lennox, and Susanne Zantop (Ann Arbor, Michigan: University of Michigan Press, 1998), 113.
[785] Rohrbach, *Deutsche Kolonialwirtschaft*, 165, 168. In that context, Rohrbach assumed male workers were more worthy than females. See: Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, New York: Cornell University Press, 2013), 50.
[786] Leutwein quoted in: Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 30.
[787] Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 185.
[788] Ibid., 186; Tilman Dedering, "A Certain Rigorous Treatment of All Parts of the Nation': The Annihilation of the Herero in German South West Africa, 1904," in *The Massacre in History: Studies on War and Genocide*, ed. Mark Levene and Penny Roberts (New York: Berghan, 1999), 208.
[789] Horst Drechsler, *Let Us Die Fighting: Struggle of the Herero and the Nama against German Imperialism* (London: Zed, 1980), 160–61; Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 10.

conclude that they only respected brute force.[790] Von Trotha promised to finish off the rebellion in the following words:

> *I know enough of these African tribes. They are all alike insofar as they only yield to violence. My policy was, and still is, to perform this violence with blatant terrorism and even cruelty. I finish off the rebellious tribes with rivers of blood and rivers of money. Only after a complete uprooting will something new emerge.*[791]

In seeking retribution, von Trotha identified with the imaginary construct of his enemy, a caricature image of the cruel, indigenous warlord who 'understands' native tribes – another example of cross-fertilization of identities of the colonizers and the colonized. Von Trotha's strategy was firstly meant to punish the Herero for rebelling against the German colonial rule and for (supposedly, given that conclusive evidence was lacking or was fabricated) for killing and maiming the Germans during the uprising of 1904.[792] Despite little evidence, von Trotha accused the Herero of cutting off ears, noses and body parts of German soldiers.[793] Some bodies were more valuable than others and the alleged attack on the Germans was presented as an attack upon the German nation for which retribution and collective punishment were to be sought.

After several armed encounters, the Herero were ultimately pushed into the Kalahari Desert, where they perished in large numbers due to the lack of water and food. The German troops established a 250-kilometer long *cordon sanitaire* to keep the Herero from returning to the Hereroland and doomed them to die of thirst.[794] Von Trotha's genocidal intent was made evident in his *Vernichtungsbefehl,* or the extermination order, issued to his officers on October 2, 1904:

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[790] Jan-Bart Gewald, "The Great General of the Kaiser," *Botswana Notes and Records* 26 (1994): 67.
[791] Steinmetz, "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective," 8.
[792] Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 7.
[793] Gewald, "The Great General of the Kaiser," 68.
[794] Große Generalstabe Kriegsgeschichtliche Abteilung, *Die Kämpfe Der Deutschen Truppen in Südwestafrika. Band I: Der Feldzug Gegen Die Hereros*, 132; Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 187.

> *The Herero people must however leave the land. If the populace does not do this, I will force them out with the Groote Rohr [cannon]. Within the German borders every Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at.*[795]

The extermination order constituted an unusually frank statement of genocidal intent, even for a German imperial general. Von Trotha also possessed the necessary knowledge that large number of Herero would die in the *Sandveld,* resulting in genocide. He observed that 'There is a lack of water for man and beast, horses die […] the climate is barbarous.'[796] The official textbook of the German imperial army reads:

> *Like a wild animal hunted half to death the enemy was driven from one source of water to the next, until, his will gone, he finally became a victim of the nature of his own land. Thus the waterless Omaheke would complete what German weapons had begun: the destruction of the Herero people.*[797]

The statements above demonstrate that von Trotha and his troops possessed the necessary intention and knowledge for their acts to qualify as what would today be considered genocide, the view held by most German historians of the period.[798] Kaiser Wilhelm's order to crush the rebellion by any means necessary and the fact that he awarded von Trotha with a medal of honor for his deeds in South West Africa also point to his responsibility for the genocide.[799]

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[795] Conrad Rust, *Krieg Und Frieden Im Hererolande* (Leipzig: Kittler, 1905), 385; translated and quoted in: Jan-Bart Gewald, *Herero Heroes: A Socio-Political History of the Herero of Namibia 1890-1923* (Oxford: James Currey, 1999), 172–73.
[796] Pool, *Samuel Maharero*, 271; Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 188.
[797] Große Generalstabe Kriegsgeschichtliche Abteilung, *Die Kämpfe Der Deutschen Truppen in Südwestafrika. Band I: Der Feldzug Gegen Die Hereros*, 211. Quoted and translated in: Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination," 210.
[798] Karie L. Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," *Time & Society* 21, no. 1 (2012): 26.
[799] Bley, *South West Africa under German Rule, 1898–1914*, 165, 169; Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany," 1164.

Since the perpetration of the genocide, the perpetrators of the genocide, as well as German political commentators, have formulated arguments that the events in South West Africa were not in breach of international law. These legal arguments could be summarized as follows. Firstly, there were those who argued that the war of annihilation should not fall inside the scope of applicable international law, because European powers did not recognize indigenous peoples as full members of the 'family of nations' and could not benefit from the same rights as the 'civilized' peoples under treaties and custom.[800] Secondly, that the German war against the Herero was a matter of internal policy and did not constitute an international conflict. However, a survey of materials reveals that the perpetrators of the genocide were cognizant of the international law applicable to their actions.

Firstly, the German government recognized the Herero as a people by referring to them as 'a nation' in official government documents.[801] On numerous occasions, von Trotha himself referred to the need to destroy the Herero 'as a nation.'[802] Secondly, while the events in South West Africa took place before the adoption of the Genocide Convention (1948), certain forms of the war of extermination had already been outlawed under customary law and would have certainly prohibited the destruction of an entire nation.[803] Meanwhile, German troops did not feel obliged to follow the same rules of warfare that would have applied in a conflict with a fellow European nation and that have already been codified in the Geneva Convention (1864) and the Hague Conventions (1899 & 1907). Von Trotha argued that it was 'obvious that the war in Africa does not adhere to the Geneva Convention,' although he did not explain the legal basis for his pronouncement.[804] The German troops poisoned wells, a tactic already

[800] Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany," 1172.
[801] Ibid., 1182.
[802] Ibid; Drechsler, *Let Us Die Fighting: Struggle of the Herero and the Nama against German Imperialism*, 160–61.
[803] Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany."
[804] Von Trotha in 'Der deutschen Zeitung,' 3 February 1909. In: Pool, *Samuel Maharero*, 293; Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under*

outlawed by the Article 23(a) of the Hague Regulations (1899). One German soldier wrote directly to Kaiser Wilhelm praising the 'new stratagem' of poisoning wells: 'after all, we are not fighting against an enemy respecting the rules of fairness, but savages.'[805] According to the men who served under von Trotha, German troops also did not take prisoners of war, which constituted a practice in breach of contemporary international law (as stressed by Bluntschli himself).[806] Von Trotha justified killing prisoners with a vocabulary of racial hygiene: he argued that German troops could not afford to take prisoners because they carried infectious diseases.[807] Accordingly, German troops were ordered to keep the Herero off the water and food supplies and, on some occasions, to burn Herero women alive, since 'they might be infected with some disease.'[808] The terms such as 'the final solution' [*Endlösung*], 'cleaning up,' and creating a 'tabula rasa' were coined and proliferated during the genocide.[809] The bodies of the colonizers had to be kept clean and healthy, while the bodies of the colonizers were to be destroyed by any means necessary. It is also worth noting that such statement went against some immediate economic interests of German settlers, who still needed the colonized people as a source of cheap labour.

The measures taken by the German troops were in breach of international law: they were designed to allow for mass-scale reprisals against the civilians and protected German soldiers and settlers from prosecution. In this context, the 'anti-economic' logic of the genocide and the violence enacted by the colonizers can be seen as a set of performative practices aimed at creating and reinforcing relations of power in the

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International Law by the Herero against Germany for Genocide in Namibia (Westport, Connecticut: Praeger, 2008), 120–21.

[805] Drechsler, *Let Us Die Fighting: Struggle of the Herero and the Nama against German Imperialism*, 147.

[806] Bluntschli, *Das Moderne Völkerrecht Der Civilisirten Staten*, 339; Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany," 1177.

[807] Pool, *Samuel Maharero*, 270.

[808] Administrator's Office, "Report on the Natives of South-West Africa and Their Treatment by Germany." (London: H.M. Stationery Office, 1918), 65; Isabel V. Hull, "Military Culture and the Production of 'Final Solutions' in the Colonies," in *The Specter of Genocide*, ed. Robert Gellately and Ben Kiernan (Cambridge: Cambridge University Press, 2003), 156; Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 445.

[809] Hull, "Military Culture and the Production of 'Final Solutions' in the Colonies"; Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 440.

colony.[810] The official German military reports compared the death of the thousands of Herero in the desert to a punishment delivered by a court, presenting it as a form of historical justice:

> *The death rattle of the dying and the shrieks of the maddened people – these echoed through the solemn silence of eternity. The court had now concluded its work of punishment.*[811]

By the time von Trotha was recalled, his grim promise to finish off the rebellion with 'rivers of blood' had been fulfilled: less than twenty thousand Herero survived the onslaught, out of the original population of sixty to eighty thousand, marking the first genocide of the 20th century.[812] The Germans also killed more than ten thousand of the Nama who took up arms against them.

The survivors of the massacres were tattooed with a 'GH,' *Gefangene Herero* (captive Herero) mark.[813] The term *Gefangene Herero* became a symbol of the German victory and of the 'verkörperte weiße Dominanzkultur' – it featured on everyday objects, such as a collector card depicting chained Herero next to a coffee advertisement.[814] The brutality of colonial domination was also captured by the new art of photography: the book of Maximilian Bayer featured photographs of partially clad captives and of prisoners held on a leash with the caption '*Gefangene Hereros.*'[815] Rust's memoir featured a photo Herero men stripped naked and hanged from a tree.[816]

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[810] On performativity of violence and embodiment, see: Lauren B. Wilcox, "Dying Is Not Permitted: Guantánamo Bay and the Liberal Subject of International Relations," in *Bodies of Violence*, Oxford Studies in Gender and International Relations (Oxford: Oxford University Press, 2015), 53.

[811] Große Generalstabe Kriegsgeschichtliche Abteilung, *Die Kämpfe Der Deutschen Truppen in Südwestafrika. Band I: Der Feldzug Gegen Die Hereros*, 214; Madley, "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia," 188.

[812] Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 174; Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*.

[813] Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 34.

[814] Klaus A. E. Weber, "Kolonialismus Und Rassismus in Der Alltagsküche," Heimat- und Geschichtsverein für Heinade-Hellental-Merxhausen e.V., 2022, https://hgv-hhm.de/cms/front_content.php?idart=1545.

[815] Maximilian Bayer, *Mit Dem Hauptquartier in Südwestafrika* (Berlin: W. Weicher, 1909), 98, 200; Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 436–37.

[816] Rust, *Krieg Und Frieden Im Hererolande*, 196.

The survivors of the onslaught were sent to the concentration camps, as the word *Konzentrationlslager* entered the German language.[817] In the concentration camps, the prisoners continued to die in large numbers due to forced labour, poor sanitary conditions and the outbreaks of typhus.[818] In accordance with Agamben's conceptualization of the camp, the prisoners were stripped off of legal protection in a space where sovereign power operated directly and without mediation upon their bare life.[819] In the meantime, German colonial anthropologists were busy tapping into the newfound supply of dead bodies: the genocide and the camps made it simple for them to obtain skeletons and skulls of the victims for their 'research.'[820] Soldiers in the colony were happy to donate the body parts, originally taken as trophies, to 'science' and to clear their conscience while doing so.[821] Herero women in concentration camps were forced to 'clean' the skulls from flesh (seen as an unnecessary impediment in measurement and preservation of bones) by using broken glass shards.[822] Skulls, skeletons and decomposed body parts were shipped to Berlin *en masse* to be used in the 'studies' designed to show racial superiority of the Germans. These processes, including complex logistics of transport of body parts from South West Africa to mainland Germany, were legitimized by the colonial power structure and the jurisdictional reach of the single empire. The practice of harvesting corpses of the enemy and taking them from Africa to the collections of Berlin can be seen as a dismemberment of the bodily and territorial integrity of the Herero, who were deprived even of the possibility of mourning their dead.

The story of colonial embodiment did not end with the genocide, however. In 1907, Colonial Secretary Bernhard Dernburg formulated a new colonial policy: the old

[817] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 446.
[818] Stone, "White Men with Low Moral Standards? German Anthropology and the Herero Genocide," 34.
[819] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Part Three: The Camp as Biopolitical Paradigm of the Modern.
[820] Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 175.
[821] Ibid., 177.
[822] Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 22.

colonialism of the 'means of destruction' was to give way to 'scientific colonization.'[823] Presenting colonialism as an enterprise grounded in science was to vest it with an air of contribution to human progress. Eugen Fisher, the later head of Nazi scientific institutions, arrived in the colony to conduct a pseudo-scientific study of Basters, an Afrikaans-speaking minority descended from intermarriage between different ethnic groups.[824] In his 'study,' Fischer fabricated correlation between bodily traits, such as eye or hair color and intelligence.[825] Fischer wrote of the '*Bastardierungsproblem*' – the idea that the qualities of 'superior' races become diluted when they are mixed with 'inferior' races. The publication was a tremendous success in Germany.

After WWII, looking back at the colonies allowed some observers to see the colonial genocide of German South West Africa as a prelude to the atrocities unleashed upon Europe in the World Wars that followed. In the *Origins of Totalitarianism*, Hannah Arendt wrote that imperialism resulted in two conceptual innovations: race as a principle of the body politic and the bureaucracy as a principle of foreign domination.[826] She connected these developments to Nazism by arguing that:

> *African colonial possessions became the most fertile soil for the flowering of what later was to become the Nazi elite. Here they had seen with their own eyes how peoples could be converted into races and how, simply by taking the initiative in this process one might push one's own people into the position of the master race.*[827]

This argument is particularly interesting given the role played by German law, anthropology, race theories, eugenics and embodiment in the Holocaust, where the biopolitical and sovereign power became entwined and brought to the paroxysmal

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[823] Bernhard Dernburg, *Zielpunkte Des Deutschen Kolonialwesens* (Berlin: Ernst Siegfried Mittler und Sohn, 1907), 9; Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality," 172.
[824] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 454.
[825] Eugen Fischer, *Die Rehobother Bastards Und Das Bastardierungsproblem Beim Menschen* (Jena: Deutsche Akademie der Wissenschaften zu Berlin, 1913).
[826] Arendt, *The Origins of Totalitarianism*, Chapter VII: Race and Bureaucracy.
[827] Ibid., 188.

point of the ultimate destruction of the Other.[828] The fetish of measurement, the harvesting of body parts, skin, bones, belongings, the pseudo-scientific 'experiments' enacted upon the bodies of the victims of Nazi regime – all of these practices could draw from a long tradition of German anthropology which conducted the preparatory groundwork in the colonies.[829] The infamous Nuremberg laws, which defined racial purity and which prohibited mixed marriages, drew from the prohibition of 'interbreeding' that was already firmly established in the colonies.[830] The terms such as *Rassenschande, Konzentrationslager* and *Endlösung* were all coined in the colonies.[831] Even the SA's infamous brown shirts were inspired by the uniforms worn by colonial troops in South West Africa. Jürgen Zimmerer argues that 'the war waged by German imperial troops against the Herero and Nama […] constitutes an important connection between colonial genocide and the crimes of the Nazis.'[832]

The legacy and importance of colonial embodiment and denial of voice and personhood was passed on through generations and continued to haunt both colonial and post-colonial settings. For a long time, Germany did not recognize the events in South West Africa as genocide. The reluctance to use the term 'genocide' was guided by the legal implications thereof and the possible reparation claims against Germany. It was based on the legal argument that the crime of genocide enshrined in the Genocide Convention (1948) could not apply to the events in South West Africa in the years 1904-1908. Germany also argued that too much time has passed and that foreign aid to Namibia, the biggest recipient of German aid, obviated the need for any other form of

[828] Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, 258–60; Z. Bauman, *Modernity and the Holocaust* (Cornell University Press, 2006).
[829] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe"; Gordon, "The Rise of the Bushman Penis: Germans, Genitalia and Genocide"; Zimmerman, "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality"; Fausto-Sterling, "The Comparative Anatomy of 'Hottentot' Women in Europe, 1815-1817."
[830] Gordon, "The Rise of the Bushman Penis: Germans, Genitalia and Genocide," 47.
[831] Madley, "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe," 448.
[832] Jürgen Zimmerer, "Colonialism and the Holocaust," in *Genocide and Settler Society*, ed. Dirk Moses, trans. Andrew H. Beattie (New York: Berghahn Books, 2004), 64.

compensation.[833] Last but not least, the Herero and Nama genocide was perceived as putting in question the singularity of the Holocaust, a memory fundamental to the identity of the modern German nation-state.[834] Only in 2004, on the centenary of the genocide, did a German Development Minister Wieczorek-Zeul issue an apology to the Herero, Nama and Damara people 'for what would be called genocide today.'[835] However, the event has been described as a 'half apology' because it reflected a sole initiative of the Minister rather than the official German policy at the time.[836] The centenary of the genocide, which provided the forum for the apology, was in itself an 'invented' commemoration: it 'was produced by modern practices of marking time, but the occasion became a historical turning point in its own right.'[837] Since 2011 Germany started returning the skulls of the victims of genocide from the collections of German museums, hospitals and scientific institutions. The first German-Namibian return of skulls ceremony in 2011 was marked by a diplomatic scandal: the Namibian delegation was given snubs by the German hosts, with the Namibian minister not given official reception and with no high-ranking German official attending the event.[838] German Minister of State in the Foreign Ministry Cornelia Pieper who attended the event refused to issue an apology and left before the Namibian Minister speech, which was seen as disrespectful.[839] Since then, more ceremonies of repatriation of skulls took place in 2014 and 2018 and they did not result in similar diplomatic rows. The transfer of the remains of victims of genocide took place at the inter-State level, with the Namibian delegation paying respect to the skulls of the genocide victims. After years of negotiations, on 28 May 2021, the German government finally announced its formal

[833] Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany," 1185.
[834] Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," 27.
[835] Franziska Boehme, "Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero Genocide," *Journal of Human Rights* 19, no. 2 (2020): 245–46.
[836] Ibid.
[837] Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," 29.
[838] Boehme, "Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero Genocide," 246–47.
[839] Ibid.

recognition of the events in South West Africa as genocide.[840] These events testify to the lasting significance of colonial embodiment to global history and to the development of international law. They also testify to the continuing importance of the argument about the phantom body of the King: the modern State of Germany, seen as a successor to German Empire, is seen as the body politic which should take responsibility for the crimes of the past. Meanwhile, it is up to Namibia, a newly independent State, to represent Herero claims internationally.

While the repatriation ceremonies, recognition of genocide and the issue of reparations are of importance at the international level, they do not fully reflect the situation of the Herero people in modern day Namibia. The decades of colonial rule and population removal have resulted in a situation where white farmers still own most of the available farmland. Due to the genocide, the Herero are now one of the ethnic minorities in Namibia.[841] The Herero and Nama resistance against the German troops has been reframed as part of a larger anti-colonial struggle by the liberation movement in Namibia.[842] Since 1990, when Namibia gained independence from South Africa, the new government's strategy was to focus on state-building and inclusive national history and reconciliation: on 'moving forward' rather than pursuing claims of specific ethnic groups.[843] Some of the Herero, who aligned with the opposition, felt that their identity, memory and interests are being marginalized and that their history is being erased from the official history of the Namibian nation-state as a result.[844] They saw the land reforms of the newly independent Namibian State as mainly beneficial to the northern regions of the country which supported the governing South West African People's

[840] DW, "Germany Officially Recognizes Colonial-Era Namibia Genocide," May 28, 2021, https://www.dw.com/en/germany-officially-recognizes-colonial-era-namibia-genocide/a-57671070 [Last access 12.07.2022].
[841] Boehme, "Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero Genocide," 243.
[842] Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," 24–25.
[843] Ibid., 25.
[844] Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia*, 184; Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," 25.

Organization.[845] The Namibian government also preferred to sideline Herero demands for reparations, instead preferring State-to-State foreign aid from Germany. The Herero claims against Germany have been considered non-justiciable by Namibian courts. This brings us back to the topic of sovereignty: the everyday governance of the Namibian State has been conducted mainly by the dominant Ovambo ethnic group, who prioritized the demands of the nascent nation-state over the particular claims of a minority ethnic group. The Herero claims had for a long time been excluded by two political bodies: that of Germany and that of the Namibian State. It was as if two parallel ceremonies were taking place: one on the official level of Namibian-German State relations, the other on the level of the Herero community and activists who demanded an apology and reparation for the crimes of the past. However, since the centenary of the genocide in 1904, the Namibian State became more supportive of the Herero claims, a step which was crucial to the recognition of the genocide at the international level and to obtaining an apology from Germany.

The genocide, known by Hereros as *Otjitiro Otjindjandja* ('many people died in one place') is still imprinted in memories and everyday practices.[846] It has been embodied and subverted in the traditional clothing of the Herero, which adopted features associated with the fashion of the former colonizers. While at their functions, Herero men wear 'turn-of-the-century German soldier uniforms and Herero women dress in their long brightly-coloured Victorian dresses and a headdress.'[847] Until today, Herero women:

> *dominate their surroundings in Victorian dress of carefully studied fashion detail: sweeping, ankle-length skirts, with many underskirts, short bodiced waistcoat, mutton-chop sleeves, long strings of necklaces, braid, pearly buttons and draped shawls, all a faithful replica of the dress worn by the wives of the Rhenish*

[845] Morgan, "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice," 27–28.
[846] Ibid., 22.
[847] Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 34.

missionaries in the nineteenth century; on their heads high padded turbans replace the three-pronged leather tribal head-dress of earlier days.[848]

The bodily practices of clothing testify to the lasting importance of embodiment in international law and to the cross-fertilization of the identity and historical memory of the former colonized and colonizers. As it has been shown in this chapter, both the German colonizers and the colonized Herero were affected by the colonial practices long after the events of 1904-1908. Their identities became marked by what Homi K. Bhabha calls 'hybridity' – the interdependence and the mutual construction of subjectivities, identity and cultural memory of the colonizers and the colonized.[849] By reenacting and re-experiencing colonial forms and meanings through their clothing, the Herero subvert the legacy of practices which sought to colonize their bodies.[850]

Chapter conclusion

In this chapter, we have studied the examples of embodiment through the operation of legal and scientific discourses. The common theme that connects the two parts of this chapter is the discursive creation of 'bodies' and the general tendency of the legal and scientific discourses to reify their objects of inquiry. The tracing of arguments about the body of the subjects of law allows us a peek into the orders of knowledge which served to classify bodies in relation to power.

The two parts of this chapter dealing with 1) organic theory of law and 2) the case study of embodiment in German South West Africa can be read as two entries into the conceptual framework discussed in the beginning of this chapter (see: Figures 1 & 2). We have witnessed a situation where, within the juridical confines of Imperial Germany, the State was being conceptualized as a 'real' person of the law, while those colonized by this very State were deprived of any functional legal personhood. The

[848] R. First, *South West Africa* (Baltimore: Penguin Books, 1967), 27; Sarkin, *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, 35.
[849] Homi K. Bhabha, *The Location of Culture* (London: Routledge, 2004).
[850] Butler, *Gender Trouble: Feminism and the Subversion of Identity*.

body of the colonized could thus be said to have existed in an asymmetrical relation to the body of the sovereign: the imperial German State.

In the first part of this chapter we have looked at the embodiment of the State by organic theorists of law: Johann Kaspar Bluntschli and Otto von Gierke. In their works, the State appeared as a metaphysical person, with a body of its own. This body could be described with the same language one would use to describe other living organisms. However, the theorists discussed in this chapter also made it clear that the State, seen as a product of technical achievement, was to be deemed superior to other types of organisms. According to the organic conceptualization, the State was to be seen as the apex legal person which represented the unity of all law. The personhood of the State understood in the organic sense takes the ultimate spot in the hierarchy of power depicted in Figure 1. As depicted in Agamben's conceptualization of the sovereign, the organic State exists both within law and outside of law, in that it is both the creator of all law and the apex juridical person of the legal order that it creates and embodies in its constitution and laws. The body of the State has replaced the phantom body of the King as the ultimate source of legal authority.

The State, as the apex person and creator of all law, cannot be bound by laws external to its will. This conceptualization of the sovereign State has given way to criticisms, which have accused organic theorists of paving the way for the subsumption of the individual within the totalitarian State; I have also discussed the role of racialized and gendered vocabularies in the organic theory preoccupied with the health and purity of German body politic. Despite these criticisms, elements of organic discourse continue to permeate modern international legal discourse: I gave examples of organic residues in our conceptualizations of customary law, sovereignty, territoriality and non-intervention.

In the second part of this chapter, we have studied the embodiment of the colonized people in German South West Africa. In particular, I have argued that legal and

scientific discourses employed by colonial actors were complicit in embodying Herero people and denying them personhood. As depicted in Figure 2 in the introduction, the sovereign power of the colonizers has operated upon bare life of the colonized by denuding them of legal protection and personality. The images of the colonizers and the colonized informed each other, with their identities arranged in an asymmetrical fashion in relation to power. In the legal and scientific discourses in the colonies, the colonized peoples were delegated to the role of the *homo sacer,* a person who can be killed by anyone. Their bodies were treated as powerless objects upon which disciplinary power of colonial law and scientific power of measurement were to be enacted. In this way, legal and scientific discourses informed each other and served to uphold and perpetuate the colonial structure of power. The related process of dehumanization found its culmination in the first genocide of the 20th century; its importance resonates until today.

The bodies depicted in Part I & II of this chapter have been both *produced* by the discourses (which aimed to describe them, to measure them, explain them) and *productive* in the sense that they generate tangible material effects in their entanglements with policy and practice. I followed the third-wave feminist scholarship in claiming that there are no pre-discursive bodies;[851] rather, bodies are constructed and reproduced by the legal and scientific discourses.[852] Bodies so-understood are constituted 'in reference to historical political conditions,'[853] and the existing power structures of the Empire. Once *produced*, bodies are also *productive* in a manner of a self-fulfilling prophecy, as the body created through the discourse creates a holistic image of the represented entity and becomes a point of reference in the discourses of sovereignty and biopolitics.[854] As theorized by Butler in the *Frames of War,* some bodies are then deemed worthy of

[851] Ibid.
[852] Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations*, 1–3; Latour, "Scientific Objects and Legal Objectivity."
[853] Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations*, 3.
[854] Ibid.

protection, while others are not.[855] References to the 'body' thus act as a traction of power, as they generate practical action and material effects.[856]

In this chapter, we have witnessed how the paradigms of sovereignty and personhood of the State were pushed to their logical extreme and expressed by means of embodiment of the State in the organic form. The metaphysical treatment of the organic form, together with the practices of embodiment and classification of the subjects of law were ultimately picked up and weaponized by the ideologues of Nazism. International legal theory reacted to the atrocities of the 20th century by proposing a radical departure from the metaphysical vision of the State discussed in this chapter. The post-WWII international public law has cast a veil of abstraction upon the State by describing it as a purely 'abstract' entity and by proposing to lay new foundations for the validity of the international order.

[855] Judith Butler, *Frames of War* (London: Verso, 2009).

[856] The biopolitical violence 'takes bodies as not only objects of protection but objects of active intervention; bodies are constituted as individuals and as populations that must be killed, or must be made to live.' In: Wilcox, *Bodies of Violence: Theorizing Embodied Subjects in International Relations*, 12, 17; Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-76*, 254.

Chapter IV

The State is Dead! Long Live the Legal Fiction

Behind a tree, a dryas, behind a river, a nymph, behind the moon, a moon-goddess, behind the sun, a sun-god. Thus, we imagine behind the law, its hypostatized personification, the State, the god of law.

- Hans Kelsen.[857]

This enormous thing… the death of this fantastic, prodigious being which held such a colossal place in history: the state is dead.

- Edouard Berth.[858]

L'état personnel et souverain… est mort ou sur le point de mourir.

- Léon Duguit.[859]

Introduction

In the previous chapters of this dissertation, we have studied different patterns of anthropomorphic thought. In Chapter III, we have witnessed the extreme manifestation of anthropomorphism in the treatment of State as a living organism, the metaphysical, ultimate 'person' of law with a body of its own. This embodiment of the State has been criticized for its contribution to fascism and collectivist theories of the State. As the Concert of Europe began to crumble and the European Empires increasingly turned against each other, the organic thinking about the State has become increasingly associated with the excesses of violence and the rise of totalitarianisms which have shaken the world in the beginning of the 20th century.

[857] Hans Kelsen, *General Theory of Law and State* (Cambridge, Massachusetts: Harvard University Press, 1945), 191.
[858] Edouard Berth, *Le Mouvement socialiste*, 1907, cited in: Schmitt, *The Concept of the Political*, 114.
[859] Léon Duguit, *Le Droit social, le droit individual et la transformation de l'État,* (Paris : Felix Alcan, 1908), cited in: Schmitt, *The Concept of the Political*, 114.

In this chapter, I examine the intellectual projects of the first half of the 20th century which sought to counter the claims of metaphysical identity of the State associated with the thought of Hegel and its influence on the legal scholarship. In its stead, the scholars and projects described in the present chapter have sought to de-anthropomorphize law and to present the State as a legal fiction. I follow Janne Nijman's work in her *Concept of International Legal Personality* with regard to the selection of thinkers and identification of projects which have shaped the modern discipline of international law and its conceptualizations of statehood.[860] The modern characterization of the State as an 'abstract entity'[861] - a fiction of law - has been founded upon and continues to be indebted to the theoretical groundwork laid out by the legal scholarship of the first half of the 20th century. A large part of what we consider foundational modern thinking about the State and the individual has been produced by legal scholars, identified by Nijman, active in the powerful institutions of knowledge production in Europe. Scholars such as Léon Duguit (in Bordeaux), Dionisio Anzilotti (in Italy), Leonard Hobhouse (in London), Hans Kelsen (in Vienna, Cologne, Geneva and Berkley), Georges Scelle (in Dijon, Paris and Geneva) and James Leslie Brierly (in Oxford) have all contributed in different ways to the theoretical dismantling of the metaphysical, anthropomorphic State of the organic theory. While doing so, they have established the theoretical foundations for the modern treatment of the State as a legal fiction, an abstract entity of the law.

The projects which advocated the view of the State as a 'fiction' or an 'abstract entity' have to be understood against their historical background: the economic inequality, political instability and the devastation of the First World War, which provided a fertile ground for theories seeking to reject the metaphysical and collectivist claims about the State and for thinking about new theoretical bases for peaceful coexistence of States. In their attempts to provide a new theoretical groundwork for peace, the scholars

[860] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*.
[861] The Trial of Major War Criminals before the International Military Tribunal Nuremberg. International Military Tribunal Nuremberg, 14 Now 1945 – 1 Oct 1946. Published at Nuremberg, 1947, 447.

discussed in this chapter preferred to leave Hegel behind and to turn to the neo-Kantian philosophy and the empiricism associated with the nascent discipline of sociology.

The period of scrutiny covers the first half of the 20th century, which proved to be the formative period for international legal institutions and gave rise to foundational texts of modern international law. This chapter can be seen as an exercise in the mapping of different legal projects and their importance for the vision of the State and the theory of the subject that we are familiar with today. I begin by studying the theoretical attempts at dismantling the anthropomorphic State and by showing how they contributed to the de-anthropomorphized vision of the State as an 'abstract entity.' Then, my argument takes a different turn, as I ask about what we miss out in analytical terms when we decide to cover the State with the veil of abstraction and to treat it as an 'As If' fictional entity. As I will argue, hidden behind the veil of abstraction is the anthropomorphic source of agency which continues to inform our discourses about the foundation of international legal authority.

Against Metaphysics

Let us firstly set the tone of this chapter by imagining ourselves in Europe in the last months of World War I. After four years of a devastating and seemingly pointless conflict, Leonard Hobhouse (1864–1929), a British sociologist, found himself reminiscing about the old days of the *Pax Britannica*. Hobhouse opened his series of lectures on the *Metaphysical Identity of the State: A Criticism* (1918), by dedicating them to his son. [862] He reminisced about the last peaceful days of July 1914, when the family sought refuge from the summer warmth by reading Kant in a Highgate garden. Only a few years later, when the First World War ravaged the continent, Hobhouse turned to reading Hegel, seen as a more appropriate lecture for the times of war. And just as Kant gave way to Hegel, the peaceful summer days were overtaken by the 'murmur of innumerable planes' and 'the thud of guns across the Northern Sea.'[863] Hobhouse notes:

[862] Leonard T. Hobhouse, *The Metaphysical Theory of the State: A Criticism* (Kitchener: Batoche Books, 1999).
[863] Ibid., 5.

> *As I went back to my Hegel my first mood was one of self-satire. […] In the bombing of London I had just witnessed the visible and tangible outcome of a false and wicked doctrine, the foundations of which lay, as I believe, in the book before me. To combat this doctrine effectively is to take such part in the fight as the physical disabilities of middle age allow*.[864]

In his lectures, Hobhouse argued that the worst acts committed by men are executed in the name of religion, which can take form of religion 'of Evolution, of the Race, the nation, or the State.'[865] It was clear for him that, once the State becomes a Hegelian substance, 'superior and indifferent to component individuals,' then it also becomes 'a false god,' whose worship culminates in the slaughterhouses of Ypres or the Somme.[866]

Hobhouse criticized the metaphysical view of the State, discussed in Chapter III of this thesis, which presented the State as an end-in-itself and a sole guardian of moral worth. According to metaphysical conceptualizations of the State, the happiness of the State was not synonymous with the happiness of the individual; rather, the worth of an individual life was to be judged according to its contribution to the goodness of the State.[867] Hobhouse saw this as a concrete realization of the Hegelian idea of the Absolute, where all conscious beings displayed 'as little title to independent consideration as the cells of the human body'[868] as they were subsumed by the general will and supreme reason of the State.[869] Seen as 'an individual writ large,' the Hegelian State was the condition of individual freedom.[870] It represented a type of humanity superior to that of any biological human being, 'with a conscience much more highly developed than that of any individual.'[871] The criticism directed at the metaphysical identity of the State led Hobhouse to denounce its anthropomorphic personality.

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[864] Ibid., 6.
[865] Ibid., 104.
[866] Ibid., 105.
[867] Ibid., 13.
[868] Ibid.
[869] Ibid., 66.
[870] Ibid., 87.
[871] Ibid.

To Hobhouse, vesting the State with the 'super-personality' had served several purposes: it helped uphold status quo of the prevailing social order; it was used to discipline the society and, finally, it has been employed to negate individual identity and freedoms.[872] Hobhouse argued that, instead, the State should be seen as 'the bony skeleton [which] is necessary to the human body and in a sense holds it together, but it is hardly that which constitutes the life of the body.'[873] He proposed a democratic view of the State as a means to an end, where the State would become a 'servant of humanity […] that it is to be judged by what it does for the lives of its members and by the part that it plays in the society of humankind.'[874] Meanwhile, individual men should not be able to escape moral responsibility by hiding behind the person of the State.[875]

Hobhouse's approach was characteristic of a broader intellectual movement which sought to replace the Hegelian *Makro-Anthropos*, the divine State person, with new de-anthropomorphized conceptualizations of the political community. The opponents of the metaphysical vision of the State tended to see the State as a legal fiction. Such projects were founded upon different epistemologies and approaches to legal theory. What connected them was their desire to cast a veil of abstraction upon the hitherto anthropomorphic, metaphysical State. And while Hobhouse was a sociologist, many jurists would also become influenced by the nascent discipline of sociology in their quest to draw a line between the individual and the State. One of them was Léon Duguit, a French constitutionalist and theoretician of 'objective law.'

[872] Ibid., 16.
[873] Ibid., 57.
[874] Ibid., 107.
[875] Ibid., 85.

Léon Duguit

Let us go back to year 1901 in France, when Léon Duguit (1859-1928) published his *L'état, le droit objectif et la loi positive*.[876] One of the principal objectives of the book was to counter the metaphysical conceptualizations of the State and to show that the State 'n'est point cette personne collective, investee d'un pouvoir souverain.'[877] To Duguit, it was evident that the fiction of the personified, anthropomorphic State would vanish when confronted with a rigorous, empirical observation of the material world.

Duguit engaged with Bluntschli's and Gierke's conceptualizations of the State in order to disprove them. As was shown in the previous chapter, the organic theory tended to present the State as a:

> *Collectivité organisée, réalité biologique vivante comme l'individu, vaste organisme dont les individus sont les cellules composantes, soumis aux lois qui président à la naissance, au développement et à la mort de tout organisme*.[878]

The personified State was deemed to possess a common will and an organic body. Duguit criticized this view for being unduly anthropomorphic; he rejected the existence of any collective consciousness or personality of the State.[879] Instead, Duguit saw the attempts at personifying the State, described in previous chapters of this dissertation, as ideological constructs aimed at rationalizing the disproportions of power between individual members of the society;[880] 'Qu'on appelle souveraineté politique ce pouvoir des plus forts sur les plus faibles, nous y donnons les mains.'[881] For Duguit, any reference to the 'collective will' thus appeared as 'politics of force' founded upon fiction.[882]

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[876] Léon Duguit, *L'état, Le Droit Objectif et La Loi Positive*, ed. Albert Fontemoing (Paris: Bibliothèque de l'Histoire du Droit et des Institutions, 1901).
[877] Ibid., 1.
[878] Ibid., 2.
[879] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 195.
[880] Duguit, *L'état, Le Droit Objectif et La Loi Positive*, 5.
[881] Ibid., 9.
[882] Ibid.

> *L'Etat pour nous, c'est l'homme, le groupe d'hommes qui en fait, dans une société, sont matériallement plus forts que les autres* […] *L'idée d'une puissance matérielle, légitime parce qu'elle appartient à l'unanimité, est une fiction.*[883]

In particular, Duguit saw the work of German jurists in the organic law tradition as an ideological attempt at grounding absolutism at home and conquest abroad on the juridical grounds of unrestrained sovereign power of the State.[884] Sovereignty understood in the organic sense appeared to Duguit as 'mots sans valeur, qui ne servent qu'à des voiler la brutalité des faits et l'arbitraire de la force.'[885] As a response, Duguit offered a vision of the State personality that would be based solely on the status of the State as a subject of law and not on any metaphysical qualities thereof:

> *L'Etat, déclare-t-on, est une personne juridique, c'est-à-dire un sujet de droit ; l'Etat entre en relation juridique avec d'autres Etats, d'autres collectivités, avec les particuliers ; il est donc un sujet de droit, il est donc une personne.*[886]

Therefore, Duguit's State was not to be seen as a thing-in-itself or a substance, but as a juridical fiction, a personification of legal relations. By presenting the State as a fiction of law, Duguit drew a clear distinction between the individual and the collective will: 'une volonté individuelle, même déterminée par un but collectif, reste une volonté individuelle.'[887]

In Duguit's view, the core of human society was founded by individuals: 'Des hommes qui ont conscience d'eux-mêmes, qui pensent, qui veulent, qui agissent en vue d'un but conscient, voilà les seules réalités du monde social.'[888] Only individual human beings with their individual consciences could be seen as real entities with agency and the

[883] Ibid., 19.
[884] Léon Duguit, *Traité de Droit Constitutionnel. La Règle de Droit.* (Paris: Fontemoing, 1927), XII; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 2008, 9.
[885] Duguit, *Traité de Droit Constitutionnel. La Règle de Droit*, 255.
[886] Duguit, *L'état, Le Droit Objectif et La Loi Positive*, 3–4.
[887] Ibid., 6.
[888] Ibid., 29.

capacity for basic human solidarity.[889] According to Duguit, any philosophy of law that would not take this 'moi individuel' as its foundational premise was ultimately destined to fail.[890] Any personification of the political collectivity would only remain a fictional representation that could never withstand the scrutiny of material facts.[891]

Duguit's empiricism led him to reject what he saw as 'subjective' law, founded upon the premise of superiority of one will over others.[892] He found the latter to be an unduly anthropomorphic way of conceptualizing the supreme source of authority behind the law. Duguit argued that the tendency to present the sovereign State as the ultimate source of authority was a residue of religious thinking in legal theory – and we have seen in previous chapters the various reiterations of the theological argument about the phantom body of the King. To counter the religious thinking about the State, Duguit proposed the category of 'objective' law: the law composed of legal relations which arise spontaneously in the conditions of mutual dependence brought about by the division of labour.[893] The objective law, as understood by Duguit and later by Scelle, was inscribed in the social and material life of a community and regulated the relations between its members; it did not constitute a purely normative set of pronouncements, but was derived from social practice instead.[894] This form of law was necessary for the functioning of human society. It could only produce legal effects if it was determined by social objectives, in accordance with social interdependence and solidarity.[895]

Duguit then proposed a vision of society where the interest of the individual and the interest of the State would be mutually dependent, where there would exist 'une

[889] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 212.
[890] Duguit, *L'état, Le Droit Objectif et La Loi Positive*, 29.
[891] Ibid., 6–7.
[892] Léon Duguit, *Le Droit Social, Le Droit Individuel et La Transformation de l'état*, Deuxième édition (Paris: Félix Alcan, 1911), 17.
[893] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 298.
[894] Fabrice Melleray, "Léon Duguit et Georges Scelle," *Revue d'histoire Des Facultés de Droit et de La Culture Juridique, Du Monde Des Juristes et Du Livre Juridique*, 2001, 62.
[895] Duguit, *Le Droit Social, Le Droit Individuel et La Transformation de l'état*, 71; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 299.

coïncidence permanente et absolue des buts collectifs et des buts individuels.'[896] According to this view, the State would not be seen a collective person, but a grouping of 'men' on a defined territory, who consciously work towards the pursuit of integration and protection of individuals. Objective law would only be deemed legitimate in so far as it served to pursue social objectives.[897] Law so-understood would not be a command of the State, but could instead serve to provide constraints upon the power of the *gouvernants* (rulers) of the State. In the pluralism of associative life, the State appeared as merely one of the network of mutual social interdependencies: next to the Church, professional groups and family, the State was to be understood as yet another forum for collective action to attain social goals.[898] In his theory, Duguit was delegating the divine, anthropomorphic State to the dustbin of history. Just as Nietzsche had proclaimed the death of God two decades before him, the time has come for legal theory to proclaim the death of the anthropomorphic State.[899]

This conceptual move was linked with Duguit's political project, which sought to emancipate the individual and to present the State as a 'political arm of social solidarity' and not as an end in itself.[900] He saw the weakness of the unitary conceptualization of the State in that it missed out on the distinctions between political and economic power:

> *Le jour où on a remis un bulletin de vote à tous les citoyens, même à ceux qui ne possèdent rien, on a créé un contraste effrayant entre l'homme qui vote et l'homme qui travaille. Devant l'urne, il est souverain ; à l'usine il est sous le joug*.[901]

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[896] Duguit, *L'état, Le Droit Objectif et La Loi Positive*, 10.
[897] Duguit, *Traité de Droit Constitutionnel. La Règle de Droit.*, 86; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 212–13.
[898] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 299; Antonio Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," *European Journal of International Law* 1 (1990): 211.
[899] Léon Duguit, *Le Droit social, le droit individual et la transformation de l'État,* (Paris : Felix Alcan, 1908), cited in: Schmitt, *The Concept of the Political*, 114. The point famously raised later by Foucault who stated that 'We need to cut off the King's head [i.e. the locus of sovereignty]: in political theory that has still to be done.' M. Foucault, "Truth and Power," in *The Foucault Reader*, by P. Rabinow (New York: Vintage Books, 2010).
[900] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 300.
[901] Duguit, *Le Droit Social, Le Droit Individuel et La Transformation de l'état*, 45.

Continuing to ignore these distinctions could in turn lead to a proletarian revolution and to the violent taking of the means of production by the working class.[902] To avoid the violence of a revolution, Duguit offered decentralization and syndicalism as potential cures to the illness of the political system.[903] In particular, he saw the gradual allocation of public functions to the *syndicats* as a way of dismantling the dangerous theory of the anthropomorphic State and as a step towards decentralization of public power.[904]

In his work and method, Duguit was influenced by the sociology of Émile Durkheim and the philosophy of August Comte.[905] Duguit's turn to the 'scientific method' of sociology constituted an attempt to prevent revolutionary turmoil and the disaster of another World War.[906] This approach manifested itself in a peculiar branch of positivism: a mixture of the study of material facts with strong claims about the role of the State in the life of a society. Malleray asks:

> *Que veut en effet démontrer Duguit ? […] Qu'il est un scientifique, qu'il appartient à la communauté des sociologues et que les facultés de droit sont le lieu le plus approprié pour l'étude des sciences sociales.*[907]

Many jurists disagreed with Duguit's project and methods, which were seen as controversial at the time. Meringhac continued to see the State as a moral person,[908] while Esmein, Hauriou and Berthélémy considered the State to be the juridical personification of the nation.[909] However, Duguit's work continued to be widely read and commented upon. While commenting upon the work of Duguit and the broader

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[902] Ibid., 46.
[903] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 301.
[904] Duguit, *Le Droit Social, Le Droit Individuel et La Transformation de l'état*, 144–53.
[905] Marek Korowicz, *Introduction to International Law: Present Conceptions Of International Law In Theory And Practice* (Dordrecht: Springer Science+Business Media, B.V., 1959), 88.
[906] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, 297.
[907] Melleray, "Léon Duguit et Georges Scelle," 73.
[908] Korowicz, *Introduction to International Law: Present Conceptions Of International Law In Theory And Practice*, 87.
[909] Adhémar Esmein, *Éléments de Droit Constitutionel* (Paris: Libraire de la société du recueil général des lois et des arrêts, 1896); Henry Berthélemy, *Traité Élémentaire de Droit Administratif*, septième édition (Paris: Libraire nouvelle de droit et de jurisprudence, 1913); Maurice Hauriou, *La Souveraineté Nationale* (Toulouse: Recueil de législation de Toulouse, 1912).

intellectual movement against the metaphysical State, Harold Laski wrote about 'a new epoch in the history of the state.'[910] Laski was witnessing what he described as a 'deeper political synthesis' and a move towards increasing decentralization of power.

The project of Duguit was to contribute to the intellectual deconstruction of the revolutionary French State.[911] In the French society, the notion of sovereignty appeared to follow the logic of the revolution, by transforming from the divine rights of kings into the divine right of the bourgeois State.[912] By negating personality of the revolutionary State, Duguit's intention was to deliver a death blow to the anthropomorphism of the person of the State. Instead of a unitary, anthropomorphic State, Duguit proposed a conceptualization of the State as one juridical person among many, equal in its status to private citizens and legally responsible towards them.[913] Both the State and the individuals could be parties to legal proceedings; they were both bound by the objective law and they bore legal responsibility for their actions. Duguit's theory was later elaborated upon and applied to international law by his famous disciple, Georges Scelle – I discuss his contribution in the second part of this chapter.

Dionisio Anzilotti

Duguit mostly wrote about the State from the perspective of domestic law and he is often described as a constitutionalist.[914] Dionisio Anzilotti (1867–1950) offered a different perspective on the identity and obligations of the State. Having studied in Pisa, Anzilotti went on to teach law across Italy, where he advocated for a dualist and positivist vision of international legal order.[915]

[910] Harold Laski, "A Note on M. Duguit," *Harvard Law Review* 31, no. 1 (1917): 186.
[911] Ibid., 188.
[912] Ibid., 189.
[913] Ibid., 190.
[914] Melleray, "Léon Duguit et Georges Scelle," 51.
[915] Giorgio Gaja, "Positivism and Dualism in Dionisio Anzilotti," *European Journal of International Law* 3, no. 1 (1992).

In 1906, Anzilotti offered a conceptualization of the external responsibility of States based upon the view of the State as the main subject of international legal obligations.[916] Anzilotti was of the view that, under international law of the time, only States could be seen as subjects of international law and internationally responsible actors. Anzilotti's dualism manifested itself in the view that, even if an individual suffered from an internationally wrongful act, the international responsibility would only arise between the State of his or her citizenship and the State which committed the breach (as exemplified by the international practice of diplomatic protection).[917] This ultimate imputability of actions to the State, according to Anzilotti, necessitated a view of the State as an agent capable of holding rights and incurring obligations under international law.[918] This requirement was fulfilled by the concept of personality of the State which founded the basis and a *condition sine qua non* of international legal responsibility.[919]

According to Anzilotti, international law and international responsibility flowed from the collective will of the States to be bound by a given rule.[920] However, Anzilotti was careful not to let his positivism turn into an outright anthropomorphism of the will of the State. This was relevant especially in the domain of State responsibility. While the responsibility of the State for its wrongful acts had traditionally necessitated the element of fault (the notion of *culpa* derived from Roman law),[921] Anzilotti criticized the assumption that the State, as a collective entity, could ever display fault or engage in any acts of will: 'au sens psychologique du mot, il n'y a pas de volonté propre de l'État ; il n'y a que des volontés individuelles, tendant à la réalisation de buts collectifs.'[922]

[916] Dionisio Anzilotti, *La Responsabilité Internationale Des États à Raison Des Dommages Soufferts Par Des Étrangers.* (Paris: Dalloz, 2012).
[917] Ibid., 10, 20.
[918] Ibid., 45.
[919] Ibid., 45.
[920] Gaja, "Positivism and Dualism in Dionisio Anzilotti," 127.
[921] Pierre-Marie Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," *European Journal of International Law* 3, no. 1 (1992): 140.
[922] Anzilotti, *La Responsabilité Internationale Des États à Raison Des Dommages Soufferts Par Des Étrangers.*, 47.

According to this conceptualization of the international order, the State was to be understood as an 'abstraction' – a collective body and a sum of individual wills.[923]

Anzilotti thus purged the conception of wrongful act of any subjective elements which could be attributed to the State.[924] According to Anzilotti, only individuals could engage in the acts of will; they could only appear to represent the will of the State by measure of institutional organization of the State.[925] 'L'activité de l'État,' Anzilotti wrote, 'c'est en définitive l'activité d'individus dûment autorisés par la loi.'[926] As international responsibility under international law could only arise between States, the wrongful acts of individual representatives of the State were imputable to the State for the sake of the proper functioning of international legal order.[927] 'By being an agent of the State, an individual acting on its account is identified with it.'[928] Strictly speaking, the rights and duties under international law addressed organs of the State and the State could only act through them.[929] Paradoxically, while seeing the State as an 'abstraction,' Anzilotti reached the same conclusion as the organic theorists discussed in the previous chapter: that the State could only act through its organs. However, he differed from organic theorists in that he treated the decisions of the organs of the State as mere facts and not as an organic manifestation of the spirit of the people. The organs of the State, understood in this way, served only as a factual, non-organic expression of the will for the purposes of legal analysis.

In Chapter II of this dissertation, we have discussed the notion of the 'person' of the State and the role played by intentional stances in international law. With Anzilotti, as with Duguit, we can observe the criticism of the tendency to write about the 'will' or the 'spirit' of the State. In writings of both Anzilotti and Duguit, individuals are the only

[923] Dionisio Anzilotti, *Scritti Di Diritto Internazionale Pubblico* (Padova: CEDAM, 1956), 424; Gaja, "Positivism and Dualism in Dionisio Anzilotti," 136.
[924] Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 141.
[925] Anzilotti, *La Responsabilité Internationale Des États à Raison Des Dommages Soufferts Par Des Étrangers.*, 49.
[926] Ibid., 54.
[927] Ibid., 56.
[928] Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 144.
[929] Anzilotti, *Scritti Di Diritto Internazionale Pubblico*, 424; Gaja, "Positivism and Dualism in Dionisio Anzilotti," 136–37.

actors capable of engaging in cognitive acts of the will. While they act as organs or agents of the State, the acts of individuals become attributable to the State. Meanwhile, the State could not be seen to have a 'will' of its own. Anzilotti also differed from Duguit in his dualist treatment of international law as an area of law distinct from the domestic legal system. In Anzilotti's vision of international legal order, the analytical focus was on the existence of an objective breach of an international legal rule committed by a legal representative of a given State.[930] The breach of international legal obligation was ultimately attributable to the State, understood as an abstract entity.

Hans Kelsen

Hans Kelsen (1881–1973) presents us with perhaps the most comprehensive account of international legal order based upon the view of the State as a legal fiction. Kelsen's upbringing was characteristic of the peculiar mixture of ethnicities and institutional orders that was the Austro-Hungarian Dual Monarchy. Born in Prague to a German-speaking Jewish family, Hans Kelsen moved to Vienna, where he received legal education. A research scholarship also allowed Kelsen to spend three semesters at the University of Heidelberg. In Germany, he was able to study under Georg Jellinek, whose work on the identity of the State exerted lasting influence over Kelsen.

In the early years of his career, Kelsen's work focused on matters of constitutional law and he was the principal author of the Austrian Constitution of 1920. However, as he witnessed the rise of fascism and the crumbling of the international legal order around him, Kelsen's interests switched from constitutional law to international law. In *Das Problem der Souveränität und die Theorie des Völkerrechts,* written in 1920, Kelsen criticized theories which saw the State as the ultimate sovereign above the law.[931] In particular, Kelsen criticized Hegel for uncritically mixing together arguments about the world history and human nature in his monistic, anthropomorphic

[930] Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 144.
[931] François Rigaux, "Hans Kelsen on International Law," *European Journal of International Law* 9 (1998): 325–43; Hans Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre* (Tübingen: J. C. B. Mohr (P. Siebeck), 1920).

conceptualization of the State.[932] According to Hegelian legal theory, discussed in Chapter III of this dissertation, international law could only exist as an off-shoot of State's law (what Kelsen named '*das Völkerrecht als äußeres Staatsrecht'*)[933] with its compulsory nature flowing from the collective will of State-persons.[934] To the theories of the divine, anthropomorphic State, Kelsen responded with his own brand of monism: the pure theory of law, which, in a Kantian manner, sought to reduce legal personality of the State from a substantial concept (*Substanzbegriff*) to a functional concept (*Functionsbegriff*).[935]

Kelsen famously differentiated between the natural sciences and the moral science of jurisprudence.[936] While natural sciences are dedicated to the study of *sein* (being), moral sciences focus their attention upon the study of *sollen* – the domain of what 'should be,' concerned with the normative claims about authority.[937] Kelsen's project was then to study law as a fully autonomous object of inquiry and to purify legal theory from metaphysics, as well as 'all political ideology and elements of natural sciences.'[938]

According to Kelsen, law could be understood in terms of 'commands' or expressions of 'will' only in a figurative mode of speech.[939] When a rule of law 'prescribes' or 'stipulates' a certain rule of conduct, it is as if one individual asked another to behave in a certain way. However, what distinguishes the rule of law from a personal command is the fact that, by having recourse to law to prescribe human behavior, we refer to:

> [*A*]*n abstraction which eliminates the psychological act of will which is expressed by a command.'*[940] *If the rule of law is a command, it is, so to speak, a de-*

[932] Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre*, 100.
[933] Ibid., 154, §37.
[934] Rigaux, "Hans Kelsen on International Law," 326.
[935] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 149–50.
[936] Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie Litschewski et al. (Oxford: Clarendon press, 1992).
[937] Georges Scelle, *Précis de Droit Des Gens : Principes et Systématique* (Paris: Sirey, 1932), I, 40.
[938] Kelsen, *Introduction to the Problems of Legal Theory*, 1.
[939] Kelsen, *General Theory of Law and State*, 35.
[940] Ibid., 35.

> *psychologized command, a command which does not imply a 'will' in a psychological sense of the term.*[941]

A fundamental aspect of Kelsen's project was to establish new ways of treating legal persons. Kelsen wrote that the concept of the legal person 'answers the need of imagining the bearer of the rights and duties.'[942] Kelsen criticized the organic thinking about personhood as a substance and a separate entity; instead, he conceptualized notion of a 'person' as a point of attribution of rights and duties within the legal order:

> *Die Person - die physische wie die juristische - lebt in der Vorstellung der Juristen als ein von der Rechtsordnung verschiedenes, selbständig existentes Wesen, das für gewöhnlich als „Träger" von Pflichten und Rechten bezeichnet wird und dem man bald mehr, bald weniger auch ein reales Dasein zuspricht. Ob man diese Realität auf die physische Person beschränkt oder - wie in der organischen Theorie - auch auf die sogenannten juristischen Personen ausdehnt, ist hier gleichgültig. Es genügt die Konstatierung der ausgesprochenen Tendenz zur Realsetzung der Person.*[943]

The notion of a person, understood in this way, appeared as a fictional personification of the complex of norms: it could appear as a personification of the entirety of the State's legal order *(die Staatsperson)* or of the constituent subparts of the legal order (*Teilrechtsordnungen*).[944] Kelsen also did not make a distinction between the nature of physical individuals and organs of the State: a person was to be 'defined through the rights, interests and competencies afforded by a legal rule. It was incidental whether such a person is a state organ or a private citizen.'[945] Indeed, Kelsen famously posited that legal rights and duties could be attributed to persons understood both as individuals and as legal entities – what mattered was the validity of such rights and

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[941] Ibid., 35.
[942] Ibid., 93.
[943] Hans Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob," *Annalen Der Philosophie* 1 (1919): 633.
[944] Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob."
[945] Rigaux, "Hans Kelsen on International Law," 331.

duties under the legal system in place.[946] To translate it for purposes of my anthropomorphic analysis: in Kelsen's theory, the State could not be said to exist as a separate substance; rather Kelsen proposed to treat it as a legal fiction – an 'as if' entity.

Kelsen thus saw the earlier attempts at conceptualizing legal persons, described in the previous chapters of this thesis, as burdened with an error of hypostasis: the attribution qualities of a substance to what really amounts to a fiction. For that reason, Kelsen explicitly rejected the distinction between the law and the State,[947] and considered all the tendencies to personify, to reify or to mythologize the legal fiction of the State as errors of human thought.[948] He wrote that:

> *In this idea, a general trend of human thought is manifested. Empirically observable qualities, too, are interpreted as qualities of an object or a substance, and grammatically they are represented as predicates of a subject. This is substance is not an additional entity. The grammatical subject denoting it is only a symbol of the fact that the qualities form a unity.*[949]

Therefore, Kelsen saw it as erroneous to vest the State with an independent existence and identity of its own.[950] He rejected the views of the State presented in Chapters II & III of this dissertation as cognitive errors. Kelsen wrote that the hypostasis committed by jurists writing about the moral person of the State and about the organic 'real' person of the State resembles the duplication of the object of inquiry 'characteristic of the primitive mythological thinking which is called animism.'[951] Just like animism, legal theory founded upon anthropomorphic conceptualization of the State commits the error of the duplication (hypostasis) of the object of inquiry: 'the order is made into a

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[946] Kelsen, *General Theory of Law and State*, 343–48.
[947] Hans Kelsen, "Das Wesen Des Staates," *Internationale Zeitschrift Für Theorie Des Rechts* 1 (1926): 5–17; Kelsen, *Introduction to the Problems of Legal Theory*, 37–40.
[948] Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob," 637.
[949] Kelsen, *General Theory of Law and State*, 93.
[950] Hans Kelsen, "Das Verhältnis von Staat Und Recht Im Lichte Der Erkenntniskritik: Chriften von Hans Kelsen, Adolf Merkl, Alfred Verdross," by H. Klecatsky, R. Marcic, and H. Schambeck (Vienna: Europa Verlag, 1968), 112; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 181.
[951] Kelsen, *General Theory of Law and State*, 93.

substance and this substance is regarded as a separate thing.'[952] The specter of 'Man' has appeared in the form of human error to cloud the judgment of jurists about the State and to cast the anthropomorphic shadow upon what would otherwise be an abstract entity. Kelsen concluded by stating that, in reality, 'the legal person is not a separate entity besides "its" duties and rights, but only their personified unity.'[953]

Kelsen thus criticized the treatment of the State as an ontologically separate entity with a will, intellect, conscience and a body of its own. He stressed that the juristic fiction of the State could never be deemed to possess a 'body' or a 'will' of its own.[954] Neither could it 'own' its territory in a manner that a biological person can hold property, for the territory is a mere sphere of validity of the national legal order.[955] From the temporal perspective, the State is not eternal, but limited by the temporal sphere of validity of the national legal order determined by international law.[956]

Kelsen criticized earlier conceptualizations of the State which relied upon the distinction between the State and the legal order and which tended to present the State as an embodied entity with a separate identity of its own.[957] In particular, he took a firm stance against the organic conceptualization of the State and other theories which presented the will of the State as a separate faculty or a form of collective consciousness. Kelsen also argued that the State could never form a body composed of individual bodies because, unlike natural organisms, the State is not a visible or a tangible body.[958] He criticized the theories of the State based upon performative representation:

> *The basic error of the theory that the juristic person is represented by its organs in the way a ward is represented by its guardian or a principal by his agent is that*

[952] Ibid., 108.
[953] Ibid., 93.
[954] Ibid., 107–10.
[955] Ibid., 218.
[956] Ibid., 219.
[957] Ibid., 182.
[958] Ibid., 191.

> *the juristic person is thought of as a kind of human being. If the physical person is a man, then the juristic person must be, it is thought, a superman.*[959]

Kelsen also criticized the inorganic accounts of a collective 'Will of the People' such as those represented by Jellinek. Instead, he considered the collective will of the State as a phantom and rejected voluntarist accounts of international law.[960] According to Kelsen, the idea that the State could possess a separate will was derived from theology, which posited God's will above the world in order to rule all creation: 'Wie der Staat so ist Gott als Persönlichkeit: Wille.'[961] Kelsen then criticized the pitfalls of anthropomorphic thinking about the State and its connection to imperialism and absolutism:

> *Wie die egozentrische Position einer subjektivischen Erkenntnistheorie in einem ethischen Egoismus (wenn solcher noch als Ethik bezeichnet warden kann) verwandelt ist, so paart sich die Rechtserkenntnishypothese des Primates eigener staatlicher Rechtsordnung mit Staatsegoismus einer imperialistischen Politik.*[962]

According to Kelsen, the anthropomorphic conceptualizations of the State have in reality served to hide the fact of domination of men over men: 'so verdeckt der Schleier der Staatspersonifikation das dem demokratischen Empfinden unerträgliche Faktum einer Herrschaft von Mensch über Mensch.'[963] What was needed was the reduction of the State to the logically delimitated contours of a legal fiction.[964]

To remedy the faults of anthropomorphic thinking about the State, Kelsen's pure theory of law posited the vision of a 'person' as a mere point of attribution within legal order. What mattered to Kelsen was not the existence of a superior 'will,' but the sheer

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[959] Ibid., 108.
[960] Hans Kelsen, "The Conception of the State and Social Psychology: With Special Reference to Freud's Group Theory," *International Journal of Psycho-Analysis* 5 (1924): 1–38.
[961] Kelsen, "Das Verhältnis von Staat Und Recht Im Lichte Der Erkenntniskritik: Chriften von Hans Kelsen, Adolf Merkl, Alfred Verdross," 115–18; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 185.
[962] Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre*, 317.
[963] Hans Kelsen, *Vom Wesen Und Wert Der Demokratie* (Tübingen: J. C. B. Mohr, 1920), 10.
[964] Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob," 637–38.

normative structure and overall efficacy of the legal order. According to Kelsen, the State should be represented as a fictional personification of the entirety of the domestic legal order: the '*Personification von Rechtsnormen*.'[965] Indeed, one of the objectives of the pure theory of law was to do away with the connection between the legal person of the State and any real entity and to disentangle the law from moral, political or natural arguments.[966] Within the pure theory of law, legal personality evolved from a substantial concept into a functional concept used to describe bundles of rights.[967] The State could then be seen as a personification of the domestic legal order, while simultaneously functioning as a 'subsystem' (*Teilordnung*) of the international legal order.[968] To illustrate his argument, Kelsen approvingly quoted Ernst Cassirer and his treatment of the atom; like the representation of the atom in the textbook, the State should not be treated a real entity independent from its surroundings.[969] Rather, the State and the atom could be perceived as subjects in so far as they were treated as starting points for possible relationships: as points of attribution within the overarching order of things.

Therefore, the State could only be described as 'person' when such depiction would be a consciously employed legal fiction resting upon the assumption of the underlying unity of all law: 'international personality is simply the fact that international law imposes duties and confers rights […] upon States.'[970] According to this view, the State was not a separate entity, but merely a manifestation of the legal order drawn with the letter of the law. Kelsen wrote: 'to describe the State as "the power behind the law" is

[965] Kelsen, *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre*, 20; Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob"; Rigaux, "Hans Kelsen on International Law," 329–31.
[966] Kelsen, *General Theory of Law and State*; Kelsen, *Introduction to the Problems of Legal Theory*; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 149–69; Brölmann and Nijman, "Personality," 684.
[967] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 149–50.
[968] Kelsen, *Introduction to the Problems of Legal Theory*, 122; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 172.
[969] Kelsen, "Das Verhältnis von Staat Und Recht Im Lichte Der Erkenntniskritik: Chriften von Hans Kelsen, Adolf Merkl, Alfred Verdross," 114; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 183.
[970] Kelsen, *General Theory of Law and State*, 252.

incorrect, since it suggests the existence of two separate entities where there is only one: the legal order.'[971] The State was to be perceived as the fictional personification of the domestic legal order.[972]

Kelsen borrowed the notion of legal fictions and of 'as if' entities, from the neo-Kantian philosopher Hans Vaihinger.[973] For Vaihinger, fictions had an epistemic function and could be employed to improve understanding of the object of cognition.[974] For example, the notion of the State as a legal fiction (and nothing beyond that) could be employed as a conceptual tool to comprehend the functioning of international law understood as a hierarchy of norms. However, it is also worth repeating here that Kelsen's project was grounded in the fundamental distinction between natural sciences and 'legal science.'[975] While natural sciences would seek to explain causation behind natural phenomena, legal science was purely normative: its goal was to determine the formal conditions for the existence of unitary and coherent legal system.[976] For this reason, Kelsen took a firm stance against the attempts to ground the validity of the legal order on any other ground other than legal formalism: the State so-understood appeared as a set of organs charged with legislating and applying the law.[977] The notions of 'a person' or 'the subject of law' thus applied to designate different points of attribution within the pyramidal structure of the legal order.[978]

By having recourse to the notion of a legal fiction, Kelsen rejected anthropomorphic vocabularies of the State and its personhood discussed in the previous chapters of this dissertation. He criticized the conceptualizations of personality of States, such as those discussed in Chapters I & II, which presented tended to present the State as a separate

[971] Ibid., 191.
[972] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 184.
[973] Christophe Bouriau, ed., *Les Fictions Du Droit: Kelsen, Lecteur de Vaihinger* (Lyon: ENS éditions, 2013).
[974] Ibid., 8–9; Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob," 631.
[975] Bouriau, *Les Fictions Du Droit: Kelsen, Lecteur de Vaihinger*, 14.
[976] Ibid., 9.
[977] Ibid., 19.
[978] Kelsen, "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob," 633.

entity.[979] Kelsen also criticized the sociological accounts of law which tended to portray the State as a form of domination (for example, Duguit's emphasis on social domination).[980] Kelsen argued that any conceptualization of the ruler or rulers exercising their power of domination through the machinery of the State must already presuppose the existence of a valid legal order which would deem such actions as legitimate.[981] For Kelsen, the objective of the legal theory properly understood was to deal with the formal validity of the legal order.

For these reasons, Kelsen advocated for a purely normative vision of the State as a singular unity of law.[982] In his theory, the State is neither a social, metaphysical nor a psychic phenomenon – rather, the State is a legal fiction and an expression of the legal order. Rigaux comments:

> *To be 'pure' a theory of law has to be stripped of the fancy dresses in which legal situations are attired. Kelsen's fashion was to let the body of state law appear in its nakedness.*[983]

To this comment we may add that the newly exposed State appeared as a fictional body: a personification of the legal order. For Kelsen, the ultimate locus of validity of legal acts was then provided by the *Grundnorm* of the overarching legal order.[984] Sovereignty, understood in this mode, would rest with the international legal order itself. Nijman comments that, in Kelsen's theory, 'it is not power that constitutes law, but law that authorizes power' by recognizing the legitimacy of the effective government.[985] Seen in this way, international law serves as a mechanism which recognizes the claims to authority of different governments.[986] While departing from

[979] Kelsen, *General Theory of Law and State*, 252–53.
[980] Ibid., 186–87.
[981] Ibid.
[982] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 171–73.
[983] Rigaux, "Hans Kelsen on International Law," 333–34.
[984] Hans Kelsen, "Die Funktion Der Verfassung," *Forum* XI (1964): 583–86.
[985] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 167.
[986] Kelsen, *Introduction to the Problems of Legal Theory*, 61.

Anzilotti's theory that the only remedy for an internationally wrongful act is the duty to make reparation, Kelsen argued that international order should provide for sanctions in cases of international delicts.[987]

Kelsen's theory constitutes a way of thinking that enables the 'As If' jurisprudence that we are familiar with today – the conscious use that international lawyers make of the notion of legal fiction in relation to the State.[988] Kelsen's formalism, his belief in the rule of law and the treatment of persons as points of attribution within legal order can be viewed in the light of his opposition towards totalitarianism, associated with organic theory of law, and his attempts to provide for peaceful coexistence of different regime types under single international law. Despite criticisms, Kelsen's ideas have 'paved the way for the dominant contemporary doctrine' and continue to influence our thinking about the State as a legal fiction.[989] Let us now move to discuss other thinkers who popularized and contributed to the conceptualization of the State as a legal fiction.

Subsequent Incarnations of the Legal Fiction

In France: Georges Scelle

Following in the footsteps of Léon Duguit and Hans Kelsen, Georges Scelle (1878–1961) addressed the conceptual problems at the foundation of law, with a particular role reserved for international law. Scelle was born only a few years after the establishment of the Third Republic and he got to witness the drastic erosion of democratic institutions which took place in France.[990] Scelle's account of democratic institutions and of the international legal order could then be seen as a theoretical attempt at demystifying the person of the State, in order to emancipate the individual and to place legal constraints upon the power of individual rulers (*les gouvernants*).

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[987] Hans Kelsen, "Unrecht Und Unrechtsfolge Im Völkerrecht," *Zeitschrift Für Öffentliches Recht* 12 (1932): 545; Georg Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Tradtitional Primacy of a Bilateral Conception of Inter-State Relations," *European Journal of International Law* 13, no. 5 (2002): 1093.
[988] Schlag, *The Enchantment of Reason*, 108–11.
[989] Rigaux, "Hans Kelsen on International Law," 325.
[990] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 197.

Scelle saw the individuals as the only real persons of the law and he took a firm stance against any theoretical attempts which sought to attribute personality to collective entities.[991] Groups could not be said to possess a collective will, Scelle argued, because they were incapable of basic human solidarity which characterized individuals. Only individuals could be said to be able to form a society and they were to be seen as ultimate subjects of law.[992] For these reasons, Scelle considered the classical notion of the society of nations as an unduly anthropomorphic idea – it was in fact a society of rulers (*une société de gouvernants*) who attempted to perpetuate their authority by clinging to the postulate of State sovereignty.[993] The true international society should therefore not be seen as a society of States; instead, any attempt at forging international society should take individuals as its points of departure.[994] Scelle wrote:

> *Il n'y a pas d'autre personnalité juridique que celle de l'individu doué de conscience et de volonté personnelle, et c'est dans l'utilisation des compétences par le sujet de droit individuel que réside le secret de la technique juridique.*[995]

As any other society, international law would then have to conform to human nature and global solidarity and serve the needs of international social life.[996] Any legal order had to conform to the demands of human sociability, expressed in the simple formula: 'Sociabilité = solidarité = juridicité.'[997]

Scelle based his view of international society on the assumption that individuals are social beings, in need of a political society to exist and to realize their interests.[998] While citing Aristotle, Scelle argued that 'l'homme est un animal politique qui ne peut vivre

[991] Ibid., 195.
[992] For the socio-political context surrounding Scelle's work, see: Ibid., 193–209.
[993] Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," 216.
[994] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 28.
[995] Ibid., II, 260.
[996] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 218.
[997] Georges Scelle, "Le Droit Public et La Théorie de l'État," in *Introduction à l'étude Du Droit*, ed. Léon Julliot de la Morandière, vol. I (Rousseau, 1951), 9.
[998] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 217; Georges Scelle, *Précis de Droit Des Gens : Principes et Systématique*, 2 vols. (Paris: Sirey, 1932).

qu'en société.'[999] The development of the faculties of Man and of his material conditions of life was thus a direct result of this fundamental *fait social*.[1000] From this *fait social* flow two basic form of human solidarity: 1) the solidarity through similarities, which was derived from the ethno-linguistic resemblances between men; and 2) the solidarity through the division of labor, which was rooted in the distribution of responsibilities between different members of the society.[1001] Law could then be seen as a product of a biological necessity, a social constraint necessary for the survival of the plurality of individuals within a society.[1002] Scelle wrote that 'toutes les contraintes sociales sont donc originairement d'ordre biologique, puisqu'elles conditionnent à la fois la cohésion du groupe et la vie de l'individu.'[1003]

The social basis for the binding force of law testifies to the influence exercised by Léon Duguit and Émile Durkheim upon Scelle's theory. However, Scelle also distinguished himself from Duguit by detaching law from considerations of individual will and by presenting it as a form of biological necessity stemming from human nature.[1004] The law rooted in human nature would continue to apply, even if feelings of justice or solidarity were to be absent from individual consciences of human beings.[1005] The anthropomorphism at the foundation of law made a full circle, by making a reference to the Aristotelean conceptualization of natural law grounded in human nature. By grounding the basis of validity of law in human nature, Scelle also rejected Kelsen's argument that the *Grundnorm* could be founded upon a mere hypothesis:

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[999] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 2.
[1000] Ibid.
[1001] Ibid., I, 2–3.
[1002] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 218.
[1003] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 3.
[1004] Melleray, "Léon Duguit et Georges Scelle," 64; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 219.
[1005] Pisier raised the incertitude whether Duguit's objective law was to be understood as a psychological mass of individual consciences or a product of the *fait social* itself, in: Évelyne Pisier, *Le Service Public Dans La Théorie de l'Étatcle Léon Duguit* (Paris: Librairie générale de droit et de jurisprudence, 1972), 122. In contrast, Scelle is explicit on this point, by making a direct connection between objective law and biological necessity, see: Melleray, "Léon Duguit et Georges Scelle," 68-69; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 220.

> *Toute hypothèse juridique doit être vérifiée. L'on ne peut pas ainsi rester suspendu dans le vide. Nous pensons qu'il n'y a point de cloison étanche entre le domaine de l'être et celui du devoir et que la norme juridique est une déduction consciente des lois du monde phénoménal.*[1006]

For the above-stated reasons, Scelle regarded collectivities as fictitious entities comprised of individuals:

> *Des sociologies et des juristes ont cherché à demontrer la réalité physique de la personne morale, mais ne sont parvenus qu'à établir des analogies ou à répandre des fables.*[1007]

Scelle saw the State as 'un groupe de gouvernants,' whose competences were recognized under international law.[1008] The conceptualization of the international order that is traceable directly to individuals allowed him to claim that only individuals could enjoy international legal personality and that they were to be seen as the prime bearers of subjective (individual) responsibility. Scelle saw it as a way to prevent individuals from hiding beneath the veil of abstraction of the State and wrote of 'une mystique qui attribue des qualités immanentes à des êtres fictifs, mais qui bénéficie à des personnes réelles devenues irresponsables et toutes puissantes derrière l'écran qui les dissimule.'[1009] While primary responsibility rested with individuals, collective responsibility, based on social solidarity, would function as a system of objective responsibility for taking risks.[1010] Here we can see a way of thinking that enables for an individualized regime of responsibility under international law and which treats international responsibility of States as a regime akin to strict liability.

[1006] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 40; Melleray, "Léon Duguit et Georges Scelle," 63.
[1007] Ibid., I, 10.
[1008] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 223.
[1009] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 12.
[1010] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 240.

Scelle's design was to cleanse international law of the anthropomorphic and collectivist notions of personality and collective will:

> *L'introduction de cette fausse notion de personnalité morale dans le droit public nous parait être une cause essentielle des retards et des déviations de son évolution. Il en est spécialement ainsi en Droit international*.[1011]

Scelle followed Duguit in denying existence of any metaphysical State persona and he rejected the traditional subjective right of sovereignty that would be attached to the State as a legal person.[1012] Scelle acknowledged the importance of the State from the sociological perspective, but he explicitly rejected any attempts at vesting it with a legal personality or other anthropomorphic qualities.[1013] He wrote that:

> *Nul ne saurait évidemment nier la réalité matérielle des phénomènes sociologiques, mais ce serait une autre aberration que de vouloir transformer ces réalités phénoménales en réalités personnelles. Faire des structures sociologiques ou des institutions sociales des êtres collectifs dotés de conscience et de volonté, c'est se laisser aller à l'imagination anthropomorphique et non plus se borner à la constatation scientifique*.[1014]

Instead, Scelle proposed to treat the State as a pure fiction.[1015] He argued that sovereignty belongs to the international legal order and that 'le Droit seul est souverain.'[1016] What distinguished positive law from other forms of social constraint was the collective decision to consider the norms in question as indispensable to the existence and progress of a given society.[1017] International law thus stemmed from the necessity to establish relations between different societies and their *gouvernants*.[1018] Here we can witness the influence of Kelsen upon Scelle: both thinkers saw international law

[1011] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 12.
[1012] Ibid., I, 13.
[1013] Ibid., I, 73–77.
[1014] Ibid., II, 2.
[1015] Ibid., I, 10.
[1016] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 224.
[1017] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 25.
[1018] Ibid., I, 31.

as necessary for the regulation of international affairs.[1019] Both thinkers also saw the State as a fiction, although Scelle did so in order to stress the importance of individual *gouvernants* as the ultimate subjects of international order.[1020] What connected Kelsen and Scelle was their vision of the systemic unity of law and the importance attributed by both jurists to the international sphere.[1021] Scelle, just as Kelsen before him, saw international law as hierarchically higher than domestic law, as he wrote of 'ce principe de la subordination necessaire du droit interne au Droit international'[1022] which sees the domestic legal norms as derived from an inter-social basic norm.[1023] International law's function was then to delimit and to assign *compétences,* even within the private realm of State's *domaine résérvé*.[1024] Nijman writes that, in Scelle's view, law was not a product of power but that power was better understood as a competence attributed by international law.[1025]

Scelle, just as Duguit before him, rejected the notion of a sovereign, metaphysical State. To Scelle, the vision of the State as the sovereign creator of law implied that, in practice, the State could not breach the law that was dependent upon its very will, as 'the king can do no wrong.'[1026] As we have seen in the previous chapter, the latter view characterized organic treatment of the State as the ultimate creator of law. Scelle's criticism of State's sovereignty and metaphysical personality translated into a number of important theoretical points: firstly, the State could not be seen to *possess* territory (as a personal holder of rights); instead, the territory simply delimitated the territorial scope of competences of the State's office holders.[1027] Secondly, strictly speaking, international recognition concerned the recognition of governmental competences in a

[1019] Ibid.
[1020] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 12.
[1021] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 221.
[1022] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 32.
[1023] Ibid., I, 39.
[1024] Ibid., I, 7–9.
[1025] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 225.
[1026] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 67.
[1027] Ibid., I, 76.

given territory and not the recognition of existence of a person of the State.[1028] Finally, only individuals, as the true subjects of law, could be held accountable under international law. According to Scelle:

> *Car dès l'instant que "juger" l'acte d'un gouvernant c'est juger en même temps l'Etat et la Nation, on se heurte à cet obstacle quasi insurmontable en pratique, qu'est le sentiment collectif et la mystique nationale, les plus lourds impondérables. Mais si, repoussant la fiction, on parvient à se convaincre que, dans la réalité des faits, le litige se réduit au point de savoir si un individu sujet de droit […] a dépassé ou non sa compétence, l'obstacle se dégonfle et […] le conflit émigre du point d'honneur au point de droit.*[1029]

Scelle, just like Anzilotti before him, criticized the attempts to attach the notion of fault (*culpa*) to collective entities, which characterized the classic discourse of international law discussed in Chapter II of this dissertation. Instead, Scelle proposed to dismantle the fiction of the State and to focus on the role of individual *gouvernants* (rulers).

Scelle's theory was distinct in that it was not the State, but individual *gouvernants,* who would provide the link between the domestic and international legal order.[1030] The power of *représentants* (office holders) was dependent upon recognition by the *représentés* (individual citizens). The recognition of lawful authority was a continuous process, conditional upon the conformity of government's action with the requirements of social solidarity and the rule of law.[1031] Therefore, the ultimate power to determine governmental competences rested with the individual members of the collectivity at stake.[1032] Human progress could then be achieved by establishing international institutions (*le féderalisme institutionnel*) and emancipating the individual, which led Scelle to advocate for democratic self-determination and a global society of individuals:

[1028] Ibid., I, 100–103.
[1029] Ibid., I, 62.
[1030] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 233–34.
[1031] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, I, 24.
[1032] Ibid.

'la société humaine universelle.'[1033] We are reminded of a distant echo of Leibniz's distinction between the *societas humana* (global society comprised of all individuals) and Wolff's *civitas maxima* (global society comprised of states *qua* moral persons) and the entailing visions of global community discussed in Chapter II.

In Scelle's work, the specter of 'Man' manifests itself not in the anthropomorphic State (an idea that he explicitly rejects) but in the regression towards the individual subject of law and the baggage of assumptions about human nature, sociability and biological origin of law accumulated along the way. By attributing international legal personality to individuals rather than to States, Scelle presented individuals as bounded, unified and generalizable entities, without inquiring much into the gendered and racial configuration of these subjects. By situating sovereignty within the international legal order, Scelle, just as Kelsen before him, opened the way to anthropomorphic thinking about the source of agency in international law: the law which *assigns* competences, which *recognizes* actors and which *determines* the scope of legitimate legal action.

Let us now traverse the Channel to discuss the project of James Leslie Brierly.

United Kingdom: James Leslie Brierly

Having served in the First World War, James Leslie Brierly (1881–1955) was then appointed as professor of international law and diplomacy at Oxford University.[1034] In his inaugural lecture, aptly entitled 'The Shortcomings of International Law,' Brierly set the agenda for his scholarly project.[1035] His was a struggle against the 'anti-social nationalism' through legal means.[1036] One of the ways of achieving this objective was through the negation of what Brierly saw as the anthropomorphic notion of State sovereignty and State-centric voluntarism in international law:

[1033] Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," 216; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 196, 220.
[1034] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 132.
[1035] James L. Brierly, "The Shortcomings of International Law," *British Year Book of International Law 5*, 1924, 4–16.
[1036] Ibid., 15.

> *A system of law that encourages the maximum of will may be tolerable at certain times, as in the nineteenth century; but we are more and more finding it intolerable in the twentieth, and it has already almost ceased to be the theory, as it certainly has ceased to be the practice of our municipal law. Yet we continue to proclaim it as the unchallengeable basis of international law, though it is rapidly passing away also from the structure of international society.*[1037]

Brierly thus criticized the anthropomorphic notions of consent and sovereignty.[1038] He argued that thinking about the State as a 'common will' was no longer acceptable in the era of public opinion and mass media that came to influence the life of democracies in the 20th century. Brierly was particularly influenced in that regard by the notion of the 'phantom public' developed by Walter Lippmann.[1039] The public opinion, the mass media and the sheer amount of available information posed a challenge to the traditional grounding of authority in the unitary, phantom body of the King and its later reiterations. Instead, Brierly chose to ground the basis of obligation in the fundamental human morality which could be uncovered through reason.[1040] Brierly thus restated the natural law argument which saw individuals as the true subjects of law who would discover the order of the universe through the proper application of the faculty of reason.[1041] The specter of 'Man' continued to inform the legal discourse, in that the discovery of morality was dependent upon the exercise of the faculty of reason by an individual.

[1037] Ibid., 16.

[1038] James L. Brierly, *The Basis of Obligation in International Law and Other Papers*, ed. Hersch Lauterpacht and Humphrey Waldock (Oxford: Clarendon Press, 1958), 3–18; Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 34–35; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 135.

[1039] Brierly, *The Basis of Obligation in International Law and Other Papers*, 41; Walter Lippmann, *The Phantom Public* (New York: Routledge, 1993); Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 141.

[1040] James L. Brierly, *Règles Générales Du Droit de La Paix*, vol. 58, Collected Courses of the Hague Academy of International Law (Hague: Brill, 1936), 34; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 136–37.

[1041] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 62–63.

By locating the basis of legal obligation in morality, Brierly adopted a monist position and effaced the distinction between domestic and international law.[1042] Brierly, who saw individuals as ultimate subjects of law, rejected the anthropomorphic notions of State sovereignty and personality as 'elusive conceptions.'[1043] He argued that:

> *Actually states are not persons, though it is often convenient to personify them; they have no wills except the wills of the individual human beings who direct their affairs*.[1044]

Brierly also lamented the attempts of legal scholarship to vest the person of the State with sovereign power. He saw the notion of the personified sovereign State as 'truly a *damnosa hereditas* [burdensome inheritance] for the international lawyer.'[1045] He wrote that:

> *Sovereignty, it was felt, must be somewhere or a state would not be a state, for philosophers and lawyers had come to speak of sovereignty almost as if it were a substance, instead of being merely an abstract idea invented by their predecessors to explain the political facts of their time. […] Still another device for retaining the doctrine of sovereignty while adapting it to modern conditions has been to attribute sovereignty to the personified state itself.* [1046]

Brierly attacked Hegel in particular for personifying the State and for treating it as a divine entity and an end-in-itself.[1047] While Brierly acknowledged that Hegel's conceptualization of the State could be interpreted in multiple ways, the question was 'not what Hegel meant, but what he has been understood to teach.'[1048] And while Hegel could have been understood to preserve the identity of the individual within the

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[1042] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 137.
[1043] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 61–63; Brierly, *The Basis of Obligation in International Law and Other Papers*, 19–20.
[1044] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 63.
[1045] Brierly, *The Basis of Obligation in International Law and Other Papers*, 20.
[1046] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 61.
[1047] Brierly, *The Basis of Obligation in International Law and Other Papers*, 29–36; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 138.
[1048] Brierly, *The Basis of Obligation in International Law and Other Papers*, 29.

community, his teaching gave rise to the wave of scholarship which tended to prioritize the interests of the embodied community over the interests of the individual. In particular, Brierly criticized German jurists for uncritically accepting the Hegelian notions of 'auto-limitation' and personality of the State.[1049] States understood as personifications of 'spirit' or 'will' could not be held accountable under international law, because they themselves represented the supreme form of morality. Brierly also criticized the view of the State as an organism and saw Bluntschli's attempt to vest the State with the masculine gender as 'an absurdity.'[1050]

In Brierly's view, the tendency to invent a 'hypothetical person' of the State as the superior will at the foundation of law was wrong and demonstrated the 'anthropomorphical bias of the human mind.'[1051] Historically, the doctrine of sovereignty has been founded upon the assumption that a degree of authority over individual wills must necessarily proceed from another, superior will. This superior will has originally been attributed to the biological person of the sovereign; however, with time, the hypothetical person of the State was invented to serve as a permanent locus of sovereignty and to make the logical structure complete. For Brierly, sovereignty arose in order to assert supremacy of the State in relation to other claimants to authority, most notably the Church.[1052] However, Brierly regarded this sovereignty of the personified State as a 'misconception of the relation of the state to force.'[1053]

Ultimately, Brierly found the notion of sovereignty to be too far-reaching and, therefore, unhelpful in describing the power of the States.[1054] He preferred the term 'authority' and embarked on a project to find the basis of this authority in international law. He proposed to ground authority in the conscious decision of an individual to participate

[1049] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 37.
[1050] Brierly, *The Basis of Obligation in International Law and Other Papers*, 29.
[1051] Ibid., 40.
[1052] Ibid., 43–44.
[1053] Ibid., 45.
[1054] Ibid., 46.

in a community and to submit oneself to its laws.[1055] 'Law,' Brierly wrote, 'exists for individuals in society, and it must make its final appeal to the individual and not any collective conscience, for the latter does not exist.'[1056] Brierly thus did not join the likes of Duguit and Scelle in negating the State, nor did he equate the State with the legal order.[1057] Instead, he chose to reduce the State to its functional nature as a system of relationships between individuals. Brierly's State appeared as an 'institution,' with a monopoly on the legitimate use of force, used to preserve security within society and to exercise the lawmaking function.[1058] Brierly wrote:

> *A State is an institution, that is to say, it is a relationship which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on.*[1059]

The personality of the individual and the personality of an institution are fundamentally different: while the essence of individual personality is self-consciousness, the institution cannot be seen as self-conscious at all.[1060] The State is thus not to be seen as a personification of the moral end-in-itself, but as a mere *means* of achieving social goals. It also follows that the institution of the State can only exist and act through individuals: 'individuals alone will or act in the literal meaning of those words [...] when we say that an institution wills or acts, we necessarily have in mind the willing or the acting of an individual, which we attribute to the institution.'[1061] According to this view, the legal personality of the State serves a procedural function by connecting individuals to the international system of law.[1062] Brierly also continued to

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[1055] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 141.
[1056] Brierly, *The Basis of Obligation in International Law and Other Papers*, 49, 66.
[1057] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 56–63.
[1058] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 142.
[1059] Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, 1928, 56.
[1060] Brierly, *The Basis of Obligation in International Law and Other Papers*, 49.
[1061] Ibid., 49.
[1062] Ibid., 51; Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 146.

advocate for the transition from State-centric system to an international law that would recognize the status of individuals as the ultimate subjects of law.[1063] The latter objective had an aspirational undertone: Brierly ended his essay on the basis of international obligation by confessing that 'the modern resurgence of natural law theories seems to open a vista full of hope for legal science.'[1064] The way was thus paved for the last utopia of the liberal argument organized around the notion of human rights and the modern understanding of the State as an abstract, fictitious entity.[1065]

The Legacy of the Aforementioned Scholarship

Ludwig von Wittgenstein once quipped that 'there are remarks that sow and remarks that reap' ('Es gibt Bemerkungen, die säen, und Bemerkungen, die ernten').[1066] The theories discussed in this chapter fall into both categories. They reaped into the anthropomorphic person of the State. Having dismantled the person of the State, the thinkers discussed in this chapter have also attempted to sow the seed of the conceptualization of the State as a legal fiction.

The modern discipline of international law builds upon the legacy of scholars discussed in this chapter. It is certainly no coincidence that some of the first volumes of the European Journal of International Law offered homages to Anzilotti, Kelsen and Scelle.[1067] Duguit is considered a giant of French constitutional and administrative law; many of his ideas have been also transmitted, through the work of Scelle, into the discipline of international law.[1068] Anzilotti, who was a judge and then the president of the Permanent Court of International Justice, has become part of the canon of international legal scholarship and practice. In the words of Pierre-Marie Dupuy, Anzilotti 'offers the spectacle, fascinating to any contemporary author, of an

[1063] Brierly, *The Basis of Obligation in International Law and Other Papers*, 52.
[1064] Ibid., 67.
[1065] Moyn, *The Last Utopia: Human Rights in History*.
[1066] Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," 223.
[1067] Ibid.; Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States"; Gaja, "Positivism and Dualism in Dionisio Anzilotti."
[1068] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, see: International law as sociology: French "solidarism" 1871–1950.

international lawyer who put his stamp not only on the theoretical thought of his era but also on legal practice.'[1069] Anzilotti's text on State responsibility is a classic which influenced generations of jurists. One of those was Roberto Ago, influenced by both Anzilotti[1070] and Kelsen,[1071] who became Special Rapporteurs of the International Law Commission on State Responsibility and a judge of the ICJ.

Kelsen's influence on the disciplinary imagination was immense, as his work gave raise to decades of lively debate. Roscoe Pound famously lauded Kelsen as 'undoubtedly the leading jurist of the time.' Clearly, the designation of the 'leading jurist' would not go unopposed. However, despite the realist critiques levelled against the pure theory of law, it would be impossible to erase the footprint of Kelsen upon jurisprudence: even critical references to Kelsen continue to be seen as 'indispensable to sound legal scholarship.'[1072] While Kelsen suffered from lackluster reception in the US, he influenced H. L. A. Hart, who continues to be one of the most cited legal philosophers in the Anglo-Saxon curricula.[1073] And to observe the legacy of Kelsen on the European legal canon, it suffices to consider the number of essays written in honour of the Austrian jurist.[1074]

Kelsen has been widely read and exerted enormous influence on legal theory, especially in the UK.[1075] Scholars such as Brierly and Lauterpacht have been indebted to Kelsen's conceptual framework. Brierly, whose name to this day decorates the title of one of the

[1069] Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 139.
[1070] Allott, "State Responsibility and the Unmaking of International Law," 6; Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Tradtitional Primacy of a Bilateral Conception of Inter-State Relations."
[1071] Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," 221.
[1072] Dupuy singles out Anzilotti and Kelsen as remarkable figures that enjoy this exceptional status in the legal discipline. Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 139.
[1073] Jeremy Telman, "The Reception of Hans Kelsen 's Legal Theory in the United States: A Sociological Model," *L'Observateur Des Nations Unis, Valparaiso University Valparaiso University Legal Studies Research Paper No. 08-03*, 2008.
[1074] Salo Engel and R. A. Métall, eds., *Law, State and International Legal Order : Essays in Honor of Hans Kelsen* (Knoxville: University of Tennessee Press, 1964); Adolf J. Merkl, ed., *Festschrift Für Hans Kelsen Zum 90. Geburtstag. Herausgegeben von Adolf J. Merkl, René Marcic, Alfred Verdroß Und Robert Walter* (Vienna: Verlag Franz Deuticke, 1971); The California Law Review, ed., *Essays in Honor of Hans Kelsen Celebrating the 90th Anniversary of His Birth* (South Hackensack: Fred B. Rothman & Co., 1971).
[1075] Roscoe Pound, "Law and the Science of Law in Recent Theories," *Yale Law Journal* 43 (1934): 532.

most renowned textbooks of international law,[1076] finished his 'Basis of Obligation' with an acknowledgment of the importance of Kelsen and with an expression of hope concerning the resurgence of natural law theories.[1077] This sentiment was present and personified in the life and work of Hersch Lauterpacht. This former student of Kelsen labored intensively to criticize the personification of the State and its impunity flowing from the State-centric vision of sovereignty.[1078] In his project, Lauterpacht employed the language of natural law to present the modern liberal argument which posited the individual as the ultimate subject of international law.[1079] He spent much of his career advocating for the legal status of individuals to be backed up with enforceable human rights mechanisms and was left bitterly disappointed with the pace of development of adequate institutions to that end.[1080] Lauterpacht also went on to become a judge at the International Court of Justice and helped draft the British prosecutor's speeches at Nuremberg trials which contributed to the vision of the individual as the ultimate subject of international law.[1081]

Most importantly, the conceptual frameworks discussed in this chapter have found reflection in the modern practice of international law. In the 1927 *Lotus* case, by majority which included the vote of Judge Anzilotti, the Permanent Court of International Justice held that:

> *International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and*

[1076] Andrew Clapham, ed., *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*, 7th Edition (Oxford: Oxford University Press, 2012).
[1077] Brierly, *The Basis of Obligation in International Law and Other Papers*, 66–67.
[1078] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longmans Green, 1927), 51; Nolte, "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Tradtitional Primacy of a Bilateral Conception of Inter-State Relations," 1091.
[1079] Lauterpacht, "The Grotian Tradition in International Law," 27.
[1080] Moyn, *The Last Utopia: Human Rights in History*, 52, 82.
[1081] Philippe Sands, "Twin Peaks: The Hersch Lauterpaht Draft Nuremberg Speeches," *Cambridge Journal of International and Comparative Law* 1 (2012): 37–44.

> *established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims*.[1082]

This State-centric view has subsequently evolved, as the element of common aims and general interest of the international community gained prominence. In 1949, echoing the vision of the State as an institution, Judge Alvarez of the ICJ presented his opinion that:

> *To-day, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law*.[1083]

We are faced with a vision of international law that remains State-centric, but which simultaneously acknowledges that some of the obligations may not emanate from free will of States, but from their shared sociability. But what kind of a State are we talking about when we refer to the main subject of international law? As noted by Jessop, it remains problematic to equate 'the State' with a complex set of social relations which generate, often heterogenous, 'state effects.'[1084] Allott argues that:

> *The subjects of international law are states but only in the sense that the present conceptual structure of international law attaches legal rights and duties to the category "state." The subjects of international law, in the sense of the persons whose behavior is conditioned by the law, are government officials who implement those rights and duties and also the citizens who may have to pay for such implementation with their possessions or their lives.*[1085]

Therefore, behind the veil of abstraction of the State lurks the individual human being. Carty argues that any legal system is in the end maintained by individuals composing

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[1082] PCIJ, *The Case of the S.S. Lotus* (France v. Turkey), Judgment No. 9, 7 September 1927, para. 44.
[1083] ICJ, Individual Opinion of Judge Alvarez, *The Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment of April 9th, 1949, 43.
[1084] Bob Jessop, "Towards a Political Ontology of State Power: A Comment on Colin Hay's Article," *The British Journal of Sociology* 65, no. 3 (2014): 483.
[1085] Allott, "State Responsibility and the Unmaking of International Law," 14.

society for a variety of different motives.[1086] He sees the narrative of the unitary will of the State as a residue of natural law thinking about the supposed real will of the community.[1087]

Indeed, some primary legal materials seem to reflect the suspiciousness about any 'collective will' of the State – instead, 'individuals' are treated as the ultimate subjects who can be held responsible under international law. The latter phenomenon is particularly relevant in the area of international criminal justice. At the close of World War II, the Nuremberg Tribunal proclaimed that the 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[1088] Similar reasoning is followed by the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).[1089] The Draft Articles offer a *modus operandi* which does not require a foray into collective intentions of States, but propose a model of vicarious liability for the actions of state officials. We are left with the schizophrenia of legal discourse which sees States as the ultimate subjects of international order and which simultaneously acknowledges the ultimate responsibility and agency of individuals. Let us now discuss the general conceptual problem with anthropomorphic agency at the foundation of modern international law.

The Problem of Agency in International Law

A fundamental issue which arises in relation to the modern international legal discourse discussed in this chapter is: how can the State be deemed to exist as a legal fiction and what does the notion of fiction imply for our theory of the subject of law? The work of

[1086] Anthony Carty, *Philosophy of International Law*, Second Edition (Edinburgh: Edinburgh University Press, 2017), 62.
[1087] Axel Hägerström, *Inquiries into the Nature of Law and Morals*, ed. K. Olivecrona, trans. C. D. Broad (Uppsala: Almqvist & Wiksells, 1953), 36–42.
[1088] The Trial of Major War Criminals before the International Military Tribunal Nuremberg. International Military Tribunal Nuremberg, 14 Now 1945 – 1 Oct 1946. Published at Nuremberg, 1947, 447.
[1089] Fleming, *Leviathan on a Leash: A Theory of State Responsibility*, 32–41.

Bérénice Schramm on the notion of the legal fiction helps us in addressing those questions.[1090]

In her book, Schramm outlines the legal and epistemological implications of 'fiction.' The notion of fiction constitutes an acknowledgment of the limits of our cognition. Derived from the Latin word *fictio,* substantive for *fingo, fingere* ('to model in wax'), the etymology points towards the artificial and representative character of fictions.[1091] So do legal fictions constitute a concession of defeat before what is sometimes referred to as a 'scientific' method of legal studies.[1092] The imperfect nature of legal fictions is nevertheless intended and accounted for: just like a map is intended to serve as an imperfect representation of a territory it is meant to cover, the fiction constitutes an imperfect representation which stabilizes and organizes meaning.[1093] The notion of a legal fiction, described by Fuller as a 'disease or affection of language,'[1094] constitutes a necessary evil for the operation of the legal discourse. By indicating the boundaries of *terra nullius* of attainable experience, fiction helps to uphold the overall claim to scientificity of the legal discourse. As shown by Kelsen, the fictional *Grundnorm* can serve to organize the entire conceptual framework and to uphold the distinct, pure and unitary character of the moral science of jurisprudence.[1095] Therefore, legal fiction, as applied by the jurists and the judges, reinforces the narrative of unity and plenitude of law: 'le mythe de la plénitude du droit international.'[1096]

The employment of fiction results in the brand of 'As If' jurisprudence. Oliver writes:

> *The fiction [...] is based only in its conception on analogy, but thereafter states that in future A must be treated as if it were B. This means that in future cases*

[1090] Bérénice Schramm, *La Fiction Juridique et Le Juge: Contribution à Une Autre Herméneutique de La Cour Internationale de Justice* (Bruxelles: Bruylant, 2018).
[1091] Ibid., 2.
[1092] Ibid., avant-propos.
[1093] Ibid., 33; Chaim Perelman and Paul Foriers, "Présomptions et Fictions En Droit, Essai Synthèse," in *Les Présomptions et Les Fictions En Droit* (Bruxelles: Bruylant, 1974), 347.
[1094] Lon Fuller, *Legal Fictions* (Stanford, California: Stanford University Press, 1967), 11.
[1095] Schramm, *La Fiction Juridique et Le Juge: Contribution à Une Autre Herméneutique de La Cour Internationale de Justice*, 22.
[1096] Ibid., 11.

> *the existence or non-existence of a true analogy is immaterial. In fact, the fiction must be applied even when a particular case shows no correspondence between A and B. Very often the original analogy has ceased to exist, but the fiction is applied nevertheless*.[1097]

To apply this insight to our argument about the mystical source of authority in international law, the fiction of the Two Bodies of the King continues to apply even if the actual figure of the King ceased to exist. The fiction of the anthropomorphic agency at the basis of international legal order echoes the argument about the phantom body of the King as the unitary source of legal authority. In the writings of jurists discussed in this chapter, this anthropomorphic agency manifested itself in two different ways: 1) by positioning the hypothetical *Grundnorm* at the foundation of international legal order and 2) by placing the hypothetical 'individual' at the source of legal agency.

The anthropomorphic source of agency in international law

In this chapter, we have witnessed different approaches to locating the source of agency in international law. Kelsen's pure theory of law famously evacuated agency[1098] towards the anonymity of the legal order. In Kelsen's theory, it is the legal order itself which *assigns* competences, *recognizes* participants in the international legal discourse and provides the hypothetical authorization at the foundation of legal authority. And while Kelsen acknowledged the hypothetical character of his *Grundnorm*, the problem remains that agency, in this view, stems from a pre-discursive authorization to act. Bruno Latour writes that endowing agency with anonymity gives it exactly as much a figure as endowing it 'with a name, a nose, a voice, or a face.'[1099] Once again, we end up stranded with the anthropomorphized vision of agency and with the hypothetical, pre-discursive authorization to act. While adopting a neo-Kantian theory of the subject,

[1097] Pierre Olivier, *Legal Fictions in Practice and Legal Science* (Rotterdam: Rotterdam University Press, 1975), 166–67; Schramm, *La Fiction Juridique et Le Juge: Contribution à Une Autre Herméneutique de La Cour Internationale de Justice*, 41.
[1098] I borrow the term from Epstein's discussion of constructivism. Epstein, *Birth of the State: The Place of the Body in Crafting Modern Politics*, 8.
[1099] Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford: Oxford University Press, 2005), 53.

Kelsen tried to resolve paradoxes of international legal order by adopting an 'objective' view-from-above of the monist international legal order. By doing so, he ultimately failed to see the importance of 'mutual recognition and intersubjectivity that create and subtend the relationships between two or more subjects.'[1100]

Moreover, the conceptualizations of legal order which rely upon the notion of fiction continue to reserve a special role for the concept of the State. Among the scholars discussed in this chapter, Kelsen saw the State as a 'fiction,' Anzilotti referred to it as an 'abstraction,' while Brierly treated it as an 'institution.' Despite their critical approach towards the identity of the State, the above-mentioned jurists continued to treat the State as a useful analytical category. What mattered was not the ontological status of the State as an entity (all of the above-mentioned jurists were careful to reject the view of the State as a 'substance'), but rather the analytical usefulness of the concept of the State.[1101] According to this view, the State was deemed as an 'As If' entity, whose name had to be invoked to describe the operation of international legal order.

The analytical usefulness of the 'As If' vision of the State has been discussed by political theorists. Hay writes that:

> *If our analytical purchase on social, political and cultural dynamics can demonstrably or even just credibly be augmented by referring to the state as if it were real, then that is sufficient justification for so doing […] Put slightly differently, the relevant issue here is not the existence or non-existence of the state but the extent to which it is useful to refer to such a construct*.[1102]

The vision of the State as an 'As If' entity must be able to respond to two theoretical objections: a) the problem with the view of the State as a unitary actor and b) the problematic character of State's agency.[1103] According to the 'As If' view, the State

[1100] Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge: Cambridge University Press, 2012), 37.
[1101] Hay, "Neither Real nor Fictitious but 'as If Real'? A Political Ontology of the State," 463.
[1102] Ibid., 463.
[1103] Ibid., 464.

cannot be seen to possess an agency or a will of its own. Rather, the State can be understood as an authority or an authorizing identity, and 'an associated set of discourses which legitimates and sanctions certain practices and certain forms of behaviour whilst constituting specific institutional contexts in which these might take place.'[1104] The 'As If' position therefore seeks to avoid the charge of treating the State as 'a physical entity endowed with powers (a "thing") or a calculating agent with a free will (a rational "subject")'[1105] by remaining agnostic about the ontological question of the actual existence of the State and by reducing the State to an analytical category used to describe practices enacted on behalf of the State.[1106] According to this view, Hay writes, 'Structure and agency, they might suggest, are not separate and distinct dimensions of social and political existence, but analytical constructs we use to help us interrogate really existing social and political practices.'[1107] To illustrate it with an example discussed in this chapter, Kelsen's pure theory of law presented the State as a point of attribution within the overarching agency of international legal order. Understood in this way, the State constitutes an important point of mediation between international and domestic legal order. However, it does not possess a 'will' or an 'agency' of its own.

It must be noted that the approach which paints the State as a legal fiction also has its limitations: it is quick to set aside the questions of legitimacy and corporate identity of the State. Moreover, even though agency may be viewed as a mere analytical construct, such treatment does not negate the fact that agency of the legal order is based upon the argument reminiscent of the two bodies of the King. While the anthropomorphic State may well be dead, the international legal order continues to act, assign competences

[1104] Ibid., 475; Philip Abrams, "Notes on the Difficulty of Studying the State," *Journal of Historical Sociology* 1, no. 1 (1988): 58–89; Timothy Mitchell, "The Limits of the State: Beyond Statist Approaches and Their Critics," *The American Political Science Review* 85, no. 1 (1991): 77–96.
[1105] Jessop, "Towards a Political Ontology of State Power: A Comment on Colin Hay's Article," 483.
[1106] Hay, "Neither Real nor Fictitious but 'as If Real'? A Political Ontology of the State," 462–64; Jessop, "Towards a Political Ontology of State Power: A Comment on Colin Hay's Article," 484; Colin Hay, "If It Didn't Exist We'd Have to Invent It . . . Further Reflections on the Ontological Status of the State," *The British Journal of Sociology* 65, no. 3 (2014): 487–91.
[1107] Hay, "Neither Real nor Fictitious but 'as If Real'? A Political Ontology of the State," 464.

and authorize behaviour by drawing from the hypothetical phantom body at the foundation of legal order.

Another approach towards this conundrum was devised by Duguit and Scelle. We have seen that in the writings of the two French authors, the State was criticized for providing ideological justification to social forms of domination. Dissatisfied with the State as an analytical category, Duguit and Scelle deconstructed the State as one of the many possible forms of human association and preferred to focus their analysis on the actions of 'real' individuals. The objective law between the individuals was grounded in the inherent sociability or *fait social* of human beings. We have seen that, in the writings of Duguit and Scelle, biological individuals acquired the role of the ultimate subjects of law. Duguit wrote :

> *Des hommes qui ont conscience d'eux-mêmes, qui pensent, qui veulent, qui agissent en vue d'un but conscient, voilà les seules réalités du monde social.'*[1108]

Scelle saw the individual as the sole subject of international law.[1109] He wrote that:

> *Il n'y a pas d'autre personnalité juridique que celle de l'individu doué de conscience et de volonté personnelle, et c'est dans l'utilisation des compétences par le sujet de droit individuel que réside le secret de la technique juridique.*[1110]

Therefore, Duguit and Scelle proposed a category of an extra-discursive subject: the sociable individual located at the source of agency. The argument was reinforced by the reliance of aforementioned thinkers on the empiricism and materialism derived from the discipline of sociology. With the help of the epistemology of social sciences, the 'individual' and his or her agency became the starting point of the legal discourse. However, as Judith Butler has famously shown in her work, references to the pre-discursive subject will necessarily imply the ordering of the discourse by the very

[1108] Duguit, *L'état, Le Droit Objectif et La Loi Positive*, 29.
[1109] Scelle, *Précis de Droit Des Gens : Principes et Systématique*, 42.
[1110] Ibid., II, 260.

subject seeking to escape its confines.[1111] By placing the individual at the source of legal hierarchy, Duguit and Scelle have effectively put forth a vision of a transcendental subject: the figure of an individual human being as the ultimate source of agency in international law.

What differentiated the approach of Scelle and Duguit from other conceptualizations of 'Man' discussed in this dissertation was their treatment of individuals as empirically verifiable subjects who would form social and legal associations in the conditions brought about by the division of labor. By acknowledging the plurality of possible associations (the State, the church, the labor union, the family) and by considering the individual human being as the nucleus of those associations, Duguit and Scelle posited the individual as the ultimate subject of legal obligations. Accordingly, the individual replaced the phantom body of the King as the ultimate source of agency in legal theory, as the unity of sovereignty gave way to the plurality of possible legal associations.

The negation of the anthropomorphic State was achieved at the cost of 'fortifying that presumption of the metaphysics of the subject that where there is activity, there lurks behind it an initiating and willful subject,'[1112] in that case: the individual or the legal order itself. Whether we choose to rely on Kelsen's *Grundnorm*, or we have recourse to Duguit and Scelle's notion of the sociable individual, we seem trapped by the conceptualizations of the anthropomorphic foundation of legal authority. The specter of 'Man' continues to haunt our discourses, as we remain enclosed in circular arguments about legal authority emanating from the anthropomorphic source of agency: a notion which echoes the logic of the phantom body of the King as the foundation of legal hierarchy.

Chapter conclusion

In this chapter, we have studied projects which aimed to de-anthropomorphize legal theory by presenting the State as a legal fiction. The thinkers discussed in this chapter

[1111] Butler, *Bodies That Matter: On the Discursive Limits of "'Sex,'"* 11.
[1112] Ibid., 9.

have relied upon various epistemologies and approaches towards legal theory. This allowed them to construct novel conceptualizations of legal hierarchy, beyond the gaze of the anthropomorphic State. What connected the above-described projects was an important role reserved for the notion of a legal fiction. The epistemological choices were translated into different conceptualizations of legal fiction and theories about the identity of the ultimate subjects of international law. Paradoxically, while arguing against the metaphysics of the organic State, the thinkers discussed in this chapter have themselves engaged in a fair dose of metaphysical theorizing.

On the one hand, Duguit and Scelle embedded their legal work in sociological empiricism and materialism associated with the discipline of sociology. This approach led them to perceive biological individuals as the ultimate subjects of law. Duguit, influenced by the sociology of Durkheim, located the source of the binding force of law in the fundamental *fait social,* while Scelle preferred to derive the basis of obligation from the necessity imposed by human nature. Duguit and Scelle wrote about the State as a fiction in a negative sense: they criticized the anthropomorphism of the State and saw sovereignty as a tool of social domination. Instead, the two thinkers proposed to see the State as one of the many possible forms of association. Their doctrines can be seen as proto-pluralist ways of making sense of the multitude of overlapping legal orders: starting from family, religious professional groups, moving to provincial level communities and culminating in the multitude of overlapping legal orders of the world community at the very top.[1113] All of these associations had one thing in common: they were formed by and animated by individual men, who were seen as the ultimate source of agency in the social world.

On the other hand, we observe arguments characteristic of modern discourse of public international law. Hans Kelsen, who grounded his approach in legal formalism, posited a hypothetical *Grundnorm* at the foundation of international legal system. Kelsen

[1113] Cassese, "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law," 211.

preferred to see the legal discipline as a normative domain that should be cleansed from the influence of natural sciences, politics and morality. His formalism has manifested itself in his account of legal personality: a person, whether an individual or a State, was to be understood as a mere point of attribution within the legal order. According to Kelsen, agency flowed from the basic norm of the legal order. Meanwhile, the fictitious State continued to play an important role as an interface between domestic and international legal obligations. And while Kelsen's conceptualization of the binding force of law was monistic and took international legal order as its point of departure, Anzilotti offered a dualistic vision of international law as a sphere of law distinct from domestic legal systems while Brierly reframed the natural law argument about the law discoverable through reason. What connected the myriad of theoretical approaches and political projects discussed in this chapter was their attempt to dethrone the anthropomorphic person of the sovereign State and to replace it with the notion of a legal fiction.

I have argued that the view of State as a legal fiction has come to dominate the modern international legal discourse. The modern discourse of international law relies upon a peculiar theory of subjects: on the one hand, in the variety of legal texts, States appear as the ultimate subjects of international legal obligations. On the other hand, the discourses of human rights and international criminal justice posit the individuals as the ultimate addresses of international rights and duties. Hiding behind the veil of abstraction of the sovereign State are the real responsible actors of international law. Whichever view we tend to favor, we are left with the problem of the anthropomorphic source of agency at the foundation of legal hierarchy: as I have demonstrated, agency in international law is said to flow either from the anonymity of the basic norm at the foundation of international legal order or from the inherent agentic capacities of the ultimate transcendental subject: the 'individual.' In the last chapter of this thesis, I will address this issue by proposing ways of thinking which go beyond the anthropomorphic source of agency in international law.

Chapter V

The Dispersed Sovereign:
The Network of European Data Sovereignty

In this way the impression comes to prevail that everything
man encounters exists only insofar as it is his construct.
This illusion gives rise in turn to one final delusion: it seems as
though man everywhere and always encounters only himself.

– M. Heidegger, *The Question Concerning Technology.*[1114]

If those arrangements were to disappear as they appeared, if some event of which we can at the moment do no more than sense the possibility – without knowing either what its form will be or what it promises – were to cause them to crumble […] then one can certainly wager that man would be erased, like a face drawn in sand at the edge of the sea.

– Michel Foucault, *Order of Things.*[1115]

Introduction

In the previous chapters of this thesis, we have followed the flows of anthropomorphic vocabularies and their attribution to the State, understood as the main subject of international law. In Chapter I, we have seen that Hobbes described the State as a person 'by fiction' which needed to be represented by actors who would act on its behalf.[1116] The list of anthropomorphic qualities used to describe the State has expanded over time. As I demonstrated in Chapter II, the jurists of the law of nations described the State as a distinct, abstract person characterized by a will, intellect and conscience of its own. As discussed in Chapter III, the anthropomorphism of the State reached its

[1114] Martin Heidegger, *The Question Concerning Technology and Other Essays*, trans. William Loveitt (New York: Garland Publishing, 1977), 27.
[1115] Michel Foucault, *Order of Things: An Archaeology of the Human Sciences*, trans. Alan Sheridan (London and New York: Routledge, 2002), 422.
[1116] Runciman, "What Kind of Person Is Hobbes's State? A Reply to Skinner"; Runciman, *Pluralism and the Personality of the State*, 40; Fleming, *Leviathan on a Leash: A Theory of State Responsibility*.

extreme manifestation in the organic theory of law. The organic theorists such as Bluntschli and Gierke saw the State as a metaphysical, 'real' person of the law, whose body could be described with the same qualities that one would use when describing a natural organism. The concept of a legal fiction discussed in Chapter IV was then used to counter the metaphysical notion of the State and to portray it as an abstract entity instead. As I have demonstrated in the previous chapter, the view of the State as a legal fiction continues to rely upon an argument about anthropomorphic source of agency in international law.

Anthropomorphism has helped jurists to present the State as a unitary subject of sovereignty and legal obligations. In this chapter, I will argue that the vision of the unitary, anthropomorphic sovereign at the foundation of legal hierarchy has been put under strain and ultimately shattered by the processes of globalization and digitalization of legal practices. Recent technological developments challenge the traditional, anthropomorphic view of sovereignty, as the conceptual apparatus of law needs to adapt in order to grasp the complexity of cross-border flows of information and of the digital infrastructures which sustain it. In the final chapter of this thesis, I intend to show how technological developments and the resulting self-deconstruction of legal practices, coupled with an increased involvement of private actors and the rise of digital infrastructures, are contributing to the dispersion of the phantom body of the King at the foundation of sovereignty.[1117]

To illustrate the technology-driven dispersion of sovereignty, I will examine the case study of European data regulation. I will analyze the case study through the lens of approaches to international law which herald the epistemological shift towards the vision of law as a network.[1118] The multiplicity and heterogeneity of connections which characterize the network allow for de-anthropomorphized and non-hierarchical vision of law. Throughout my analysis, I am particularly interested in how the notion of 'data

[1117] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy."
[1118] Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*.

sovereignty' has been employed by the actors to fit within the conceptual framework of a network to refer to the regulation of data flows and to describe the role of non-human actants (the digital infrastructures) in the process. The use of the notion of data sovereignty constitutes an interesting example of the application of the concept of sovereignty to the entropy of cross-border data flows. I compare the notion of data sovereignty against the traditional, anthropomorphic conceptualizations of sovereignty outlined in the previous chapters of this dissertation.

The Disassembling of the King's Two Bodies

Before proceeding to the case study analysis, I would like to begin this chapter by going back to our theoretical framing: the notion of the King's Two Bodies. I follow Teubner in positing that the factors which have contributed to the dispersion of the phantom body of the King were the technological change, globalization and the resulting self-deconstruction of legal practices.

The King's Two Bodies, this grandiose symbol of law's mystical source of authority, has survived many theoretical attempts to de-anthropomorphize and to deconstruct legal argument. Teubner notes the remarkable survival power of the law's hierarchy:

> *The remarkable thing is that law's hierarchy has survived and probably will survive all subversive discoveries of its tangled, circular character, all undermining revelations of its paradoxical foundations, all threatening contradictions of multiple identities-if these discoveries are not accompanied by the self-deconstruction of legal practices themselves*.[1119]

Despite all the best efforts of modern jurists to present the State as a lifeless, abstract entity and despite the more recent efforts of critical legal scholarship to dissect the structure of international legal argument, the reports of the death of the King's Two Bodies have been, until recently, greatly exaggerated. Law has, in large part, continued

[1119] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 768.

to draw from its mystical source of authority in the circular, self-explaining operation of the legal argument.

> *For centuries the strange paradox of self-validation of contract and organization has remained in a strange twilight. Such phenomena were known jurisprudential conundra, but they remained latent.*[1120]

However, the dispersion of the unitary ego of the sovereign can no longer be ignored: we observe the structural impact of globalization and of the dispersion of legal practices and power outside the category of the State, towards the planes of global, transnational law and self-regulation. Teubner argues that the paradigm shift has finally arrived and that it is driven by structural and historical change: 'the name of the great paradoxifier is neither "Jacques Derrida" nor "Niklas Luhmann." Its name is "globalization."'[1121]

The structural changes brought about by globalization and self-deconstruction of legal practices force us to rethink our conceptualizations of agency and of the anthropomorphic subject at the foundation of law's hierarchy. It may no longer be possible to ignore structural and extra-juridical factors which affect the very practice of law. Teubner gives examples of international *lex mercatoria,* labour law, sport law, environmental law and globalized human rights as illustrations of the tendency to disassemble the pyramidal ordering of the King's Two Bodies by means of decentralized, self-deconstructing legal practice which has developed in insulation from the State.[1122] The afore-mentioned transnational regimes are characterized by the global attempts at coordination and self-regulation and the increased involvement of private actors in the process. The 'lawmaking without the Sovereign,'[1123] which characterizes global legal regimes, has become a practical reality. 'The One King has Two, Three, Four, […] Many Bodies!'[1124]

[1120] Ibid., 771.
[1121] Ibid., 769.
[1122] Ibid., 770–72.
[1123] Ibid., 771.
[1124] Ibid., 777.

These phenomena have been noted by legal pluralists. In the previous chapters, I have mentioned legal pluralists such as Léon Duguit, Georges Scelle, Frederic William Maitland, John Neville Figgis, G. D. H. Cole and Harold Laski, who saw the State as one among many other types of association. According to them, associations were established as result of individual choice.[1125] What connected them was the vision of an individual human being as a nucleus of association: the individual was seen as a basic unit and animator of associational life.

Legal pluralism has also played an important role in the conceptualizations of world politics and its transformations throughout the 20th century. The scholarship produced by legal anthropologists took particular interest in the coexistence of European law and 'indigenous' or 'customary' law in the colonies and in the peripheries of the Empire.[1126] In the second half of the 20th century, decolonization has resulted in the proliferation of the State form across the world, accompanied by the establishment of international regimes seeking to protect investment, economic power and private rights of former colonial powers. The 1950s-1960s witnessed the infancy of International Investment Agreements and trade liberalization: the signing of GATT (1947), the drafting of the Havana Charter (1948), and the signing of ICSID in 1965. Nevertheless, it was not until the 1990s when the fall of the Soviet Union and the end of the Cold War gave a new impetus for the development of international institutions and legal regimes in the areas of investment law, trade law and international criminal justice. The subsequent proliferation of legal regimes and fora has resulted in a disciplinary sense of fragmentation of international law and of the unified source of sovereignty. The process has famously resulted in the adoption of a Report of the Study Group of the

[1125] Nico Krisch, "The Pluralism of Global Administrative Law," *The European Journal of International Law* 17, no. 1 (2006): 271.

[1126] For a review of literature concerning anthropological approaches to legal pluralism, see: Sally Engle Merry, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869–96. For the extension of argument about legal pluralism to the world politics, see: Gunther Teubner, "Global Bukowina: Legal Pluralism in the World-Society," in *Global Law Without a State*, ed. Gunther Teubner (Dartmouth: Brookfield, 1997).

International Law Commission, led by Martti Koskenniemi, on the fragmentation of international law.[1127]

Currently, it is difficult to conceive of international law as anything but plural. David Kennedy sees pluralism as an inherent part of the professional experience of international lawyers.[1128] Teubner writes of 'the multitude of "fragmented discourses" hermetically closed to each other […] that are generated quite independent of the State and that operate at various levels of formality.'[1129] De Sousa Santos notes the leading role of 'the conception of different legal spaces superposed, interpenetrated and mixed in our minds as much as in our actions' in the postmodern accounts of law.[1130] All of these remarks raise important theoretical and practical questions. If we are indeed faced with a plurality of legal orders, hierarchies and sources of authority, the idea of a uniform concept of law and of the anthropomorphic subject of sovereignty can no longer be maintained.[1131] For the purposes of our current analysis, the idea of pluralism is particularly relevant because it entails the replacement of a single anthropomorphic sovereign by a multitude of legal orders, systems and spaces. When the mirror displaying the singular image of the Leviathan is shattered, the notion of the unified ego of the sovereign becomes fragmented and withers away.

In our search for de-anthropomorphized visions of law, we must also consider the ongoing digitalization of our epistemologies. Teubner, who mostly wrote in the late nineties, hinted at the increasing role of telecommunications and of 'the Internet struggling for its own global legal regime.'[1132] Since then, the digital transformation has resulted in developments which pose further challenge to the traditional conceptual

[1127] International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law."
[1128] David Kennedy, "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream," *NYU Review of Law & Social Change* 3 (2007): 641.
[1129] Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13, no. 5 (1992): 1443.
[1130] Boventura de Sousa Santos, "Law: A Map of Misreading. Toward a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987): 297–98.
[1131] Klaus Günther, "Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory," *NoFo* 5 (2008).
[1132] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 770.

apparatus of international law with its State-centrism, anthropomorphic source of sovereignty, pyramidal structure of authority and presumption of fixed borders.[1133] To illustrate challenges posed by digitalization and the application of the notion of sovereignty to the data flows, I propose to look at the case study of European data regulation. I am interested in how legal authority is distributed horizontally in relations between actors and how the latter make use of the notion of sovereignty in their communications. I will then analyze the recent developments in European data regulation through the lens of approaches which perceive the impending paradigm shift towards the view of law as a 'network.'[1134] The term 'network,' which had been originally used to designate the intersection of textile fibers, puts the emphasis on the increasing polycentricism, heterogeneity and flexibility of law: instead of the imposing person of the Leviathan and the anthropomorphized subject-object relationship, we observe a multitude of legal nodes and interactions in a heterogeneous relationship which characterizes a network.[1135] The latter approach allows us to offer a de-personified account of law as a network.

In the next section, I present the case studies of EU Commission's European strategy for data and of the GAIA-X project, the two initiatives aiming at regulation and management of data at the EU level.[1136] I also introduce the notion of 'data sovereignty' which illustrates an attempt to apply the notion of sovereignty to the flows of data. I propose to analyze the significance of the notion of data sovereignty against the background of traditional conceptualizations of sovereignty discussed in this thesis.

[1133] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); Susan Marks, "State-Centrism, International Law, and the Anxieties of Influence," *Leiden Journal of International Law* 19 (2006): 339–47; Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*.

[1134] Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*; Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1996).

[1135] Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*, 17; Henry Bakis, *Les Réseaux et Leurs Enjeux Sociaux* (Paris: Presses Univesitaires de France, 1993); Daniel Parrochia, *Philosophie Des Réseaux* (Paris: Presses Univesitaires de France, 1993).

[1136] European Commission, "A European Strategy for Data," Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, February 19, 2020; GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem" (Berlin: German Federal Ministry of Education and Research, 2019).

In particular, I argue that the topic of data regulation, which transcends traditional conceptual frontiers of international law, requires an equally cybernetic and relational epistemology. I will therefore attempt to theorize how the de-anthropomorphized theories of dispersed sovereignty could look like by analyzing the aforementioned case studies through the lens of approaches which rely upon the vision of law as a network. I will be particularly attentive to the work of jurists inspired by systems theory, Actor-Network Theory (ANT) and Science and Technology Studies (STS). I will then attempt to conceptualize how infrastructural accounts of international law could look like, in order to lay the theoretical groundwork for future research projects. I will draw from the toolbox of concepts offered by various theories in order to conceptualize the de-anthropomorphized vision of law and to contemplate the added value of approaches based on the vision of law as a network.

Case Study: A European Strategy for Data

In this section, I present two case studies relevant for the topic of European data regulation: 1) EU Commission's 'European Strategy for Data' and 2) the GAIA-X federated data infrastructure project. I ask how the actors (both public and private) interpret the notion of 'data sovereignty.'

In early 2020, the EU Commission has issued a communication entitled 'A European Strategy for Data.'[1137] The Strategy recognizes the need to regulate data in order to ensure the bloc's competitiveness in the digital world dominated by US-based Big Tech companies. Having recognized that a small number of companies hold a large proportion of the entire world's data, the Commission notes that the data of the future will increasingly come from 'industrial and professional applications, areas of public interest or internet-of-things applications in everyday life, areas where the EU is strong.'[1138] The developments in cloud and quantum computing technologies can further disturb the current balance of power. This leads the Commission to predict that

[1137] European Commission, "A European Strategy for Data."
[1138] Ibid., 3.

'the winners of today will not necessarily be the winners of tomorrow;' however, 'the sources of competitiveness for the next decades in the data economy are determined now.'[1139] To ensure that the EU remains competitive, a series of legislative initiatives and projects are proposed in order to increase the strategic autonomy of the Union in relation to data regulation. GAIA-X, a Franco-German data infrastructure project which aims to create a shared data ecosystem for Europe, and which complements the European strategy for data from the side of the private sector, provides us with another case study relevant to the topic of European data regulation. In particular, GAIA-X relies on the notion of data sovereignty, which it defines as a question of complete control over stored and processed data and independent ability to decide who is permitted to have access to data.[1140] In order to grasp the objectives and the interpretation of data sovereignty employed the GAIA-X, I studied the project documentation and attended the two-day-long GAIA-X Association European Data Infrastructure Summit. During the summit, Bruno Le Maire the French Minister of Economy, Finance and Recovery, went as far as saying that 'in the 21st century, there is no political sovereignty without digital sovereignty.'[1141]

On the first look, it may seem counterintuitive to apply the notion of sovereignty to data. We are used to thinking about data in terms of free flows which tend to ignore State boundaries and jurisdictions. Indeed, the early interpretations of the notion of data sovereignty had been associated with the attempts of autocratic countries to create their own, curated version of cyberspace: the Great Firewall of China or the Russian isolated internet. However, since the Snowden affair exposed the extent of surveillance and tracking programmes in the US and in Europe, the notion of data sovereignty has also found purchase among democracies, such as Germany.[1142] German political discourse

[1139] Ibid., 3.
[1140] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem."
[1141] GAIA-X, "Bruno Le Maire, Minister of Economy, Finance and Recovery, France - Closing Gaia-X Summit," November 19, 2022, https://www.youtube.com/watch?v=uDE1kGsen9Q [Last access on 25.06.2022].
[1142] Julia Pohle, "Digital Sovereignty. A New Key Concept of Digital Policy in Germany and Europe," Research Report (Berlin: Konrad-Adenauer-Stiftung, 2020).

has since featured frequent references to 'Digitale Souveränitat.'[1143] Within the context of German political debate, the digital sovereignty of the State was understood as analogous to the ability of individuals to act and to control their data in the digital age: so-called 'informational self-determination' or 'digital self-determination' ('Digitale Selbstbestimmung'). According to this analogy, digital sovereignty is seen as entailing the capability to make autonomous decisions concerning the use of data.[1144] It would seem that the specter of 'Man' continues to haunt the legal discourses on sovereignty, as the concepts applicable to States continue to mirror analogous concepts applicable to individuals.[1145]

The notion of data sovereignty, initially rooted in German policy discourse, has since penetrated into the realm of politics and legislation at the EU level. The central role of Germany within the European Union and the period of German EU Presidency have resulted in the increased use of the notion of data sovereignty (or the related concept of 'strategic autonomy') at the EU level.[1146] However, the interpretation of the notion of data sovereignty at the European level has also differed from its German counterpart: the term data sovereignty has been used to refer to the competitiveness of the EU and the digital infrastructures necessary to achieve it.[1147] More generally, it has been used to refer to the creation of a 'value-driven, regulated and therefore reasonable and secure digital sphere.'[1148] This language has been reflected in the European Commission's 'European Strategy of Data.'[1149]

[1143] Ibid.
[1144] Julia Pohle and Thorsten Thiel, "Digital Sovereignty," in *Practicing Sovereignty: Digital Involvement in Times of Crises*, ed. Bianca Herlo et al. (Bielefeld: Transcript Publishing, 2021), 59.
[1145] Marcel Mertz et al., "Digitale Selbstbestimmung" (Cologne: Cologne Center for Ethics, Rights, Economics, and Social Sciences of Health, 2018); Pohle, "Digital Sovereignty. A New Key Concept of Digital Policy in Germany and Europe," 10.
[1146] The European Commission, fearing the appeal that the concept of digital sovereignty or data sovereignty may have for authoritarian regimes, prefers to use the language of 'strategic autonomy' instead. See: European Political Strategy Centre, "Rethinking Strategic Autonomy in the Digital Age," EPSC Strategic Notes (European Commission, July 2019); Pohle, "Digital Sovereignty. A New Key Concept of Digital Policy in Germany and Europe."
[1147] Pohle, "Digital Sovereignty. A New Key Concept of Digital Policy in Germany and Europe," 12.
[1148] Pohle and Thiel, "Digital Sovereignty," 61.
[1149] European Commission, "A European Strategy for Data."

Formally, 'A European Strategy of Data' is a communication from the European Commission addressed to other EU's institutions.[1150] The use of the indefinite article to describe 'a strategy' leaves the reader with an impression of inconclusive nature and openness of the subject of regulation: the rapidly changing world of data flows.[1151] Indeed, the Commission's document opens by noting that the 'digital technologies have transformed the economy and society.'[1152] To address the challenges posed by this transformation, the EU's Data Strategy recognizes the need to regulate data in order to ensure the bloc's competitiveness in the digital sphere.[1153] In this context, the ambition of the EU should be to become 'a leading role model for a society empowered by data to make better decisions – in business and the public sector.'[1154] In order to achieve this objective, a strong legal framework will be needed to govern data flows; the EU has taken several steps in that direction by adopting the GDPR, the Regulation on the free flow of non-personal data (FFD), the Cybersecurity Act (CSA) and the Open Data Directive.[1155] However, these legislative initiatives have so far been restricted to specific issue-domains and did not provide for a comprehensive framework to regulate and govern data flows in the EU. With its new strategy, the Commission proposes to establish a 'single European data space', a 'data-driven ecosystem' and a 'genuine single market for data' based on 'European values.'[1156] The Commission's proposal offers to:

> *Create frameworks that shape the context allowing lively, dynamic and vivid ecosystems to develop […] the Commission deliberately abstains from overly detailed, heavy-handed ex ante regulation, and will prefer an agile approach to governance that favours experimentation (such as regulatory sandboxes), iteration, and differentiation.*[1157]

[1150] Ibid.
[1151] Hereinafter I will use the definite article 'the' to refer to the document presented by the Commission.
[1152] European Commission, "A European Strategy for Data," 1.
[1153] Ibid.
[1154] Ibid.
[1155] Ibid., 4.
[1156] Ibid., 4–5.
[1157] Ibid., 12.

The Commission is careful to acknowledge that the ex-ante and top-down regulation of the quickly evolving field is impossible. Instead, it proposes to establish a legislative framework for the governance of common European data spaces from which further developments will follow.[1158] The objectives of such framework are to ensure: a) the flows of data within the EU and across sectors; b) the respect of European values and laws pertaining to data protection, consumer protection and competition law and c) the fair access to data and trustworthy data governance mechanisms.[1159]

In order to achieve these objectives, the Commission proposes to adopt cross-sectoral, horizontal measures for data access that would constitute the pillars of an overarching legal framework. The aim is to establish and strengthen governance structures at the EU and at the Member State level which would provide a clear roadmap to decide 'what data can be used in which situations, facilitate cross-border data use, and prioritize interoperability requirements and standards within and across sectors.'[1160] The Commission is thus attempting to avoid heavy-handed, top-down regulation and instead chooses to delegate the setting of sectoral requirements to relevant sectoral authorities. The standardization activities between and within sectors could include the comparative analysis of existing and future standards, as well as harmonized description of datasets, data objects and identifiers, by bringing them in line with the FAIR data principles.[1161] They would build upon the existing initiatives in the EU Member States.[1162]

As part of its strategy, in early 2022, the Commission proposed the text of the Data Act (subject to further legislation by the Parliament and the Council) which aims to incentivize horizontal data sharing across sectors and to contribute to the creation of a

[1158] Ibid., 12.
[1159] Ibid., 5.
[1160] Ibid., 12.
[1161] Ibid.; FORCE11, "Findability, Accessibility, Interoperability and Reusability (FAIR) data principles." Available at: https://www.force11.org/group/fairgroup/fairprinciples [Last access on 25.06.2022].
[1162] Such initiatives include: Finnish Health and Social Data Permit Authority Findata (https://www.findata.fi/en/); French Health Data Hub (https://www.health-data-hub.fr/); German Forschungsdatenzentrum (https://www.forschungsdatenzentrum.de/en) [Last access on 25.06.2022].

cross-sectoral governance framework for data access and use by regulating the relations between different actors in the data-agile economy.[1163] The text of the proposed Data Act is designed to foster business-to-business and government-to-business data sharing, to enhance data access and to clarify rules for the responsible data use. The potential of the Data Act lies in unlocking the potential of data-driven innovation by 'providing opportunities for the reuse of data, as well as by removing barriers to the development of the European data economy in compliance with European rules and fully respecting European values.'[1164]

The Data Act also displays a security function tied to the traditional understanding of sovereignty: the Commission notes that 'concerns have been raised about non-EU/European Economic Area (EEA) governments' unlawful access to data.'[1165] With this general statement, the Commission refers to the transfers of the data of European citizens to the US and China. The Data Act puts in place safeguards against any such interventions; it is designed to ensure that the final instance of sovereign decision with regards to data remains within the European jurisdictions. When addressing the jurisdictional issues related to data, the Commission notes that:

> *The EU should not compromise on its principles: all companies which sell goods or provide services related to the data-agile economy in the EU must respect EU legislation and this should not be compromised by jurisdictional claims from outside the EU.*[1166]

Another element which can be linked with the traditional understanding of sovereignty is enshrined in Chapter V of the proposed text of the Data Act, which deals with the instances where data is to be made available to public sector bodies in case of emergency or exceptional need. Art. 14 of the proposed Data Act text states that:

[1163] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)." Brussels, 23.2.2022 COM(2022) 68 final 2022/0047 (COD).
[1164] Ibid., 1.
[1165] Ibid., 3.
[1166] European Commission, "A European Strategy for Data," 14.

'Upon request, a data holder shall make data available to a public sector body or to a Union institution, agency or body demonstrating an exceptional need to use the data requested.' Art. 15 further defines an exceptional need to exist in the circumstances where the data requested is necessary to prevent or to respond to a public emergency or where the data in question is needed by the Union or a public sector body to fulfil a specific task in the public interest. At least for a moment, we are reminded of the Schmittian description of the sovereign as the one who decides upon the state of exception.

To foster benefits for 'the society, the environment and the economy' the Commission is also planning to adopt an Implementing Act on High Value Datasets under the Open Data Directive.[1167] The Open Data Directive identifies the following categories of High Value Datasets: geospatial, earth observation and environment, meteorological, statistics, companies and company ownership, mobility.[1168] The sovereign not only protects, but also contributes to the self-perfection of his subjects.

Indeed, one of the sections of the European strategy for data is dedicated to the capacity building and empowering of individuals through data literacy education programmes and the enhancement of privacy rights under the GDPR.[1169] The Commission notes the gaps in digital literacy among the population which generate labor shortage in data-intensive sectors. The development of data-driven technologies seems to surpass the pace of education of individuals: it is now turn for 'Man' to catch up with the requirements of a data-intensive economy.

[1167] European Commission, "Commission Seeks Views on the Implementing Act on High Value Datasets," May 24, 2022. Available at: https://digital-strategy.ec.europa.eu/en/news/commission-seeks-views-implementing-act-high-value-datasets#:~:text=In%20the%20framework%20of%20the,and%2C%20where%20relevant%2C%20as%20a [Last access on 25.06.2022]. At the time of writing, the Implementing Act remains at the consultation stage.
[1168] Annex I of the EU Directive 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (Open Data Directive).
[1169] European Commission, "A European Strategy for Data," 20–21.

Towards the cloud federation? The vertical ordering of European data spaces

In order to complement its horizontal framework, the Commission will also engage in some vertical ordering: it will promote the development of federated cloud architecture and common European data spaces in strategic economic sectors and domains of public interest.[1170] To achieve these objectives, the Commission plans to use its convening power and the EU funding programmes 'to strengthen Europe's technological sovereignty.'[1171]

As part of its industrial strategy, the Commission is planning to invest in projects seeking to establish and develop European data spaces.[1172] According to the Commission's working documents, the creation of EU-wide data spaces aims at 'overcoming legal and technical barriers to data sharing by combining the necessary tools and infrastructures and addressing issues of trust by way of common rules.'[1173] Such data spaces would consist of: (i) the deployment of secure and privacy-preserving infrastructure, tools and services to pool, access, share, process and use data; (ii) establishment of clear and transparent data governance mechanisms and structures which determine the rules for the access and use of data; (iii) improvement of availability, quality and interoperability of data both within and between sectors.[1174] For example, a common industrial data space would support competitiveness and performance of EU's industry, while a common European Green Deal data space would unleash the potential of data in tackling climate change, pollution circular economy, biodiversity, deforestation and compliance assurance.[1175] Other data spaces will cover

[1170] Ibid., 21.
[1171] Ibid., 16.
[1172] Ibid., 16.
[1173] European Commission, "Commission Staff Working Document on Common European Data Spaces" (Brussels, February 23, 2022), 2.
[1174] Ibid.; European Commission, "A European Strategy for Data."
[1175] It would also complement other parts of European Green Deal and digital strategy, such as GreenData4All and Destination Earth. See: European Commission, "GreenData4All – Updated Rules on Geospatial Environmental Data and Access to Environmental Information," https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13170-GreenData4All-updated-rules-on-geospatial-environmental-data-and-access-to-environmental-

the sectors of mobility, health, finance, energy, agriculture, skills and public administration.

The 'cloud federation' project, consisting of trustworthy cloud services and capacities, plays an important role in the creation of European data spaces. The cloud federation seeks to 'foster the gradual rebalancing between centralised data infrastructure in the cloud and highly distributed and smart data processing at the edge.'[1176] The framework proposed by the European Commission is meant to build upon and to reinforce existing capacities and initiatives both at the European and at the Member States level. The EU's investments may be directed to further the connection of national computing capacities[1177] and High Performance Computing capacities supported by EuroHPC Initiative.[1178] The Horizon Europe programme can be used to support technologies and build capacities necessary for the data economy.[1179] Interconnection with the European Open Science Cloud (EOSC)[1180] and the Data and Information Access Services (DIAS)[1181] is also envisaged. The overarching goal behind the mobilization of a myriad of initiatives is to 'help common data and world class cloud infrastructures for the public good to emerge, enabling secure data storage and processing for the public sector and research institutions.'[1182] The investments are meant to provide data and computing infrastructure and to 'bring together private actors with public support to develop common platforms offering access to a large diversity of cloud services' in

information_en [Last access 26.06.2022]; European Commission, "Destination Earth," https://digital-strategy.ec.europa.eu/en/policies/destination-earth [Last access 26.06.2022].

[1176] European Commission, "A European Strategy for Data," 17.

[1177] Examples include the French government's "Cloud de Confiance" label and the Polish Common State IT Infrastructure Programme (WIIP).

[1178] EuroHPC, "The European High Performance Computing Joint Undertaking (EuroHPC JU)," https://eurohpc-ju.europa.eu/index_en [Last access 26.06.2022].

[1179] European Commission, "Horizon Europe," https://ec.europa.eu/info/research-and-innovation/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en [Last access 26.06.2022].

[1180] European Open Science Cloud, "EOSC Portal," https://eosc-portal.eu/ [Last access 26.06.2022].

[1181] Copernicus, "Data and Information Access Services," https://www.copernicus.eu/en/access-data/dias [Last access 26.06.2022].

[1182] European Commission, "A European Strategy for Data," 17.

areas such as AI, simulation, modelling, digital twins and high performance computing.[1183]

As the success of the cloud federation project and data-sharing initiatives will depend on pan-European participation and capacity to scale, the Commission will coordinate with EU Member States and propose a 'cloud rulebook' which will offer 'a coherent framework around the different applicable rules (including self-regulation) for cloud services.'[1184] The cloud federation project enshrined in the European strategy for data is designed to follow the gradual rebalancing between centralized data infrastructure in the cloud and distributed architecture characteristic of edge computing, which processes and stores data locally.

To achieve the ambitious objectives described in its strategy for data, the Commission is seeking to foster synergies with existing projects, such as the GAIA-X project concerning the digital 'architecture of standards.'[1185]

The GAIA-X project and the paradox of European digital sovereignty

GAIA-X is a Franco-German project which aims to create European federated data infrastructure and data spaces in to facilitate the creation of new European data and AI ecosystems.[1186] It comprises of representatives from the government, business and science communities.[1187] GAIA-X aims to establish the 'architecture of standards' which would combine regulatory, industry specific and technical standards that would support the European cloud federation.[1188] Its range of application covers areas such as

[1183] Ibid.
[1184] Ibid., 18.
[1185] German Federal Ministry of Education and Research, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem" (Berlin, 2019); "Franco-German Position on GAIA-X," February 18, 2020. The project of IDSA is also worth noting in the context of European data sovereignty: Intenational Data Spaces Association, "IDSA Rule Book" (Berlin, 2020).
[1186] GAIA-X, "GAIA-X: A Pitch Towards Europe" (Berlin: German Federal Ministry for Economic Affairs and Energy, June 4, 2020).
[1187] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 2.
[1188] GAIA-X, "GAIA-X: Policy Rules and Architecture of Standards" (Berlin: German Federal Ministry for Economic Affairs and Energy, 2020).

Industry 4.0, health, energy, finance, public sector, mobility and smart living; the list remains open for use cases from other issue domains.

The creators of GAIA-X see it as 'the cradle of an open digital ecosystem where data can be made available, securely collated and shared while enjoying the trust of users.'[1189] GAIA-X declares adherence to European values and it relies on a set of standardization rules, policy principles and uniform semantics.[1190] For example, a service provider who intends to comply with GAIA-X Policy Rules for Infrastructure would have to publicly declare the adherence to the principles set out in Art. 6 of the Free Flow of Data Regulation dealing with the porting of data.[1191] There are also rules applicable to the service being offered: for example, while good practices include storing and processing data in European jurisdictions and in accordance with EU rules, any applicable non-EU extraterritorial regulations would have to be disclosed by means of a self-declaration. GAIA-X thus builds upon and reinforces existing regulatory frameworks. Compliance with GAIA-X standards can be assured through independent and automated certification and contracting of a participant in the GAIA-X project.[1192] To ensure implementation, GAIA-X relies on a network of participants working on use cases across different issue-domains which serve as 'tools for analysing business requirements based on customer journeys and include additional necessary policy rules and standards applications.'[1193] GAIA-X is open to all parties who share its goals and it relies on a network of hubs distributed across Europe.[1194] The objective of that network is to drive the implementation of GAIA-X on the national and international level.

[1189] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 2.
[1190] Ibid., 23.
[1191] Art. 6 of the Regulation describes the good practices, minimum information requirements, codes of conduct and certification schemes applicable to porting of data. For a list of relevant principles, see: GAIA-X, "GAIA-X: Policy Rules and Architecture of Standards," Appendix.
[1192] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem. Executive Summary" (Berlin: German Federal Ministry of Education and Research, 2019).
[1193] GAIA-X, "GAIA-X: Policy Rules and Architecture of Standards," 7.
[1194] GAIA-X, "GAIA-X: A Pitch Towards Europe," 3.

The common reference architecture proposed by GAIA-X is meant to ensure exchange of data and fostering of innovation, including in the domain of AI.[1195] Currently, work environments tend to involve many computers and machines which use a variety of cloud systems; their integration is only possible through a laborious project work.[1196] The technical interoperability of infrastructures envisaged by GAIA-X is designed to create new possibilities for business collaboration and scaling up: 'simple migration to other cloud or edge providers must be possible.'[1197] The advantage of pooling the network together through a federated data infrastructure allows for efficiency gains and increased security through the distribution of data processing, as each cloud-service provider can become a node in a network by adhering to GAIA-X reference architecture.[1198] By qualifying as a GAIA-X node, protagonists can share their data with a larger circle of interested parties.[1199] Meanwhile, they retain control over the sharing of data in line with the principle of data sovereignty.

One of the core objectives of GAIA-X is to ensure attainment of data sovereignty:

> *We understand digital sovereignty […] as the 'possibility of independent self-determination by the state and by organisations' with regard to the 'use and structuring of digital systems themselves, the data produced and stored in them, and the processes depicted as a result.'*[1200]

Sovereignty in this context is interpreted as a question of complete control over stored and processed data and as an independent ability to decide who is permitted to have access to data.[1201] This does not mean that all the technical components of a digital infrastructure have to be produced in Europe – rather, data sovereignty implies the

[1195] Ibid., 16.
[1196] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 20.
[1197] Ibid., 11.
[1198] Ibid., 12.
[1199] Ibid., 23.
[1200] Ibid., 7.
[1201] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem."

ability to exercise control over already existing technologies.[1202] The documents outlining the GAIA-X project, published by the German federal ministries, begin by noting that the German term 'Digitale Souveränitat' does not necessarily have a direct equivalent in the English language.[1203] The document then proceeds to stipulate that: 'we understand digital sovereignty as the possibility of independent self-determination by the state and by organisations with regard to the use and structuring of digital systems.'[1204]

There are several interesting points about this definition. Firstly, unlike the traditional conceptualization of the sovereign right, digital sovereignty appears as a 'possibility' – it remains an aspirational goal that has to take into account the reality that most of digital infrastructure providers come from another continent. Secondly, the possibility of 'independent self-determination' lies not only in the hands of the State, but it is also shared with other organizations, such as GAIA-X. Last but not least, while the document begins with the proclamation 'we understand digital sovereignty as [...],' it remains unclear who the 'we' in the document are: the documents produced by the GAIA-X project refer vaguely to 'We, representatives of the German Federal Government, business and science communities'[1205] as well as to 'representatives of industries, cloud services providers (CSP) and cloud services customers (CSC), from France and Germany.'[1206] However, at the GAIA-X Association European Data Infrastructure Summit, which took place on 18-19 November 2021, the project was mostly represented by its CEO Francesco Bonfiglio, Chief Marketing Officer Vassilia Orfanou and Chief Technology Officer Pierre Gronlier.

[1202] GAIA-X, "GAIA-X: A Pitch Towards Europe," 5.
[1203] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 7.
[1204] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem. Executive Summary," 3.
[1205] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 2.
[1206] Franco-German Position on GAIA-X, 18 February 2020, https://www.bmwk.de/Redaktion/EN/Downloads/F/franco-german-position-on-gaia-x.pdf?__blob=publicationFile&v=2 [Last access 26.06.2022].

GAIA-X also enjoys legal presence in the form of an international, non-profit association established under Belgian law.[1207] The association was founded by 22 companies and organizations and currently counts over 300 members from different countries.[1208] Members include European members such as Deutsche Telekom, BNP Paribas, De-Cix Group, Thalex and Airbus, but also US Big Tech companies such as Amazon, Google, Microsoft, IBM, Oracle Corporation, as well as Chinese corporations such as Huawei Technologies and Alibaba Cloud.[1209] On the one hand, the project envisages the creation of a central organization at the European level which would lay down organizational and technical foundations of a federated data infrastructure.[1210] On the other hand, given the membership and important role of American and Chinese technology giants in sponsoring GAIA-X activities, it remains an open question whether the project could pursue independent goals that could go against the interests of its sponsors.[1211]

This tension permeates the GAIA-X's stated goals and activities. One of the ways of achieving data sovereignty envisaged by GAIA-X project has been to reduce dependency on technologies produced and controlled by non-European States and Big Tech companies. For the European digital sovereignty to materialize, the creation of competitive European operating systems, search engines, social networks and cloud infrastructure would be necessary.[1212] Meanwhile, the project relies upon support from the very American and Chinese corporations which have mastered cloud infrastructure and digital sovereignty in their respective countries.

[1207] Gaia-X European Association for Data and Cloud AISB.
[1208] GAIA-X, "Who We Are: Association,", https://www.gaia-x.eu/who-we-are/association [Last access 26.06.2022].
[1209] GAIA-X, "Membership," https://www.gaia-x.eu/membership [Last access 26.06.2022].
[1210] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem. Executive Summary," 3.
[1211] Some of the doubts were voiced in: Clothilde Goujard and Laurens Cerulus, "Inside Gaia-X: How Chaos and Infighting Are Killing Europe's Grand Cloud Project," *POLITICO*, October 26, 2021, https://www.politico.eu/article/chaos-and-infighting-are-killing-europes-grand-cloud-project/ [Last access 03.07.2022]; Yannick Chavanne, "Europas Cloud-Projekt Gaia-X Wird Zum Problemfall," *Netzwoche*, November 23, 2021, https://www.netzwoche.ch/news/2021-11-23/europas-cloud-projekt-gaia-x-wird-zum-problemfall Last access 03.07.2022].
[1212] GAIA-X, "GAIA-X: A Pitch Towards Europe," 5.

This brings us to a theoretical observation: the concept of data sovereignty, as understood in the sense of the GAIA-X project, has to rely upon healthy competition between different providers of digital infrastructures. The sovereign in this mode is not singular – it is distributed and has to be created from the bottom-up. In a characteristic statement, one of the documents outlining GAIA-X project notes that:

> *We strive for an ecosystem that distributes sovereignty and benefits among business, science, the state and society in equal measure. Involvement is open to all market participants – including those outside Europe – who share the goals of data sovereignty and data availability defined by GAIA-X.*[1213]

Sovereignty is therefore interpreted as a collective and distributed capacity. Establishing a network of common standards will promote innovation and collaboration between different sectors to enhance European data sovereignty. It is also interesting to observe the description of the role reserved for the State in this configuration: the State is understood as a mere 'user' in the digital environment. The aim of applications in the public sector should therefore be 'to provide city planners and decision makers with concrete and effective solutions.'[1214] We witness the transition towards what Fleur Johns calls new ways of seeing like a State, as the government planning is informed by business development methods which include the increased use of prototypes.[1215] Unlike the grand modernist planning projects described by James C. Scott, 'seeing' in terms of prototypes entails repetitive use and incremental adoption of technologies.

Taken together, the European strategy for data and GAIA-X project constitute novel examples of the application of the notion of sovereignty to the data flows.

[1213] Ibid., 5.
[1214] Ibid., 11.
[1215] Johns discusses the transition towards business models based on prototypes in: Fleur Johns, "From Planning to Prototypes: New Ways of Seeing Like a State," *Modern Law Review* 82 (2019): 833–63; James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1999).

I now turn to analyze the case study of European data regulation through the lens of scholarship which offers the vision of law as a network.

The Dispersed Sovereign: Case Study Analysis

Writing about the cybernetic dispersion of sovereign power within the digital space necessitates an equally cybernetic epistemology. I understand my method to be cybernetic in the sense of the Greek term *kubernētēs* (*κυβερνήτης*) used to denote a steersman, whose role was to perceive movement and to issue instructions to allow the system to self-perpetuate. I draw from the vision of law as a network, law which is knit together like textiles and which grows horizontally like a rhizome.

> *L'étymologie du terme « réseau » - du latin retis - renvoie à l'idée de filet qui a engendré le mot « rets ». Utilisé au XVIIe siècle pour désigner l'entrecroisement des fibres textiles ou végétales, il se référait à une sorte de tissu de fil ou de soie*.[1216]

Over the last few decades, international jurists have drawn from the vision of law as a network. In the section that follows, I identify the legal scholarship influenced by insights from systems theory, Actor-Network Theory and infrastructural accounts of international law. The identification of the strands of scholarship which draw from and build upon the idea of the network allows me to apply these insights to our case study and, more broadly, to conceptualize the de-anthropomorphized law and to examine the prospect of epistemological shift towards the vision of law as a network.

Each of the methods discussed in this chapter will put emphasis on different aspects of the network, its nodes and participants. Even though the approaches of jurists discussed in this chapter differ between each other, I argue that different approaches are nevertheless connected by the paradigm of a 'network' and a relational approach to the participants in that network. My objective here is to demonstrate the possibilities offered by the vision of law as a network and by the idea of de-anthropomorphized law.

[1216] Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*, 17.

Let us now proceed to examine the 'networked' methods of international jurists and to apply their insights to our case study of the European strategy for data and the GAIA-X project.

The cybernetic sovereign? Insights from systems theory

Systems theory, as developed by Niklas Luhmann and applied to international law by Gunther Teubner, relies upon the vision of social systems as networks of communications.[1217] For the purpose of this dissertation, I focus on Teubner's contribution and application of systems theory to law as an example of de-anthropomorphized conceptualization of legal and regulatory systems.

The systems theory puts emphasis on communication activities and 'criteria of addressability' of different actors, the conditions which must be satisfied so that an entity can be capable of communication in a given social system: for our purposes, the legal system of European data regulation.[1218] The systems theory provides us with a useful re-conceptualization of the nature of collective actors: instead of 'Otto von Gierke's (in)famous *reale Verbandspersönlichkeit*' we are led to treat the collective actor as a series of messages, as a 'talk incorporated.'[1219] According to this re-conceptualization, the basic characteristic of a collective actor is not that it consists of people or some collective agency, but that it constitutes a series of messages which bind the multitude together: 'the ultimate elements of networks are, correspondingly, not human actors […] but communications.'[1220] Instead of anthropomorphic conceptualizations of a

[1217] Niklas Luhmann, *Social Systems*, trans. John Bednarz and Dirk Baecker, Writing Science (Stanford, California: Stanford University Press, 1995); Niklas Luhmann, *Law as a Social System*, ed. Fatima Kastner et al., trans. Klaus A. Ziegert (Oxford: Oxford University Press, 2004); Gunther Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (Berlin, New York: Walter de Gruyter, 1988); Gunther Teubner, ed., *Law as an Autopoietic System* (Hoboken, New Jersey: Blackwell Publishing, 1993).
[1218] Gunther Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," *Journal of Law & Society* 33 (2006): 497–521.
[1219] Ibid., 451; Luhmann, *Social Systems*, Chapter 5, VI.
[1220] Gunther Teubner, "The Many-Headed Hydra: Networks as Higher-Order Collective Actors," in *Corporate Control and Accountability: Changing Structures and the Dynamics of Reguations*, ed. Joseph McCathery, Sol Picciotto, and Colin Scott (Oxford: Oxford University Press, 1993), 44.

'corporate actor' or an 'associative person,' Teubner proposes the metaphor of the many-headed hydra.

> *It is no longer personification, but polycentric autonomization; no longer unitary attribution, but simultaneous multiple attribution that can do justice to the collective logic of networks. The collective capacity for action is maintained, but fragmented into decentralized sub-units, among them the centre as primus inter pares.*[1221]

Polycentrism and multi-polarity characterize the unified network.[1222] The network itself can be understood as a collective actor, 'whose actions are accomplished not in one node, but in all nodes, without the nodes thereby losing their capacity as collective actors.'[1223] As stated by Teubner, this conceptualization allows us to 'escape the traps of fiction theories and the mystifications of theories of real associative personality.'[1224] The collective actors understood as parts of a network of communications are 'neither "fictions of the law" nor the "mind-body unity" of real associative personality' discussed, respectively, in Chapters IV and III of this dissertation.[1225]

The systems theory's criteria for collective personhood do not rely on intrinsicist properties of a collective actor nor its organizational form, but on its capacity to communicate within a social network. Accordingly, the 'minimal requirement for the international political system is the organised capacity of collective communication.'[1226] The acts of collectives understood in this way are not reducible to the actions of single individuals making up the collective, nor is the corporate actor understood to possess its own agency. Instead, the systems theory's conceptualization of a collective actor relies on a 'communicative self-description of an organization as a cyclical linkage of

[1221] Ibid., 57.
[1222] Ibid., 51.
[1223] Ibid., 57.
[1224] Ibid., 56.
[1225] Ibid.
[1226] Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," 571.

identity and action.'[1227] For a collective actor to become a social reality, two conditions must be met: 1) the chain of communications has to communicate about itself and create self-description; and 2) individual communications have to be attributed to this self-description as actions.[1228]

To apply these categories to the present case study would mean to focus on the acts of communication between participants in the discourse of European data regulation. The systems theory allows us to see the European Commission, GAIA-X and other private and public actors and initiatives as nodes within the network of data regulation regime. The capacity for being a collective actor is not defined *a priori* by the official public law of the State; rather, it is determined by the entity's actual capacity to engage in acts of communications.[1229] In that configuration, the European Commission could be understood to assume the role of the 'primus inter pares' – the cybernetic steersman who issues socially recognizable streams of communication.

The European Commission, with its communication strategy and legislative proposals, can be seen as a steersman who issues instructions, surveils the system and steers it towards growth and self-perpetuation as a coherent whole. Indeed, the document entitled 'A European Strategy for Data' is formally nothing more than a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.[1230] The Commission uses this communication to refer to itself and to its role in the institutional structure of the EU. The Commission presents itself as a guardian of the treaties, responsible for monitoring of application of EU Law and European values.[1231] According to Art. 11(3) of the Treaty of the European Union (TEU), its responsibilities include the carrying out of consultations with concerned parties in order to ensure that

[1227] Ibid.
[1228] Ibid.
[1229] Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," 1459.
[1230] European Commission, "A European Strategy for Data."
[1231] European Union, "What the European Commission Does in Law," Ensuring correct implementation, accessed September 20, 2021, https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law_en; Ost and van de Kerchove, *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*, 23.

the Union's actions are coherent and transparent. As provided in Art. 17 TEU, the Commission promotes the general interest of the Union and takes initiatives to that end; it also ensures the application of the Treaties and overlooks the correct application of the EU treaty law. The role of the Commission is therefore described through the acts of communication with various force of legal power: it is constituted by the EU treaties, its role is described in the EU case law and it reasserts its power in relation towards other EU institutions through the feedback loop consisting of acts of socially recognized communication. The Commission engages in self-referential acts of communication aimed at directing the system of EU data regulation and monitoring the behavior of actors in line with EU law, interests and values. To paraphrase Teubner, the social reality of the Commission lies 'in the socially binding self-description of an organized social system as a cyclical linkage of identity and action attribution.'[1232]

According to this conceptualization, GAIA-X and other European projects and institutions can also be seen as collective actors when they meet the above-described criteria for collective communication. For example, the identity of GAIA-X, a project which includes a variety of actors ('representatives of the German Federal Government, business and science communities')[1233] is constructed by a series of self-descriptions (GAIA-X as a foundation under Belgian law, GAIA-X as a repository, GAIA-X as a set of standards, GAIA-X as a hub, GAIA-X as a project with defined objectives) which are confirmed, upheld and reenacted by its social environment. While much of the project's communication is done by the official representatives of GAIA-X (CEO Francesco Bonfiglio, CMO Vassilia Orfanou and CTO Pierre Gronlier), the role of GAIA-X as a project more extensive than the sum of its human parts is projected and upheld by its environment. For example, GAIA-X's signature event, the European Data Infrastructure Summit, featured presentations by the German Federal Minister of Economy Affairs and Energy, Peter Altmaier, and the French Minister of Economy, Finance and

[1232] Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," 571.
[1233] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 2.

Recovery Funds, Bruno Le Maire, who highlighted the central role of GAIA-X in the attainment of European digital sovereignty. The latter stated that 'in the 21st century, there is no political sovereignty without digital sovereignty.'[1234] In this context, GAIA-X constitutes a communication of the ambition to attain digital sovereignty within the EU.

In the system of European data regulation, digital sovereignty is presented as a pre-condition for political sovereignty understood in a traditional sense. It is worth noting the important differences between the two terms. While traditional conceptualizations of sovereignty were based on the fact of control, digital sovereignty is an aspirational collective capacity that is yet to materialize in the context of EU data regulation. And while traditional conceptualizations of sovereignty were based upon the unifying meta-recit of the single source of sovereign power, the world of networks is characterized by the lack of society's comprehensive political rationality.[1235] Instead, all the different social subsystems 'relentlessly stick to their institutionalized "iron laws" of superspecialized rationalities.'[1236] European data sovereignty, understood as complete control over stored and processed data and independent ability to decide who is permitted to have access to data,[1237] can thus be understood as a political rationality that is to be achieved within the domain of data regulation. It is also worth noting the influence of structural factors and market incentives over the behavior of private actors engaged in data regulation: the fact remains that most of the data continues to be controlled by US-based big-tech giants whose interests diverge from those of European political actors. In this context, it is worth paraphrasing Teubner who wrote of the need to redefine the focus of polycontextural law 'from the sovereignty of politics to the domination of the many environments and from the sovereign's abuse of power to self-destructive tendencies of colliding discourses.'[1238]

[1234] GAIA-X, "Bruno Le Maire, Minister of Economy, Finance and Recovery, France - Closing Gaia-X Summit."
[1235] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 784.
[1236] Ibid.
[1237] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem."
[1238] Teubner, "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy," 784.

As we witness the fragmentation of political sovereignty and the attempt of the notion of data sovereignty to recapture what has been lost, the reconstructive aspiration of autopoiesis becomes particularly relevant. Autopoiesis – the system's ability to produce and to reproduce itself – offers an alternative to deconstruction associated with post-structuralist philosophy. As explained by Teubner, 'legal autopoiesis poses the somewhat sobering question: After the deconstruction?'[1239] To answer this question, autopoiesis offers a way of conceptualizing system-making: 'the metaphor is order from noise.'[1240]

In our case study, we have observed a multitude of claimants to the title of data sovereignty and numerous interpretative and discursive practices that they employed in their quest. As stated by Teubner:

> *Paradoxes, tautologies, contradictions, and ambiguities in discursive practice are not the end of autopoietic analysis; they are seen as the starting point, as the very foundation of self-organizing social practices.*[1241]

Autopoiesis thus allows us to move 'beyond deconstructive analysis into reconstructive practice.'[1242] It helps us conceptualize how, out of the initial entropy of data flows, there arises a legal system for the regulation and management of data which follows a rationality of its own. For the purpose of our current study, it is of utmost importance that this 'reconstructive' quality of autopoiesis is not achieved at the cost of the return of the anthropomorphic subject of law. Instead, the specter of 'Man' gives way to the de-anthropomorphized network of communications, which reproduces itself in a cybernetic feedback loop.

With our case study, we have witnessed the importance of communications and the interplay between public and private actors acting together in pursuit of European data sovereignty. Another branch of theorization relevant to this research will concern the

[1239] Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," 1444.
[1240] Ibid., 1445.
[1241] Ibid., 1444.
[1242] Ibid.

important role played by infrastructural, non-human *actants* in European data regulation and in the achievement of data sovereignty.

Reassembling the sovereign: tracing the legal connections

It is worth noting the importance of Actor-Network Theory (ANT) and Science and Technology Studies (STS) in shifting the attention of jurists towards the 'fabrique du droit' and its material underpinnings.[1243] As explained by Latour, one of the objectives of ANT was to escape the dominance, uniformity and rigidity of the hierarchical conceptual models, such as the notion of a 'legal order' and its anthropomorphic subjects.[1244] In place of a top-down legal hierarchy, ANT posits a granular, bottom-up approach to the object of inquiry by focusing on the 'tracing of associations' between entities and things. The method associated with Actor-Network Theory allows jurists to study the types of connections between things, which can include both human and non-human actants.

ANT displays a careful approach towards ascribing identity to the entities who 'act.' It remains suspicious of the anthropomorphic source of agency. Instead, ANT grants recognition to the 'actants.' The technical term 'actant' – derived from literary narrative theories – is used to describe the instances where the same actant may act through different agencies.[1245] The term 'actant' lowers the threshold for capacity of action and serves to de-anthropomorphize the traditional meaning associated with the term 'actor,' often equated with individuals or collective entities, such as the State.[1246] The term 'actant' can also be used to denote non-human forms of activity. The actant can be anything, an object, a machine, an infrastructure or another non-human thing which provides the source of action. For example, the communication between AI systems without human supervision could be credibly described as communication between actants. ANT posits the existence of a multitude of actants, connected by complicated

[1243] Bruno Latour, *La Fabrique Du Droit. Une Ethnographie Du Conseil d'Etat* (Paris: La Découverte, 2002).
[1244] Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory*.
[1245] Ibid., 54–55.
[1246] Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," 12.

forms of association and uncertain forms of subordination, which cannot be identified with human individuals or any collective will.[1247]

The immediate relevance of ANT to this dissertation consists of the role it grants to non-humans actants.[1248] This approach is of particular relevance as we attempt to escape the tyranny of the anthropomorphic subject by describing the role of infrastructure which underwrites legal relations and allows them to reproduce and expand. To address this need, analysis in the spirit of ANT can include non-human objects as actors and not mere bearers of symbolic projection.[1249] The agency of non-humans remains open and not constrained to traditional classification such as 'biological,' 'economical,' 'material' or 'legal' agency.[1250] Rather, the non-human agency can be better understood to designate a movement, a displacement, a transmission, a transformation. The actor of ANT is not the source of action, but 'the moving target of a vast array of entities swarming toward it.'[1251] Action in that mode is not to be understood as a conscious enactment of the subject-object relationship. Rather, it should be 'felt as a node, a knot, and a conglomerate of many surprising sets of agencies that have to be slowly disentangled.'[1252] The connections between entities are never stable nor imposed externally by some form of social structure. As new associations are established and exercised, the network is created.[1253]

The ANT approach avoids the imposition of 'conceptual frameworks' and application of 'models' to the case study at hand. Instead, the actors are granted an ability 'to make up their own theories.'[1254] Therefore, the role of the observer is not to 'discipline' the actors to make them fit into one of the pre-established categories (the State, the

[1247] Bruno Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Cambridge, Massachusetts: Harvard University Press, 2004); Teubner, "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law," 5.
[1248] The expression *non-human* is used to expand the list of possible participants in the process of assembling the network. See: Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory*, 72.
[1249] Ibid., 10.
[1250] Ibid., 64.
[1251] Ibid., 46.
[1252] Ibid., 44.
[1253] Ibid., 65.
[1254] Ibid., 11.

sovereign the non-state actor, the citizen, the biological individual, the 'Man'), but to allow them to deploy their own controversies, worlds and explanations. The task of the legal theorist turns to the tracing of connections between controversies.

While an extensive ethnography of the European Commission cannot be provided within the constraints of this dissertation, a few ANT-inspired remarks are in order. The European Union itself constitutes a highly heterogeneous arrangement of elements; it consists of a variety of institutional actors, which include Member States, EU institutions, agencies, courts, initiatives and a specialized bureaucracy surrounded by a network of lobbyists who influence policy outputs. In this network of actors and actants, the European Commission is undoubtedly one of the most important regulators. However, for all its pan-European rhetoric, the Commission is surprisingly small in terms of its size and physical presence. In 2021, it employed 32281 staff members, a number which pales in comparison with many national bureaucracies.[1255] It is given a physical presence at the Berlaymont building in Brussels, in close proximity to other European institutions. It is also surrounded by one of the world's biggest concentrations of lobby groups.

One of the most important prerogatives of the Commission is its power to initiate legislation at the European level. In accordance with the ordinary legislative procedure, the proposed text of legislation must be subsequently adopted by the European Parliament and the Council.[1256] The lawmaking in the European Union has an inter-institutional character: the Parliament or the Council may call upon the Commission to initiate legislative process on a particular subject-matter. The Commission, as the only European institution legally empowered to initiate legislation,[1257] submits a proposed text of legislation to the Parliament and to the Council. Each of the latter institutions can take positions and propose amendments to the text. The ultimate adoption of the text

[1255] European Commission, "HR Key Figures," https://ec.europa.eu/info/sites/default/files/european-commission-hr_key_figures_2021_en.pdf [Last access 26.06.2022].
[1256] Art. 294 TFEU.
[1257] In a limited number of cases, the Commission may also submit a proposal together with EU Member States, European Court of Justice or European Central Bank.

depends on a co-decision of the Parliament and the Council.[1258] The lawmaking in this mode consists of interaction within a highly complex network of institutions and acts of communication: the strategies, committee reports, draft texts of legislation and amendments thereof, all of which can be understood as semantic actants in the legislative process.

Indeed, the Commission itself had recourse to the 'network' mode of governance to explain its own role in the European institutional setup.[1259] Since the 1990s, the idea of 'network governance' provided a response to neoliberal arguments that the common market would self-regulate itself. The idea of network governance drew from a tradition of justifying government intervention and harmonization of standards in the areas of telecommunications, energy and transport.[1260] For the European institutions, the idea of a 'network' came to signify a more far-reaching legal and political project: a form of decentralized organization and intervention that would not be imposed from above, but that would arise from inter-institutional cooperation. The actions of the European institutions (and of the Commission in particular) were to be coordinated, harmonized and conducted in accordance with the principles of proportionality and subsidiarity in order to justify intervention at the European level. The 'network' thus became understood as a mode of action which consists of steady reordering of policy space while acknowledging complexity and linkages between innovation, knowledge, economics, politics and law. Against this background, the European attempts at data regulation can be understood both in terms of inputs (any new legislation has to accord with the 'European values' and aim to ensure 'European data sovereignty') and in terms of outputs (the EU's strategy translates into a set of legislatives initiatives aimed at regulating the data flow, such as the proposed text of the Data Act).

[1258] Exceptions to this rule include the situations where a special legislative procedure is explicitly provided for.
[1259] Andrew Barry, "In the Middle of the Network," in *Complexities: Social Studies of Knowledge Practices*, ed. John Law and Annemarie Mol (Duke University Press, 2002).
[1260] Ibid., 147.

In the descriptive mode of ANT analysis, we are interested in tracing how the law circulates through the landscape to create networks which associate entities in a *legal* way. For Latour, the originality of law consists precisely of its force to repeatedly reattach entities to each other.[1261] As a regime of truth, law stabilizes connections between human and non-human entities by engendering linkages between 'utterances and their authors, deeds and their doers, actions and those responsible for them.'[1262] Contrary to what the legal imagination would dictate, these connections are not pre-established or transcendental: rather, they have to be established anew each time in repeated interactions between entities.

The status of the Commission as the 'guardian of the treaties' sets it in the middle of the polycentric and multimodal data regulation network. The Commission's 'strategy for data' is addressed to other participants in this network. The attempt of the Commission to regulate and manage data flows can be seen as recognition of the political and economic significance of data. As noted already, the Commission begins its strategy with an overview of geopolitical issues surrounding data: the fact that most of the data is currently controlled by the US-based Big Tech companies and the opportunities offered by new technologies in disturbing this imbalance of power and shifting it in favor of the EU. The Commission does not want to regulate the area by imposing a uniform set of standards. Instead, in its 'Strategy for data,' the Commission enunciates its attempt to create an overarching legal framework that would set the overall direction for further regulatory initiatives and that would bind the actants together through the network of legal pronouncements and initiatives.

Meanwhile, the case study of GAIA-X is particularly helpful in tracing the pathways of actors through the space of European data regulation. As a relatively recent initiative, GAIA-X relies upon a set of self-descriptions to explain its role in European data regulation: documents, pitches, online platforms and summits allow it to convene and

[1261] McGee, *Latour and the Passage of Law*, 3; Bruno Latour, *Enquête Sur Les Modes d'existence : Une Anthropologie Des Modernes* (Paris: La Découverte, 2012).
[1262] McGee, *Latour and the Passage of Law*, 3.

to create a community of participants: public institutions, state-owned companies and private firms. It presents itself as an open ecosystem which includes a central repository, identity management and quality monitoring and a distributed network of nodes which connect actors. The GAIA-X project is open to all parties who share its goals and it relies on a network of hubs distributed across Europe acting 'as nuclei' for GAIA-X.[1263] While, the openness of GAIA-X was meant to enhance its implementation, the project has also been criticized for including the US-based hyperscalers.[1264] The hyperscalers, such as Microsoft, Amazon and Google, can harness the power of digital infrastructures to their advantage. We arrive at the discussion of potential advantages offered by infrastructural accounts of law in addressing this phenomenon.

Towards the infrastructural accounts of law and politics

Recent years have witnessed increased academic interest in the infrastructural accounts of law and politics. Inspired by the insights from Actor-Network Theory, STS, new materialism, assemblage theory, as well as critical geography and security studies, infrastructural accounts of law open new avenues for engagement with the spatial and epistemological transformations brought about by technological change. In this subsection, I theorize about the form that infrastructural accounts of international law could take, in order to lay conceptual groundwork for future research projects.

In the previous subsection, we have discussed the relevance of ANT to the study of legal connections. However, it is also worth remarking other approaches to materialism, spatiality and the tracing of associations between the human and non-human actants. The latter might help us conceive of a broader infrastructural approach to international law. In that context, Peter Dear and Sheila Jasanoff propose to invert the ontology offered by Latour and claim that:

> *STS embraces as its field of investigation knowledge and knowledge making, including the wider ramifications of producing various kinds of authoritative*

[1263] GAIA-X, "GAIA-X: A Pitch Towards Europe," 3.
[1264] Goujard and Cerulus, "Inside Gaia-X: How Chaos and Infighting Are Killing Europe's Grand Cloud Project."

> *knowledge (science writ large), embodying them in objects and material systems (artifacts, instruments, and industries), and seeing how the resulting "things," epistemic and otherwise, play their parts in such activities as law, policy, politics, social organization, religion, aesthetic culture, the economy, and ethics.*[1265]

Jasanoff's method brings our attention back to the moral, political and epistemological conflicts involved in the creation and maintenance of infrastructures and networked systems of governance.[1266] She criticizes the tendency of ANT to side-step the questions of political conflict and power by escaping into description. Jasanoff asks:

> *Who loses and who wins through the constitution of networks? How are benefits and burdens (re)distributed by or across them? How willing or unwilling are participants to change their behavior or beliefs because of their enrollment into networks?*

Let us try to relate the above to the current developments in the discipline of international law. Recently, the term 'new materialism' has been proposed as a distinct category of legal scholarship. Hohmann writes that new materialism can be identified as a distinct stream of scholarship for three intertwined reasons:

> *The first is its insistence on giving attention to matter in its very physicality; the second its position on the entanglement or intraaction of all matter; and the third its openness to considering matter as vital or agentive*.[1267]

However, the above-mentioned reasons do not strike me as particularly new. As has been pointed out in this dissertation, for centuries have jurists sought to uncover the natural laws that govern the material world. Indeed, it appears as nearly impossible to conceptualize sovereignty without having to rely upon the Euclidian ordering of space and the corresponding theory of subjects and objects of law. While it is important to

[1265] Peter Dear and Sheila Jasanoff, "Dismantling Boundaries in Science and Technology Studies," *Isis* 101, no. 4 (2010): 772–73.
[1266] Sheila Jasanoff, "Ordering Knowledge, Ordering Society," in *States of Knowledge: The Co-Production of Science and the Social Order*, ed. Sheila Jasanoff (London: Routledge, 2004), 23.
[1267] Jessie Hohmann, "Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law," *Leiden Journal of International Law* 34 (2021): 592.

recognize matter as one of possible sources of agency, we must remain vigilant not to slip into the determinism that accompanied the materialisms of old. For these reasons, I prefer to view infrastructures as the extension of epistemological struggles: while various claims can be projected and inscribed upon infrastructures, the infrastructures can be also viewed as actants who, through their very existence, modify the parameters of legal and political struggle.

Alain Pottage goes further, for he criticizes the basic assumption that there exists an institution, such as 'law,' which has to be reified in the form of ready-made blocks.[1268] He sees such an approach as too indulgent to the ontological assumptions of the legal professionals themselves. Pottage criticizes the Latourian approach to law that is based upon the view of connection of nicely fitting legal blocks:

> *The basic technique of law is not to connect ready-made blocks of legal enunciation into chains but to produce legal enunciations by qualifying events or enunciations as legal in the first place. Law makes its own `building blocks' and connections between blocks. Events or enunciations that have not so far been construed as legal might suddenly, depending on how the distinction is drawn, be qualified as legal*.[1269]

Pottage's argument brings us back to the usefulness of systems theory in describing the flow and reproduction of acts of communications in social systems. Materiality in itself cannot provide the *clef de lecture* of law. Law can only exist:

> *[A]s a disembodied, dematerialized, and `non-human' structure that is sustained by the recursive operations of a system which, in the old adage of systems theorists, 'produces itself from its own operations.'*[1270]

This view appears as particularly relevant when we consider the importance of networked communications in the case studies described above. Documents such as

[1268] Alain Pottage, "The Materiality of What?," *Journal of Law and Society* 39, no. 1 (2012): 167–83.
[1269] Ibid., 177.
[1270] Ibid., 177.

'European strategy for data' and projects such as GAIA-X may not be binding in themselves, but they nevertheless create a discursive space for further European data regulation. They recognize the materiality of infrastructures and exercise their discursive power to claim sovereignty upon them. They rely upon law, but they are also inherently political in nature.

To capture the complexity of different types of connections, I therefore see it useful to try to conceive of a broader infrastructural approach to international law. Kingsbury writes that 'infrastructure' constitutes 'one of a cluster of technology-linked concepts that opens up promising paths for international lawyers thinking about technology and society.'[1271] Thinking in infrastructural terms is relational and entails work upon processes and imaginations. Infrastructures provide a point of reference for the establishment, modification and performance of social links and practices.[1272] The infrastructural accounts of security politics are connected by their focus on the role of 'the mundane, aesthetic/affective and emerging socio-material infrastructures.[1273] The mundane aspect of infrastructures and their composition: the cables, switches, devices and protocols make for an environment which may appear better suited for engineers than it is for lawyers.[1274] Indeed, Susan Leigh Star wrote of the 'master narrative,' shared by designers and developers of information infrastructures, which tends to monopolize the discourse and to mute diversity.[1275] However, a critical infrastructural approach allows us to study the affective perceptions of the capacities offered by the new technologies as well as their material (aesthetic) form. Such an

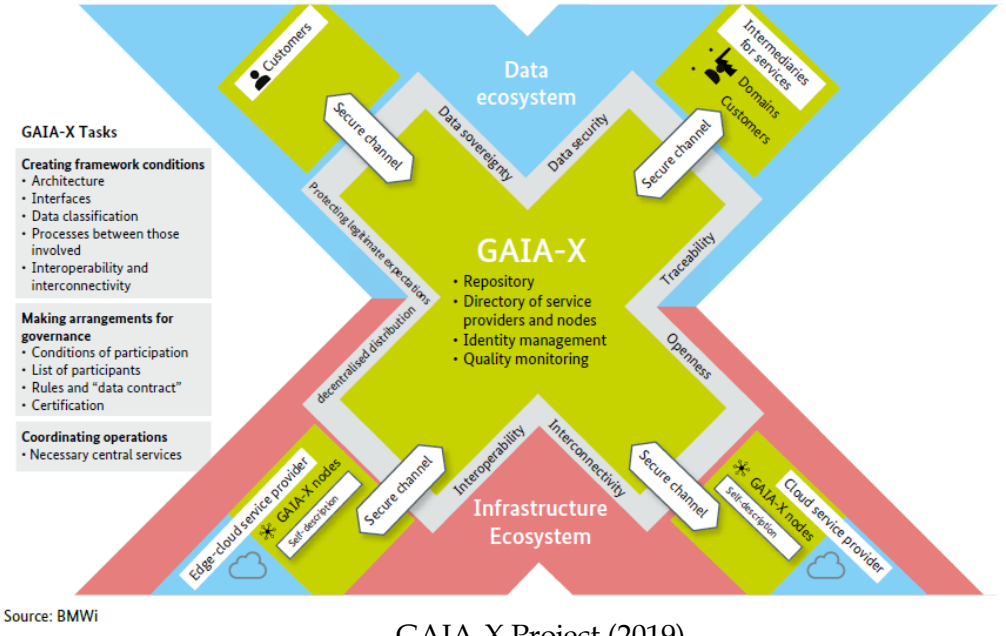
[1271] Benedict Kingsbury, "Infrastructure and InfraReg: On Rousing the International Law 'Wizards of Is,'" *IILJ Working Paper*, InfraReg Series, no. 1 (2020).
[1272] Ashley Carse, "Keyword: Infrastructure: How a Humble French Engineering Term Shaped the Modern World," in *Infrastructures and Social Complexity*, ed. Penelope Harvey, Casper Jensen, and Atsuro Morita (London: Routledge, 2016); Casper Bruun Jensen and Atsuro Morita, "Introduction: Infrastructures as Ontological Experiments," *Ethnos* 82, no. 3 (2017): 615–26; Nikhil Anand, Akhil Gupta, and Hannah Appel, eds., *The Promise of Infrastructure* (Durham, North Carolina: Duke University Press, 2018); Matthias Korn et al., eds., *Infrastructuring Publics* (Wiesbaden: Springer VS, 2019); Benedict Kingsbury, "Infrastructures and Laws: Publics and Publicness," *International Law and Justice Working Papers* 3 (2021).
[1273] Anna Leander, "Parsing Pegasus: An Infrastructural Approach to the Relationship between Technology and Swiss Security Politics," *Swiss Political Science Review* 27, no. 1 (2021): 205–13.
[1274] Kingsbury, "Infrastructure and InfraReg: On Rousing the International Law 'Wizards of Is'"; Leander, "Parsing Pegasus: An Infrastructural Approach to the Relationship between Technology and Swiss Security Politics," 202.
[1275] Susan Leigh Star, "The Ethnography of Infrastructure," *American Behavioral Scientist* 43, no. 3 (1999): 377–91.

approach can help us cast light upon the visible and invisible work of infrastructures, upon their emergent and contextual logic and its relation to law.[1276] It is therefore my hypothesis that the legal discipline, too, can rely upon infrastructural approaches in providing a new perspective on the technological change and its relation to law and society.

As is made evident in the case study, one of the important aspects of GAIA-X relates precisely to the role accorded to infrastructures, non-human actors and hybrid assemblages. The aim of GAIA-X is to connect centralized and decentralized infrastructures (in particular, cloud and edge services) into a 'homogenous' and 'distributed' ecosystem.[1277] The role of actants in this ecosystem cannot be understood in isolation from the digital infrastructure that binds them together. GAIA-X can be seen as a mediator which influences the data flows by providing an ecosystem and an architecture of standards which connects infrastructures together and guarantees their interoperability. The significance of GAIA-X lays in the 'invisible work' of infrastructures which attain their own recognition as actants, vested with political and legal significance, that are connected to customers and intermediaries through the mediation of GAIA-X.[1278]

[1276] Susan Leigh Star and Anselm Strauss, "Layers of Silence, Arenas of Voice: The Ecology of Visible and Invisible Work," *Computer Supported Cooperative Work* 8 (1999): 9–30.
[1277] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 12.
[1278] Star and Strauss, "Layers of Silence, Arenas of Voice: The Ecology of Visible and Invisible Work"; Leander, "Parsing Pegasus: An Infrastructural Approach to the Relationship between Technology and Swiss Security Politics."

Figure 1: Overall picture of data infrastructure and ecosystem



GAIA-X Project (2019)

Another important point to consider is the spatiality (and not mere 'materiality') of infrastructures. Drawing from the philosophy of Deleuze and Guattari, Andreas Philippopoulos-Mihalopoulos proposes a conceptualization of the 'lawscape' understood as the fusion of space and normativity.[1279] The lawscape is an infinite plane of interlacing of geography with the normative force of law. It denotes spatial control and regulation, the imposition of standards that allow for everyday functioning and that are so ingrained that they become invisible.

Philippopoulos-Mihalopoulos gives the following illustration of a lawscape that permeates materiality:

> *The atmosphere is assembled by a safe, small measure of law, there to protect you and to make you feel immune in your enclosed sphere. But look again. Or rather, smell, listen, touch again. The red and yellow colour combination is a registered trademark of KODAK. The smell of roses comes from the rubber used for the floor*

[1279] Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes," *Emotion, Space and Society* 7 (2013): 35–44; Andreas Philippopoulos-Mihalopoulos, "In the Lawscape," in *Law and the City* (Abingdon: Routledge-Cavendish, 2007).

> *of the room - the Sumitomo Rubbers's successful application for trademark. The first notes of Für Elise by Beethoven have been registered as a trademark by a Dutch company. The iPad touch screen is part of patented technology for which Apple has been in dispute with Samsung over the past few years. Finally, the Coke, well!, the Coke is obviously one of the best examples of a fully protected product in terms of taste, appearance, logo, bottle - the whole lot.*[1280]

The link between law and spatiality stands in opposition to the view of law as a transcendental space inhabited by 'abstract entities' or inanimate material objects. The category of 'space' is proposed with a view of decentering the anthropomorphic and anthropocentric subject through an assemblage of signs not limited to humans.[1281] It is guided by the recognition of that it may be 'a mistake to believe in the existence of things, persons, or subjects.'[1282] Indeed, the posthuman lawscape is populated by 'the human animal of the post-animal world,' 'a body amenable to capture.'[1283] The fragmented anthropomorphic effigy is grounded in the overarching materiality of *here*.[1284] This view allows us to recognize the ontological qualities of space: it can help us to describe the space where the data is created, exchanged and captured.

I have described how the 'European strategy for data' refers to the need to establish a common European 'ecosystem' and European 'data spaces' in the sectors such as industry, European Green Deal, mobility, health, finance, energy, agriculture, skills and public administration.[1285] The GAIA-X project seeks to address this need by establishing 'data spaces' where the data is exchanged between different participants in the 'Data Ecosystem.'[1286] GAIA-X documents refer to the International Data Spaces Association's reference architecture as 'a technical infrastructure and a semantic body of rules for data

[1280] Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes," 42.
[1281] Ibid., 37.
[1282] Gilles Deleuze, *Negotiations, 1972-1990*, trans. Martin Joughin (New York: Columbia University Press, 1995), 26.
[1283] Catherine Ingraham, *Architecture, Animal, Human: The Asymmetrical Condition* (London: Routledge, 2006), 85.
[1284] Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes," 37.
[1285] European Commission, "A European Strategy for Data."
[1286] GAIA-X, "GAIA-X: Technical Architecture" (Berlin: German Federal Ministry of Education and Research, 2020), 26–27.

exchange and data use in ecosystems' necessary to ensure interoperability of cloud services while safeguarding European data sovereignty.[1287] In the short term, each data space proposed by GAIA-X will be characterized by domain-specific standard architecture which will serve as a prototype. In the medium to long-term, GAIA-X seeks to achieve cross-domain functionality: 'we want to move forward step by step, by progressively expanding the GAIA-X layer with additional sub-functionalities.'[1288] Seen in this light, the notion of a data space can be understood as an attempt at capturing the *plasma*: that which is yet to be captured. For Latour, plasma marks the absence: it is the background, that which is not yet formatted, measured or socialized.[1289] It is a necessary embarrassment and a delineation of limits of his epistemology. The fact that the most part of industrial data is never put to any use constitutes a tragedy for analytics and an embarrassment for the epistemology based upon incessant quantification and harvesting of data points.

I submit that the language of 'data spaces' and of 'data ecosystems' is reflective of a larger epistemological shift concerning data regulation in the cyberspace. The vocabularies employed in the case studies reflect the necessity of thinking about data as the object of regulation which transcends the boundaries of the State and escapes its regulatory authority. Tellingly, 'Member States' are rarely mentioned in the documents of the EU Commission and of the GAIA-X project. 'Individuals' constitute another category that is rarely mentioned in the documentation. One may legitimately ask: why would they be? Most of the processes discussed in these cases studies refer to the often-automated processes and interactions between large scale infrastructures, data providers and consumers. Individuals are only mentioned in passing, when the data protection rules under GDPR are referred to or when the need to invest in data literacy is mentioned. In both instances, the individuals are mentioned to the extent that they

[1287] GAIA-X, "Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem," 14.
[1288] GAIA-X, "GAIA-X: A Pitch Towards Europe," 3; Laurent de Sutter, "Plasma! Notes on Bruno Latour's Metaphysics of Law," in *Latour and the Passage of Law*, ed. Kyle McGee, Critical Connections (Edinburgh: Edinburgh University Press, 2015).
[1289] Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory*, 244.

operate within the common European data *space*. We observe decentralization of the anthropomorphic and anthropocentric subject, as data 'ecosystems,' 'spaces' and 'infrastructures' take precedence over the subject-centric language of international law. The subject-object relationship is destabilized, as data providers and data consumers may well change their roles in the course of interaction. What connects them is that they are both embedded in a common regulatory space.

Finally, the term 'data sovereignty,' a notion used by European institutions and the GAIA-X project, offers a vision of sovereignty that is radically different from the anthropomorphic conceptualizations of sovereignty discussed in the previous chapters of this thesis. Data sovereignty, understood as control over stored and processed data, appears as a collective bottom-up effort, which results from interaction between different institutions, actants and infrastructures. The notion is based on a particular feedback loop: for data sovereignty to be achieved, Europe must have its own tech companies and data infrastructures. For innovation to thrive, a stable and predictable regulatory framework must be established. Therefore, the attainment of data sovereignty may be more akin to the maintaining of a 'balanced ecosystem' than it is to the covenanting to establish the person of the *Leviathan*. Viewed from the perspective of data regulation, the mechanism of the State appears as a fragmented being, with the power of sovereignty dispersed beyond its immediate control. Together with 'Man' – its ancient nemesis – they have been exposed: they can no longer claim to have any pretense to unity or ontological priority as the anthropomorphic subjects at the foundation of law's authority. Instead, the State and 'Man' have been reduced to points of reference within the infinitely more complex network of regulation. The sovereign power can no longer be understood as a right acquired by the person of the sovereign. Instead, it is dispersed and dependent upon the feedback loop of infrastructure and space, which serves to uphold or to deny claims to sovereignty.

Chapter conclusion

In this chapter, I have studied the European initiatives in the domain of data regulation. I have analyzed the definition of 'data sovereignty' and compared it against traditional accounts of sovereignty. Throughout the analysis, I argued that the topic of data regulation and data sovereignty is difficult to grasp with the traditional conceptual apparatus of international law. Instead, I proposed to embed my study in theoretical approaches which share the vision of law as a network.

The systems theory has allowed us to re-conceptualize our criteria for collective personhood. Instead of viewing collective entities as abstract entities or collections of individuals, the systems theory allows us to focus on the (re)production of the streams of socially recognized communications in the system of the European data regulation. According to this theoretical approach, there can be no *ex ante* unified sovereign before and above the law. Rather, invocations of the concept of 'data sovereignty' need to be continuously recognized through a feedback loop of socially recognized communications.

The Actor-Network Theory then enables us to see the role of the 'network governance' and of the relevant infrastructures in upholding the new concept of 'data sovereignty.' An ANT-inspired analysis helps us trace connections between persons and things. The actors described in our case studies had recourse to the notion of a network to explain their position within the system of the European data regulation. While the European Commission can be seen as an actor in the middle of a polycentric network, its position is still dependent upon cooperation with other actors and actants. This is where we come to another advantage of an ANT-inspired approach: by employing the technical term 'actant,' ANT allows us to perceive forms of non-human agency which escape traditional legal analysis. We have seen how the concept of data sovereignty is dependent on the very infrastructures which it seeks to regulate. Seen in this light, the European digital sovereignty is both a goal and an outcome of the invisible work of

infrastructures: its achievement is dependent upon the existence of competitive European technological solutions, as well as a clear regulatory regime.

In the last part of this chapter, I have outlined some of the criticisms that have been levelled at Actor-Network Theory and new materialism. Following Peter Dear and Sheila Jasanoff, I have advocated for a political vision of infrastructures as actants in various epistemological struggles. I have also followed Pellet in criticising the scholarship which views materialism as the *clef de lecture* of law. Instead, basing upon the work of Philippopoulos-Mihalopoulos, I proposed the concept of space as a useful analytical category in describing the role of modern apparatuses of production and capture of data.

Thinking about the law in terms of a distributed 'lawscape' or an 'ecosystem' allows us to shift ontological priority away from individualized subjects and to focus on the spatiality which underpins the concept of 'data sovereignty.' Viewed from the perspective of data regulation, sovereignty appears as a dispersed feature, beyond the means of immediate State control. The sovereign can no longer be understood as a unified entity, as the holder of sovereign right above or beyond the legal hierarchy. Rather, sovereignty is dispersed among actors and infrastructures which form the polycentric network of participants in European data regulation. While the public authorities exercise their regulatory function, they are far from being the only entities active in the field. Instead, 'data sovereignty' needs to be sustained by the very infrastructure and space which it aims to regulate.

We may then ask, after Deleuze and Guattari: have the European efforts at data regulation resulted in a new striation of space? I have argued that the political economy of technology can be linked with the profound epistemological shifts in thinking about sovereignty. Data sovereignty is not an acquired right of the anthropomorphic sovereign, but a capacity that must be built through collective work of public and private stakeholders and non-human infrastructures. The concept of data sovereignty

thus constitutes an input and an output of a regulatory loop: on the one hand, it claims control over the data by prescribing standards and by providing clear rules on who is permitted to have access to data. On the other hand, for the concept of data sovereignty to have any substantive meaning, it must also depend on private-sector competition, innovation and the invisible work of infrastructures. The sovereign abdicates his exclusionary right, as the sovereignty is dispersed among the participants in the system of data regulation.

The above-described epistemological shifts challenge our traditional conceptualization of the anthropomorphic subject. In the closing epilogue of this dissertation, I synthesize the main findings of this dissertation and I lay the theoretical foundations for further research into the notion of dispersed sovereignty.

The Epilogue:

Eulogy for the Anthropomorphic Subject

For you have but mistook me all this while:
I live with bread like you, feel want,
Taste grief, need friends: subjected thus,
How can you say to me, I am a king?

– William Shakespeare, *Richard II*, Act III, Scene II.

I may venture to affirm of the rest of mankind, that they are nothing but a bundle or collection of different perceptions, which succeed each other with an inconceivable rapidity, and are in a perpetual flux and movement. […] The mind is a kind of theatre, where several perceptions successively make their appearance; pass, re-pass, glide away, and mingle in an infinite variety of postures and situations. There is properly no simplicity in it at one time, nor identity in different […]

– David Hume, *A Treatise of Human Nature*, Book I, Part 4, Section 6.

The two quotes from English classics remind us of the long tradition of debate about the nature of personal identity. However, I also like to read them as reminders of two paradigm shifts which have occurred in the legal discourse concerning the theory of subjects of international law. The quote from Shakespeare's play reminds us of the decay of the person of the King and its replacement by the new body politic, the Westphalian State, as the ultimate subject of international law. Meanwhile, Hume challenges and destabilizes the very notion of personhood by focusing on the flux and movement hidden beneath the category of a 'person.' If the unity of a biological person is to be doubted, then surely the criticism applies even more so to 'moral persons' and 'abstract entities' – the protagonists of this dissertation. As we have seen, concerns about the nature of personhood have played an important role in the debates about the

identity of the subjects of international law and in situating the source of sovereignty within a political community.

In this dissertation, we have witnessed multiple accounts and appearances of the specter of 'Man' in the legal discipline. The anthropomorphic analogy has served jurists who sought to establish a unitary object of inquiry for the nascent 'legal science.' Anthropomorphism served to portray the State as:

- a unified, singular object of inquiry with a continuous identity in time;
- a person, understood as a bearer of rights and duties under natural law, whose lifespan goes beyond that of biological individuals;
- a cognizant participant in the legal discourse;
- an embodied and gendered entity.

To conclude, the anthropomorphic approaches towards legal hierarchy covered in this dissertation can be situated in the following manner. In the first chapter of this dissertation, we have studied the natural law approaches, which posited that certain legal principles flow from human nature and that they are discoverable by human faculties. Grotius and Hobbes both used the language of natural law to explain their theories of sovereignty. Their view of personhood of the State was performative, for they drew distinction between the seat of sovereignty and the performance thereof. The texts of Grotius and Hobbes would later be appropriated by modern legal scholarship to suit different modern political agendas. The writings of Grotius were appropriated by the likes of Hersch Lauterpacht, who used the resurgent interest in the 'Grotian tradition' to voice the modern legal argument about rule of law and human rights. Meanwhile, modern international legal scholarship has treated the Hobbesian Leviathan mainly through the lens of its apparent organicism and totalizing qualities. However, as I have noted in Chapter I, Hobbes can be credited with developing a sophisticated account of personhood 'by fiction,' which continues to be relevant for the purpose of the study of the State as a subject of law. According to the Hobbesian account, the mechanistic State could only act in the world if it was represented by real

persons who bore the mask of the State, just like actors would wear a mask to represent a fictitious person in theatre.

In Chapter II, we have analyzed the intrinsicist conceptualization of the person of the State as the ultimate subject of the law of nations. Although such theories continued to rely on vocabularies of natural law and social contract, they also increasingly presented the State as an autonomous person on the top of the legal hierarchy. Pufendorf's contribution to the anthropomorphic legal thought was that he equated the State with an individual in their status as a moral person. The moral person of the State was characterized by faculties of its own: it possessed a separate intellect and will which played an important function in Pufendorf's facultative conceptualization of sovereignty.

We have then seen the liberation of the person of the State which occurred in the works of Christian Wolff and Emer de Vattel. These two thinkers portrayed the moral person of the State as the ultimate subject of international legal obligations. By accounting for a different nature of States as moral persons, Wolff set international discourse on its liberal course: the one which sees the State as the main subject of a separate body of international law applicable to collective entities. In the writings of Emer de Vattel, the conceptual movement was completed, as international legal personality transitioned from being a personal attribute of the Prince to becoming a legal attribute of the State. Accordingly, international order has become dependent upon the notion of consent flowing from the intellect of the person of the State. Paradoxically, the political philosophy of individualism ended up strengthening sovereign States understood as equal and free subjects of the law of nations.[1290] The State, seen through the mirror of its international obligations, became a cohesive image: a separate moral person with a conscience of its own and a capacity to determine its own best interest. To put it in literary terms, the realization of King Richard II that he was a mere mortal was

[1290] Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, 110.

accompanied by the rise of a new body politic, which took the role of the ultimate subject of international legal obligations.

In Chapter III, we have studied how the image of the person of the State has reached its extreme manifestation in the organic theories of law. Organic theorists posited the view of the State as the 'real' person above the law, who subsumed identities of individuals. Indeed, in the works of Bluntschli and von Gierke, the State appeared as a metaphysical person with a body of its own. This conceptualization has been criticized for its absolutist and collectivist bent. It has been described by Friedmann as 'an important stepping-stone towards that merger of the individual in the collective, which is an essential and vital aspect of modern totalitarian government.'[1291] We have seen that organic theorists tried to address these concerns by developing their conceptualizations of what Runciman calls the 'plurality-in-unity' of the State, in order to account for the identities of a multitude of subjects and interest groups within the overarching unitary identity of the body of the State.[1292] Finally, we have seen that the residues of organic theory continue to inhabit the modern discourse of international law concerning statehood, territorial integrity and customary law.

The embodiment of the State has been criticized for its contribution to totalitarian doctrine; it has been associated with the violent excesses of imperialism in the early 20th century. In Chapter IV, we have mapped the projects which sought to counter organic image of the State, by presenting the latter as a 'legal fiction' or an 'abstract entity' instead. On the one hand, the sociologically oriented approaches of Duguit and Scelle identified individuals as the ultimate subjects of law. The French jurists criticized the anthropomorphism of the State and they saw sovereignty as a tool of social domination wielded by some individuals to dominate the others. On the other hand, Kelsen saw law as a normative domain which should be cleansed from the influence of other disciplines. Kelsen's formalism was manifested in his account of legal personality:

[1291] Wolfgang Friedmann, *Legal Theory*, 5th edition (New York: Columbia University Press, 1967), 238.
[1292] Runciman, *Pluralism and the Personality of the State*, 37.

a person, whether an individual or a State, was to be understood as a mere point of attribution within the overarching legal order. What connected the different theoretical approaches and political projects discussed in Chapter IV was the attempt of the modern jurists to cleanse international of the notion of anthropomorphic, sovereign State and to replace it with the conceptualization of the State as a legal fiction. However, as I have argued in the closing of that chapter, the notion of legal fiction continues to draw from the logic of the phantom body of the King as a theoretical foundation of legal hierarchy. While the anthropomorphic State may well be dead, the international order continues to 'act' by recognizing legitimate participants, assigning competences and authorizing behaviour while drawing from the hypothetical phantom body at the foundation of the legal order.

To address this paradox, in the final chapter of this dissertation I have followed theoretical approaches, based upon the view of law as a network, which seek to de-anthropomorphize law and to dispel the specter of 'Man' haunting our conceptualizations of the legal order. Looking at the case study of European data regulation, I applied insights from systems theory, Actor-Network Theory and infrastructural accounts of law. I argued that systems theory theory can help us to re-conceptualize the criteria for collective personhood. By focusing on the pure streams of communication, reproduced and upheld by actors in a given social system, we cease to be dependent upon ex ante metaphysical claims about the identity of the ultimate subject of law. As jurists, our task increasingly shifts towards analysis of the role of different actors and instruments in upholding, recognizing and reproducing one among many legal rationalities. An ANT-inspired approach could then help us trace connections between persons and things, by allowing us to perceive forms of non-human agency which escape the lenses of traditional legal analysis.

I have then argued that a broader, infrastructural research agenda in international law is needed. In the case study of European data regulation, we have seen how the concept of data sovereignty is dependent on the very infrastructures which it seeks to regulate.

Seen in this light, the European digital sovereignty is both a goal and an outcome of the invisible work of infrastructures. This new type of sovereignty over the data is not a top-down right, but a collective capacity that must be re-assembled through collective work of public and private actors and non-human infrastructural actants. The infrastructural accounts of international law allow us to see the role of non-human actants in upholding the concept of 'data sovereignty,' while remaining sensitive to the epistemological struggles involved in the work of infrastructures. Finally, we have witnessed the use of spatial legal vocabularies which describe the 'spaces' and 'ecosystems' of regulation. Thinking about the law in terms of lawscape allows us to shift ontological priority away from individualized subjects, to focus on the cyber-spatiality which underpins the concept of data sovereignty.

The notion of an anthropomorphic subject of sovereignty finds little application in the dispersed space of data regulation. All of this calls for a eulogy for the anthropomorphic subject. I have presented the vision of law as a network as a way of de-anthropomorphizing our visions of law. However, it must be noted that the network approaches to law also rely upon a fair dose of anthropomorphizing themselves. Early proponents of systems theory have relied upon the allegory of 'nerves' and 'neural networks' to explain social processes.[1293] The agentive capacity of collective actors, defined as networks of communication, has also been described with the use of anthropomorphic vocabularies; early cybernetic works, such as Karl W. Deutsch's *The Nerves of Government: Models of Political Communication and Control* and Norbert Wiener's *Cybernetics: or, Control and Communication in the Animal and the Machine* have made direct parallels between the biological and computerized systems.[1294]

Secondly, the purely descriptive and technical focus on the infrastructures and non-human actors has been criticized for not paying sufficient heed to the political aspect of

[1293] Hayward R. Alker, "The Powers and Pathologies of Networks: Insights from the Political Cybernetics of Karl W. Deutsch and Norbert Wiener," *European Journal of International Relations* 17, no. 2 (2011): 355.
[1294] Karl W. Deutsch, *The Nerves of Government: Models of Political Communication and Control* (New York: The Free Press, 1963); Norbert Wiener, *Cybernetics: Or Control and Communication in the Animal and the Machine* (Cambridge, Massachusetts: MIT Press, 2019).

infrastructures.[1295] The analysis in the mode of Actor-Network Theory has certainly contributed towards greater attentiveness to 'forms of distributed agency and action – and hence of dispersed causality – that disciplinary training tends to simplify or dismiss.'[1296] This is why I argued for a broader infrastructural research agenda that would take into account the epistemological struggles related to the legal work of the infrastructures and the role thereof in generating legal arguments and controversies. One of the current challenges for international lawyers is to find the pathways of responsibility in a distributed and networked world, lest we fall into the dystopia of modernity's 'organized irresponsibility' described by Ulrich Beck.[1297] I see it as more important than ever to conceptualize responsibility in a networked world: a world which seemingly escapes the logic of a single hierarchy, but where hierarchies and asymmetries of power are more real than ever.

Indeed, as we have seen throughout this dissertation, the anthropomorphism of the subject of international law has served one important function from the legal perspective: it helped jurists to identify the subject responsible for actions and to assign rights and duties to this very subject. As I have argued, anthropomorphizing the subject of law is no longer a sufficient modus operandi in a world where identities are in flux and where sovereignty is dispersed and has to be (re-)assembled. Nevertheless, this should not preclude international lawyers from tracing the pathways of responsibility. Quite to the contrary, the creation of new private-public assemblages, surveillance systems and apparatuses of capture should only serve to incentivize us to think about the responsibility for all the draining work of the infrastructures.

A new research agenda is needed. That is why, in my future research projects, I will propose to address the void left behind by the demise of the anthropomorphic subject of law and the dispersion of sovereignty. I have outlined some of the themes that form

[1295] Jasanoff, "Ordering Knowledge, Ordering Society," 23.
[1296] Sheila Jasanoff and Sang-Hyun Kim, eds., *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power* (Chicago: University of Chicago Press, 2015), 16.
[1297] Ulrich Beck, *The Politics of Risk Society*, ed. Jane Franklin (Cambridge: Polity Press, 1997).

the backbone of my conceptual framework: the focus on infrastructures and their role in legal, political and epistemological controversies, as well as the inclusion of spatiality as an important level of analysis. The different threads of a de-anthropomorphized legal analysis could be connected by the notion of an assemblage, defined as the gearing of a multiplicity of heterogeneous actors and actants towards the goal of reproduction of public order and private authority through legal means.[1298] My future research projects will build upon the aforementioned concepts, with an aim of offering a case by case analysis of specific instances of contracting and collaboration between public and private entities for the purpose of reproducing sovereign claims.

This dissertation has sought to narrate the rise and fall of anthropomorphism as an explanatory force in international legal theory. I hope to have convinced the reader that the specter of Man has played a crucial role in conceptualizing the source and shape of sovereignty within a political community by vesting it with a human form. The recognition of the importance of the anthropomorphic subject of sovereignty comes with the realization of the dangers posed by its demise. If the specter of 'Man' is to be dispelled in legal theory, it is only with a view of uncovering the power relations that took its place and became the new dogma.

[1298] Kevin D. Haggerty and Richard V. Ericson, "The Surveillant Assemblage," *British Journal of Sociology* 51, no. 4 (2000); Manuel Delanda, *Assemblage Theory* (Edinburgh: Edinburgh University Press, 2016).

Bibliography

Abrams, Philip. "Notes on the Difficulty of Studying the State." *Journal of Historical Sociology* 1, no. 1 (1988): 58–89.

Administrator's Office. "Report on the Natives of South-West Africa and Their Treatment by Germany." London: H.M. Stationery Office, 1918.

Agamben, Giorgio. *Homo Sacer: Le Pouvoir Souverain et La Vie Nue*. Translated by Marilène Raiola. Paris: Seuil, 1997.

———. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford, California: Meridian, 1998.

Alker, Hayward R. "The Powers and Pathologies of Networks: Insights from the Political Cybernetics of Karl W. Deutsch and Norbert Wiener." *European Journal of International Relations* 17, no. 2 (2011): 351–78.

Allott, Philip. "State Responsibility and the Unmaking of International Law." *Harvard International Law Journal* 29, no. 1 (1988): 1–26.

———. *The Health of Nations: Society and Law Beyond the State*. Cambridge: Cambridge University Press, 2002.

Anand, Nikhil, Akhil Gupta, and Hannah Appel, eds. *The Promise of Infrastructure*. Durham, North Carolina: Duke University Press, 2018.

Anderson, Rachel. "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action against Germany." *California Law Review* 93, no. 4 (2005): 1155–90.

Anghie, Anthony. *Imperialism, Sovereignty and the Making of International Law*. Cambridge: Cambridge University Press, 2005.

Anzilotti, Dionisio. *La Responsabilité Internationale Des États à Raison Des Dommages Soufferts Par Des Étrangers.* Paris: Dalloz, 2012.

———. *Scritti Di Diritto Internazionale Pubblico*. Padova: CEDAM, 1956.

Aquinas. *The Summa Theologiæ*. Translated by Fathers of the English Dominican Province. Digital: Benziger Brothers, 1920. https://www.ccel.org/a/aquinas/summa/home.html.

Arendt, Hannah. *The Origins of Totalitarianism*. Later Edition reprint. London: Penguin Classics, 2017.

Aristotle. *Aristotle's Politics*. Translated by Carnes Lord. Second Edition. Chicago: The University of Chicago Press, 2013.

———. *Nicomachean Ethics*. Translated by W. D. Ross. Batoche Books, 1999.

Armitage, David. "Hobbes and the Foundations of Modern International Thought." In *Rethinking the Foundations of Modern Political Thought*. Edited by Darrin M. McMahon Cambridge: Cambridge University Press, 2006.

———. "In Defense of Presentism." In *History and Human Flourishing*. Edited by Darrin M. McMahon. Oxford: Oxford University Press, 2023.

Aspremont, Jean d'. "The Doctrine of Fundamental Rights of States and Anthropomorphic Thinking in International Law." *Cambridge Journal of International and Comparative Law* 4, no. 3 (2015): 501–20.

Aust, Helmut P. "Fundamental Rights of States: Constitutional Law in Disguise?" *Cambridge International Law Journal* 4, no. 3 (2015).

Austin, John L. *How to Do Things with Words: Second Edition*. Edited by J. O. Urmson and M. Sbisà. Cambridge, Massachusetts: Harvard University Press, 1975.

Bacon, Francis. "Of Sedition and Troubles." In *Bacon: The History of the Reign of King Henry VII and Selected Works*, edited by Brian Vickers. Cambridge: Cambridge University Press, 2012.

Bakis, Henry. *Les Réseaux et Leurs Enjeux Sociaux*. Paris: Presses Univesitaires de France, 1993.

Balibar, Etienne. "Spinoza: From Individuality to Transindividuality." *Mededelingen Vanwege Het Spinozahuis* 71 (1997).

Barkan, Joshua. *Corporate Sovereignty: Law and Government under Capitalism*. Minneapolis: University of Minnesota Press, 2013.

Barker, Ernest. "Introduction." In *Natural Law and the Theory of Society: 1500 to 1800*, by Otto von Gierke. Boston: Beacon Press, 1957.

Barry, Andrew. "In the Middle of the Network." In *Complexities: Social Studies of Knowledge Practices*, edited by John Law and Annemarie Mol. Duke University Press, 2002.

Bartelson, Jens. *A Genealogy of Sovereignty*. Cambridge: Cambridge University Press, 1995.

Barthélemy, Joseph. *Le Rôle Du Pouvoir Exécutif Dans Les Républiques Modernes*. Paris: Giard et Brière, 1906.

Bauman, Zygmunt. *Modernity and the Holocaust*. Cornell University Press, 2006.

Bayer, Maximilian. *Der Krieg in Südwestafrika Und Seine Bedeutung Für Die Entwicklung Der Kolonie*. Leipzig: erlag von Friedrich Engelmann, 1906.

———. *Mit Dem Hauptquartier in Südwestafrika*. Berlin: W. Weicher, 1909.

Beck, Ulrich. *The Politics of Risk Society*. Edited by Jane Franklin. Cambridge: Polity Press, 1997.

Bennett, Jonathan. "Spinoza's Mind-Body Identity Thesis." *The Journal of Philosophy* 78, no. 10 (1981): 573–84.

Benvenisti, Eyal. "The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks." *Theoretical Inquiries in Law* 16, no. 2 (2015).

Berthélemy, Henry. *Traité Élémentaire de Droit Administratif*. Septième édition. Paris: Libraire nouvelle de droit et de jurisprudence, 1913.

Bhabha, Homi K. *The Location of Culture*. London: Routledge, 2004.

Bhuta, Nehal. "Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order." In *Governance by Indicators: Global Power through Quantification and Rankings*, edited by Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry. Law and Global Governance. Oxford: Oxford University Press, 2012.

———. "State Theory, State Order, State System — Jus Gentium and the Constitution of Public Power." In *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, edited by Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit. Oxford: Oxford University Press, 2017.

———. "The State Theory of Grotius." *Current Legal Problems* 73, no. 1 (2020): 127–76.

Bhuta, Nehal, Susanne Beck, Robin Geiß, Hin-Yian Liu, and Klaus Kreß. *Autonomous Weapons Systems: Law, Ethics, Policy*. Cambridge: Cambridge University Press, 2016.

Bianchi, Andrea. "The Fight for Inclusion: Non-State Actors and International Law." In *Non-State Actors and International Law*. The Library of Essays in International Law. London: Routledge, 2009.

Bianchi, Andrea, and Anne Saab. "Fear and International Law-Making: An Exploratory Inquiry." *Leiden Journal of International Law* 32 (2019): 351–65.

Black, Antony. "Fellowship and Community: Gierke and Tönnies." In *Guild & State European Political Thought from the Twelfth Century to the Present*. New York: Routledge, 2003.

Black, Max. *Models and Metaphors: Studies in Language and Philosophy*. Ithaca, New York: Cornell University Press, 1962.

Bley, Helmut. *South West Africa under German Rule, 1898–1914,*. Translated by Ridley Hugh. Evanston, Illinois: Northwestern University Press, 1971.

Blits, Jan H. "Hobbesian Fear." *Political Theory* 17, no. 3 (1989).

Bluntschli, Johann K. "Arische Volkerund Arische Rechte." In *Deutsches Staats-Wörterbuch*. Stuttgart: Giesecke & Devrient, 1857.

———. *Das Moderne Völkerrecht Der Civilisirten Staten*. Nördlingen: Beck, 1878.

———. *Das Moderne Völkerrecht Der Zivilisierten Staaten Als Rechtsbuch Dargestellt*. Nördlingen: C.H. Beck, 1866.

———. *Denkwürdiges Aus Meinem Leben*. Vol. I&II. Norderstedt: Hansebooks, 2017.

———. *The Theory of the State*. Authorised English Translation from the Sixth German Edition. Kitchener: Batoche Books, 2000.

Bodin, Jean. *Les Six Livres de La République*. Édition et présentation de Gérard Maire. Un abrégé du texte de l'édition de Paris de 1583. Les classiques des sciences sociales, 1993.

———. *Methodus Ad Facilem Historiarum Cognitionem*. 1566th & 1572nd ed. Paris: Bibliothèque nationale de France, 2022.

Boehme, Franziska. "Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero Genocide." *Journal of Human Rights* 19, no. 2 (2020): 238–55.

Bok, Hilary. "Baron de Montesquieu, Charles-Louis de Secondat." In *Stanford Encyclopedia of Philosophy*, 2003.

Botero, Giovanni. *Raison et Gouvernement d'estat En Diz Livres*. 1599th ed. Paris: Hachette Livre BNF, 2012.

Bourdieu, Pierre. *Habitus and Field*. Translated by Peter Collier. Vol. Vol. 2. General Sociology. Lectures at the College de France (1982-1983). Cambridge: Polity Press, 2020.

———. *Practical Reason*. Cambridge: Polity Press, 1998.

———. *Sur l'État: Cours Au Collège de France (1989-1992)*. Paris: Seuil, 2012.

Bouriau, Christophe, ed. *Les Fictions Du Droit: Kelsen, Lecteur de Vaihinger*. Lyon: ENS éditions, 2013.

Brett, Annabel. "Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius." *The Historical Journal* 45, no. 1 (2002): 31–51.

———. "The Space of Politics and the Space of War in Hugo Grotius's De Iure Belli Ac Pacis." *Global Intellectual History* 1, no. 1 (2016): 33–60.

———. "The Subject of Sovereignty. Law, Politics and Moral Reasoning in Hugo Grotius." *Modern Intellectual History* 17 (2019): 619–45.

Brierly, James L. *Règles Générales Du Droit de La Paix*. Vol. 58. Collected Courses of the Hague Academy of International Law. Hague: Brill, 1936.

———. *The Basis of Obligation in International Law and Other Papers*. Edited by Hersch Lauterpacht and Humphrey Waldock. Oxford: Clarendon Press, 1958.

———. *The Law of Nations: An Introduction to the International Law of Peace*. 1st Edition. Oxford: Clarendon Press, 1928.

———. *The Law of Nations: An Introduction to the International Law of Peace*. 6th ed. Clarendon Press, Oxford, 1963.

———. "The Shortcomings of International Law." *British Yearbook of International Law* 5 (1924): 4–16.

Brölmann, Catherine, and Janne Nijman. "Personality." In *Concepts for International Law: Contributions to Disciplinary Thought*, edited by Jean d'Aspremont and Sahib Singh, 678–90. Cheltenham: Edward Elgar, 2019.

Butler, Geoffrey. "Sovereignty and the League of Nations." *British Yearbook of International Law* 35, no. 1 (1920).

Butler, Judith. *Bodies That Matter: On the Discursive Limits of "'Sex.'"* New York: Routledge, 1993.

———. *Frames of War*. London: Verso, 2009.

———. *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge, 1999.

———. *The Force of Nonviolence: The Ethical in the Political*. London: Verso, 2020.

Carse, Ashley. "Keyword: Infrastructure: How a Humble French Engineering Term Shaped the Modern World." In *Infrastructures and Social Complexity*, edited by Penelope Harvey, Casper Jensen, and Atsuro Morita. London: Routledge, 2016.

Carty, Anthony. "International Legal Personality and the End of the Subject: Natural Law and Phenomenological Responses to New Approaches to International Law." *Melbourne Journal of International Law* 6, no. 2 (2005): 534–52.

———. *Philosophy of International Law*. Second Edition. Edinburgh: Edinburgh University Press, 2017.

———. *Postmodern Law: Enlightenment, Revolution and the Death of Man*. Edinburgh: Edinburgh University Press, 1990.

Cassese, Antonio. "Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law." *European Journal of International Law* 1 (1990): 210–31.

Chamayou, Grégoire. *A Theory of the Drone*. Translated by Janet Lloyd. New York: The New Press, 2015.

Charlesworth, Hilary. "The Sex of the State in International Law." In *Sexing the Subject of Law*, edited by Ngaire Naffine and Rosemary Owens. Holmes Beach, Florida: Gaunt & Sons, 1997.

Charlesworth, Hilary, and Christine Chinkin. *The Boundaries of International Law: A Feminist Analysis*. Manchester: Manchester University Press, 2000.

Chavanne, Yannick. "Europas Cloud-Projekt Gaia-X Wird Zum Problemfall." *Netzwoche*, November 23, 2021. https://www.netzwoche.ch/news/2021-11-23/europas-cloud-projekt-gaia-x-wird-zum-problemfall.

Chetail, Vincent, and Peter Haggenmacher, eds. *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*. Vol. 9. Graduate Institute of International and Development Studies. Martinus Nijhoff Publishers, 2011.

Cicero. *De Re Publica*. Translated by Clinton W. Keyes. Cambridge, Massachusetts: Harvard University Press, 1928.

Clapham, Andrew, ed. *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations*. 7th Edition. Oxford: Oxford University Press, 2012.

Cohen, Jean L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge: Cambridge University Press, 2012.

Copernicus. "Data and Information Access Services," June 26, 2022. https://www.copernicus.eu/en/access-data/dias.

Davidson, Donald. "What Metaphors Mean." *Critical Inquiry* 5, no. 1, (1978): 31-47.

Dear, Peter, and Sheila Jasanoff. "Dismantling Boundaries in Science and Technology Studies." *Isis* 101, no. 4 (2010).

Dedering, Tilman. "A Certain Rigorous Treatment of All Parts of the Nation': The Annihilation of the Herero in German South West Africa, 1904." In *The Massacre in History: Studies on War and Genocide*, edited by Mark Levene and Penny Roberts. New York: Berghan, 1999.

Delanda, Manuel. *Assemblage Theory*. Edinburgh: Edinburgh University Press, 2016.

Deleuze, Gilles. *Negotiations, 1972-1990*. Translated by Martin Joughin. New York: Columbia University Press, 1995.

Dennett, Daniel. *The Intentional Stance*. Cambridge, Massachusetts: MIT Press, 1987.

———. "The Self as a Center of Narrative Gravity." In *Self and Consciousness: Multiple Perspectives*, edited by F. Kessel, P. Cole, and D. Johnson, 275–88. Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1992.

Dernburg, Bernhard. *Zielpunkte Des Deutschen Kolonialwesens*. Berlin: Ernst Siegfried Mittler und Sohn, 1907.

Derrida, Jacques. *Limited Inc*. Evanston, Illinois: Northwestern University Press, 1988.

Derrida, Jacques, and F.C.T. Moore. "White Mythology: Metaphor in the Text of Philosophy." *New Literary History* 6, no. 1 (1974): 5–74.

Deutsch, Karl W. *The Nerves of Government: Models of Political Communication and Control*. New York: The Free Press, 1963.

DeWitt Dickinson, Edwin. "The Analogy between Natural Persons and International Persons in the Law of Nations." *The Yale Law Journal* 26, no. 7 (1917): 564–91.

Diderot, and D'Alembert. "Droit Des Gens." In *L'Édition Numérique, Collaborative et CRitique de l'Encyclopédie Ou Dictionnaire Raisonné Des Sciences, Des Arts et Des Métiers*. l'Académie des sciences, 1772 1751. http://enccre.academie-sciences.fr/encyclopedie/article/v5-256-25/.

DiStefano, Christine. *Configurations of Masculinity: A Feminist Perspective on Modern Political Thought*. New York: Cornell University Press, 1991.

Drechsler, Horst. *Let Us Die Fighting: Struggle of the Herero and the Nama against German Imperialism*. London: Zed, 1980.

Duguit, Léon. *Le Droit Social, Le Droit Individuel et La Transformation de l'état*. Deuxième édition. Paris: Félix Alcan, 1911.

———. *L'état, Le Droit Objectif et La Loi Positive*. Edited by Albert Fontemoing. Paris: Bibliothèque de l'Histoire du Droit et des Institutions, 1901.

———. *Traité de Droit Constitutionnel. La Règle de Droit.* Paris: Fontemoing, 1927.

Dupuy, Pierre-Marie. "Dionisio Anzilotti and the Law of International Responsibility of States." *European Journal of International Law* 3, no. 1 (1992): 139–48.

DW. "Germany Officially Recognizes Colonial-Era Namibia Genocide," May 28, 2021. https://www.dw.com/en/germany-officially-recognizes-colonial-era-namibia-genocide/a-57671070.

Engel, Salo, and R. A. Métall, eds. *Law, State and International Legal Order : Essays in Honor of Hans Kelsen*. Knoxville: University of Tennessee Press, 1964.

Engle Merry, Sally. "Legal Pluralism." *Law & Society Review* 22, no. 5 (1988): 869–96.

Epstein, Charlotte. *Birth of the State: The Place of the Body in Crafting Modern Politics*. Oxford: Oxford University Press, 2021.

Esmein, Adhémar. *Éléments de Droit Constitutionel*. Paris: Libraire de la société du recueil général des lois et des arrêts, 1896.

EuroHPC. "The European High Performance Computing Joint Undertaking (EuroHPC JU)." Accessed June 26, 2022. https://eurohpc-ju.europa.eu/index_en.

European Commission. "A European Strategy for Data." Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, February 19, 2020.

———. "Commission Seeks Views on the Implementing Act on High Value Datasets," May 24, 2022. https://digital-strategy.ec.europa.eu/en/news/commission-seeks-views-implementing-act-high-value-datasets#:~:text=In%20the%20framework%20of%20the,and%2C%20where%20relevant%2C%20as%20a.

———. "Commission Staff Working Document on Common European Data Spaces." Brussels, February 23, 2022.

———. "Destination Earth." Accessed June 26, 2022. https://digital-strategy.ec.europa.eu/en/policies/destination-earth.

———. "GreenData4All – Updated Rules on Geospatial Environmental Data and Access to Environmental Information." Accessed June 26, 2022. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13170-GreenData4All-updated-rules-on-geospatial-environmental-data-and-access-to-environmental-information_en.

———. "Horizon Europe." Accessed June 26, 2022. https://ec.europa.eu/info/research-and-innovation/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en.

———. "HR Key Figures." Accessed June 26, 2022. https://ec.europa.eu/info/sites/default/files/european-commission-hr_key_figures_2021_en.pdf.

European Open Science Cloud. "EOSC Portal." Accessed June 26, 2022. https://eosc-portal.eu/.

European Political Strategy Centre. "Rethinking Strategic Autonomy in the Digital Age." EPSC Strategic Notes. European Commission, July 2019.

European Union. "What the European Commission Does in Law." Accessed September 20, 2021. https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law_en.

Fairhead, Edward. "Carl Schmitt's Politics in the Age of Drone Strikes: Examining the Schmittian Texture of Obama's Enemy." *Journal for Cultural Research* 22, no. 1 (2018): 39–54.

Fausto-Sterling, Anne. "The Comparative Anatomy of 'Hottentot' Women in Europe, 1815-1817." In *Deviant Bodies: Critical Perspectives on Difference in Science and Popular Culture*, edited by Jennifer Terry and Jacqueline L. Urla. Bloomington: Indiana University Press, 1995.

Ferrari, G. R. F. *City and Soul in Plato's Republic*. Chicago: The University of Chicago Press, 2005.

First, R. *South West Africa*. Baltimore: Penguin Books, 1967.

Fischer, Eugen. *Die Rehobother Bastards Und Das Bastardierungsproblem Beim Menschen*. Jena: Deutsche Akademie der Wissenschaften zu Berlin, 1913.

Fleming, Sean. *Leviathan on a Leash: A Theory of State Responsibility*. Princeton: Princeton University Press, 2020.

Forsyth, Murray. "Thomas Hobbes and the External Relations of States." *British Journal of International Studies* 5, no. 3 (1979): 196–209.

Foucault, Michel. *Order of Things: An Archaeology of the Human Sciences*. Translated by Alan Sheridan. London and New York: Routledge, 2002.

———. *Sécurité, Territoire et Population*. Hautes Etudes. Gallimard/Le Seuil, 1978.

———. *Security, Territory, Population: Lectures at the Collège de France, 1977-78*. Edited by Michel Senellart. Translated by Graham Burchell. Palgrave Macmillan, 2007.

———. *Society Must Be Defended*. Translated by David Macey. London: Penguin Books, 2020.

———. *Society Must Be Defended: Lectures at the Collège de France, 1975-76*. Edited by Mauro Bertani and Alessandro Fontana. Translated by David Macey. New York: Picador, 2003.

———. *Surveiller et Punir: Naissance de La Prison*. Gallimard, 1975.

———. "The Body of the Condemned." In *The Foucault Reader*, edited by Paul Rabinow. New York: Vintage Books, 2010.

———. “Truth and Power.” In *The Foucault Reader*, by Paul Rabinow, 51–75. New York: Vintage Books, 2010.

“Franco-German Position on GAIA-X,” February 18, 2020.

François, Hugo von. *Nama Und Damara*. Magdeburg: Bänsch, 1896.

Frenssen, Gustav. *Peter Moor's Journey to South West Africa*. Translated by Margaret May Ward. Boston: Boughton Mifflin Company, 1908.

Friedmann, Wolfgang. *Legal Theory*. 5th edition. New York: Columbia University Press, 1967.

Fuller, Lon. *Legal Fictions*. Stanford, California: Stanford University Press, 1967.

Gaeta, Paola. “On What Conditions Can a State Be Held Responsible for Genocide?” *The European Journal of International Law* 18, no. 4 (2007).

GAIA-X. “Bruno Le Maire, Minister of Economy, Finance and Recovery, France - Closing Gaia-X Summit,” November 19, 2022. https://www.youtube.com/watch?v=uDE1kGsen9Q.

———. “GAIA-X: A Pitch Towards Europe.” Berlin: German Federal Ministry for Economic Affairs and Energy, June 4, 2020.

———. “GAIA-X: Policy Rules and Architecture of Standards.” Berlin: German Federal Ministry for Economic Affairs and Energy, 2020.

———. “GAIA-X: Technical Architecture.” Berlin: German Federal Ministry of Education and Research, 2020.

———. “Membership.” Accessed June 26, 2022. https://www.gaia-x.eu/membership.

———. “Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem.” Berlin: German Federal Ministry of Education and Research, 2019.

———. “Project GAIA-X: A Federated Data Infrastructure as the Cradle of a Vibrant European Ecosystem. Executive Summary.” Berlin: German Federal Ministry of Education and Research, 2019.

———. “Who We Are: Association.” Accessed June 26, 2022. https://www.gaia-x.eu/who-we-are/association.

Gaja, Giorgio. “Positivism and Dualism in Dionisio Anzilotti.” *European Journal of International Law* 3, no. 1 (1992).

Genette, Gérard. *Figures of Literary Discourse*. Translated by Alan Sheridan. New York: Columbia University Press, 1982.

Gewald, Jan-Bart. *Herero Heroes: A Socio-Political History of the Herero of Namibia 1890-1923*. Oxford: James Currey, 1999.

———. “The Great General of the Kaiser.” *Botswana Notes and Records* 26 (1994): 67–76.

Gewald, Jan-Bart, Marianne Bechhaus-Gerst, and Reinhard Klein-Arendt. "The Herero Genocide: German Unity, Settlers, Soldiers, and Ideas." In *Die (Koloniale) Begegnung : AfrikanerInnen in Deutschland (1880-1945), Deutsche in Afrika (1880-1918)*, 109–27. Frankfurt: Peter Lang, 2003.

Gierke, Otto von. *Community in Historical Perspective: A Translation of Selections from Das Deutsche Genossenschaftsrecht (The German Law of Fellowship)*. Edited by A. Black. Translated by M. Fisher. Cambridge: Cambridge University Press, 1990.

———. *Das Deutsche Genossenschaftsrecht. Erster Band: Rechtsgeschichte Der Deutschen Genossenschaft*. Berlin: Weidmannsche Buchhandlung, 1868.

———. *Natural Law and the Theory of Society: 1500 to 1800*. Translated by Ernest Barker. Boston: Beacon Press, 1957.

———. *Political Theories of the Middle Age*. Translated by F. W. Maitland. Cambridge: Cambridge University Press, 1900.

Gordon, Robert. "The Rise of the Bushman Penis: Germans, Genitalia and Genocide." *African Studies* 57, no. 1 (1998): 27–54.

Goujard, Clothilde, and Laurens Cerulus. "Inside Gaia-X: How Chaos and Infighting Are Killing Europe's Grand Cloud Project." *POLITICO*, October 26, 2021. https://www.politico.eu/article/chaos-and-infighting-are-killing-europes-grand-cloud-project/.

Gregory, Derek. "From a View to a Kill: Drones and Late Modern War." *Theory, Culture & Society* 28, no. 7–8 (2011): 118–215.

Große Generalstabe Kriegsgeschichtliche Abteilung. *Die Kämpfe Der Deutschen Truppen in Südwestafrika. Band I: Der Feldzug Gegen Die Hereros*. Berlin: Ernst Siegfried Mittler & Sohn, 1906.

Grotius, Hugo. *Commentary on the Law of Prize and Booty*. Edited by M. J. van Ittersum. Indianapolis: Liberty Fund, 2006.

———. *On The Law of War and Peace*. Translated by Francis W. Kelsey. Translation of 1646 edition. 'The Classics of International Law.' New York: Carnegie Institution, 1913.

———. *On the Laws of War and Peace*. Translated by Francis W. Kelsey. Oxford: Clarendon Press, 1925.

———. *The Rights of War and Peace*. Edited by Richard Tuck. Indianapolis: Liberty Fund, 2005.

Grovogui, Siba N. "To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions." *Indiana Journal of Global Legal Studies* 18, no. 1 (2011): 41–63.

Günther, Klaus. "Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory." *NoFo* 5 (2008).

Hägerström, Axel. *Inquiries into the Nature of Law and Morals*. Edited by K. Olivecrona. Translated by C. D. Broad. Uppsala: Almqvist & Wiksells, 1953.

Haggenmacher, Peter. "Le Modèle de Vattel et La Discipline Du Droit International." In *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*, Vol. 9. Graduate Institute of International and Development Studies. Martinus Nijhoff Publishers, 2011.

Haggerty, Kevin D., and Richard V. Ericson. "The Surveillant Assemblage." *British Journal of Sociology* 51, no. 4 (2000).

Hanemann, Alfred. *Wirtschaftliche Und Politische Verhältnisse in Deutsch-Südwest-Afrika*. Berlin: Akademie Verlag, 1905.

Haraway, Donna. "A Game of Cat's Cradle: Science Studies, Feminist Theory, Cultural Studies." *Configurations* 2, no. 1 (1994): 59–71.

———. "Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective." *Feminist Studies* 14, no. 3 (1988): 575–99.

———. *Staying with the Trouble: Making Kin in the Chthulucene*. London: Duke University Press, 2016.

Hardt, Michael, and Antonio Negri. *Empire*. Harvard University Press, 2001.

Hauriou, Maurice. *La Souveraineté Nationale*. Toulouse: Recueil de législation de Toulouse, 1912.

Hay, Colin. "If It Didn't Exist We'd Have to Invent It . . . Further Reflections on the Ontological Status of the State." *The British Journal of Sociology* 65, no. 3 (2014): 487–91.

———. "Neither Real nor Fictitious but 'as If Real'? A Political Ontology of the State." *The British Journal of Sociology* 65, no. 3 (2014): 459–80.

Hegel, Georg Wilhelm Friedrich. *Philosophy of Right*. Translated by S.W. Dyde. Kitchener, Ontario: Batoche Books, 2001.

———. *The Philosophy of History*. Translated by John Sibree. Kitchener, Ontario: Batoche Books, 2001.

———. *The Philosophy of Right*. Translated by T. M. Knox. Oxford: Clarendon Press, 1952.

Heidegger, Martin. *The Question Concerning Technology and Other Essays*. Translated by William Loveitt. New York: Garland Publishing, 1977.

Hobbes, Thomas. *De Cive*. Public Library UK, 1642.

———. *Leviathan*. Reprinted from the Edition of 1651. Oxford: Clarendon Press, 1965.

———. *On the Citizen*. Edited by Richard Tuck and Michael Silverthorne. Cambridge: Cambridge University Press, 1998.

Hobhouse, Leonard T. *The Metaphysical Theory of the State: A Criticism*. Kitchener: Batoche Books, 1999.

Hohmann, Jessie. "Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law." *Leiden Journal of International Law* 34 (2021): 585–606.

Holland, Ben. "Natural Law and the Theory of International Society: Otto von Gierke and the Three Traditions of International Theory." *Journal of International Political Theory* 8, no. 1–2 (2012): 48–73.

———. "Pufendorf's Theory of Facultative Sovereignty: On the Configuration of the Soul of the State." *History of Political Thought* 33, no. 3 (2012): 427–54.

———. "The Moral Person of the State : Emer de Vattel and the Foundations of International Legal Order." *History of European Ideas* 37, no. 4 (2012): 438–45.

———. *The Moral Person of the State: Pufendorf, Sovereignty and Composite Polities*. Cambridge: Cambridge University Press, 2017.

Holmqvist, Caroline. "Undoing War: War Ontologies and the Materiality of Drone Warfare." *Millennium: Journal of International Studies* 41, no. 3 (2013): 535–52.

Hont, István. *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective*. Cambridge, Massachusetts: Harvard University Press, 2005.

Howse, Robert. "Schmitt, Schmitteanism and Contemporary International Legal Theory." In *The Oxford Handbook of the Theory of International Law*, edited by Anne Orford and Florian Hoffman, 213–30. Oxford, 2016.

Hull, Isabel V. *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany*. Ithaca, New York: Cornell University Press, 2013.

———. "Military Culture and the Production of 'Final Solutions' in the Colonies." In *The Specter of Genocide*, edited by Robert Gellately and Ben Kiernan. Cambridge: Cambridge University Press, 2003.

Hunter, Ian. "The Figure of Man and the Territorialisation of Justice in 'Enlightenment' Natural Law: Pufendorf and Vattel." *Intellectual History Review* 23, no. 3 (2013): 289–307.

Hyslop, Jonathan. "The Invention of the Concentration Camp: Cuba, Southern Africa and the Philippines, 1896–1907." *South African Historical Journal* 63, no. 2 (2011): 251–76.

Ingraham, Catherine. *Architecture, Animal, Human: The Asymmetrical Condition*. London: Routledge, 2006.

Intenational Data Spaces Association. "IDSA Rule Book." Berlin, 2020.

International Law Association. "Statement of Principles Applicable to the Formation of General Customary International Law." London Conference, 2000.

International Law Commission. "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law." Geneva: UN General Assembly, 2006.

Jasanoff, Sheila. "Ordering Knowledge, Ordering Society." In *States of Knowledge: The Co-Production of Science and the Social Order*, edited by Sheila Jasanoff. London: Routledge, 2004.

Jasanoff, Sheila, and Sang-Hyun Kim, eds. *Dreamscapes of Modernity: Sociotechnical Imaginaries and the Fabrication of Power*. Chicago: University of Chicago Press, 2015.

Jensen, Casper Bruun, and Atsuro Morita. "Introduction: Infrastructures as Ontological Experiments." *Ethnos* 82, no. 3 (2017): 615–26.

Jessop, Bob. "Towards a Political Ontology of State Power: A Comment on Colin Hay's Article." *The British Journal of Sociology* 65, no. 3 (2014): 481–86.

John of Salisbury. *Policratius*. Edited by C. J. Nederman. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press, 1990.

Johns, Fleur. "From Planning to Prototypes: New Ways of Seeing Like a State." *Modern Law Review* 82 (2019): 833–63.

———, ed. *International Legal Personality*. The Library of Essays in International Law. Surrey: Ashgate, 2010.

Jørgensen, Nina. "State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty." *American Journal of International Law* 108, no. 4 (2014): 722–49.

Jouannet, Emmanuelle. *Emer de Vattel et l'émergence Doctrinale Du Droit International Classique*. Paris: A. Pedone, 1998.

Kantorowicz, Ernst. "Pro Patria Mori in Medieval Political Thought." *The American Historical Review* 56, no. 3 (1951): 472–92.

———. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton, NJ: Princeton University Press, 1957.

———. *The King's Two Bodies: A Study in Medieval Political Theology*. Princeton Classics. Princeton, NJ: Princeton University Press, 2016.

Kelly, Duncan. "Revisiting the Rights of Man: Georg Jellinek on Rights and the State." *Law and History Review* 22 (2004): 493–529.

Kelsen, Hans. *Das Problem Der Souveränität Und Die Theorie Des Völkerrechts: Beitrag Zu Einer Reinen Rechtslehre*. Tübingen: J. C. B. Mohr (P. Siebeck), 1920.

———. "Das Verhältnis von Staat Und Recht Im Lichte Der Erkenntniskritik: Chriften von Hans Kelsen, Adolf Merkl, Alfred Verdross." by H. Klecatsky, R. Marcic, and H. Schambeck. Vienna: Europa Verlag, 1968.

———. "Das Wesen Des Staates." *Internationale Zeitschrift Für Theorie Des Rechts* 1 (1926): 5–17.

———. "Die Funktion Der Verfassung." *Forum* XI (1964): 583–86.

———. *General Theory of Law and State*. Cambridge, Massachusetts: Harvard University Press, 1945.

———. *Introduction to the Problems of Legal Theory*. Translated by Bonnie Litschewski et al. Oxford: Clarendon press, 1992.

———. "The Conception of the State and Social Psychology: With Special Reference to Freud's Group Theory." *International Journal of Psycho-Analysis* 5 (1924): 1–38.

———. "Unrecht Und Unrechtsfolge Im Völkerrecht." *Zeitschrift Für Öffentliches Recht* 12 (1932).

———. *Vom Wesen Und Wert Der Demokratie*. Tübingen: J. C. B. Mohr, 1920.

———. "Zur Theorie Der Juristischen Fiktionen. Mit Besonderer Berücksichtigung von Vaihingers Philosophie Des Als Ob." *Annalen Der Philosophie* 1 (1919): 630–58.

Kennedy, David. "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream." *NYU Review of Law & Social Change* 3 (2007): 641.

Khan, Daniel-Erasmus, and Lando Kirchmair. "'All's Well That Ends Well?'Zum Verbot Der Rassendiskriminierung Im Völkerrecht." In *Rassismus in Geschichte Und Gegenwart: Eine Interdisziplinare Analyse. Festschrift Für Walter Demel*, edited by Sylvia Schraut and Ulrike Paul. Frankfurt: Peter Lang, 2018.

Kingsbury, Benedict. "Infrastructure and InfraReg: On Rousing the International Law 'Wizards of Is.'" *IILJ Working Paper*, InfraReg Series, no. 1 (2020).

———. "Infrastructures and Laws: Publics and Publicness." *International Law and Justice Working Papers* 3 (2021).

Klabbers, Jan. "The Concept of Legal Personality." *Ius Gentium* 11 (2005).

Kleinlein, Thomas. "Christian Wolff: System as an Episode?" In *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, edited by Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit. Oxford: Oxford University Press, 2017.

Korn, Matthias, Wolfgang Reißmann, Tobias Röhl, and David Sittler, eds. *Infrastructuring Publics*. Wiesbaden: Springer VS, 2019.

Korowicz, Marek. *Introduction to International Law: Present Conceptions Of International Law In Theory And Practice*. Dordrecht: Springer Science+Business Media, B.V., 1959.

Koskenniemi, Martti. "Between Coordination and Constitution: International Law as a German Discipline." In *Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory*, edited by Kari Palonen, 15:45–70. Münster, 2011.

———. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2006.

———. "Imagining the Rule of Law: Rereading the Grotian 'Tradition.'" *European Journal of International Law* 30, no. 1 (2019): 17–52.

———. "International Community from Dante to Vattel." In *Vattel's International Law from a XXIst Century Perspective / Le Droit International de Vattel vu Du XXIe Siècle*, edited by Vincent Chetail and Peter

Haggenmacher, Vol. 9. Graduate Institute of International and Development Studies. Martinus Nijhoff Publishers, 2011.

———. "Miserable Comforters: International Relations as New Natural Law." *European Journal of International Relations* 15, no. 3 (2009): 395–422.

———. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge University Press, 2001.

———. "The Politics of International Law." *European Journal of International Law* 1 (1990): 4.

Krisch, Nico. "The Pluralism of Global Administrative Law." *The European Journal of International Law* 17, no. 1 (2006): 247–78.

Krisch, Nico, and Benedict Kingsbury. "Introduction: Global Governance and Global Administrative Law in the International Legal Order." *The European Journal of International Law* 17, no. 1 (2006): 1–13.

Kuhn, Thomas. *The Structure of Scientific Revolutions*. Chicago: University of Chicago Press, 1996.

Lakoff, George and Mark Johnson. *Metaphors We Live By*. Chicago: University of Chicago Press, 2003.

La Mettrie, Julien Offroy. *L'homme Machine*. Paris: Gallimard, 1999.

La Perrière, Guillaume de. *Le Miroir Politique*. Paris: Gallica, 2014.

Laski, Harold. "A Note on M. Duguit." *Harvard Law Review* 31, no. 1 (1917): 186–92.

Latour, Bruno. *Enquête Sur Les Modes d'existence : Une Anthropologie Des Modernes*. Paris: La Découverte, 2012.

———. *La Fabrique Du Droit. Une Ethnographie Du Conseil d'Etat*. Paris: La Découverte, 2002.

———. *Politics of Nature: How to Bring the Sciences into Democracy*. Cambridge, Massachusetts: Harvard University Press, 2004.

———. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford: Oxford University Press, 2005.

———. "Scientific Objects and Legal Objectivity." In *Law, Anthropology, and the Constitution of the Social*, by Alain Pottage. Cambridge: Cambridge University Press, 2009.

Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*. London: Longmans Green, 1927.

———. "The Grotian Tradition in International Law." *British Year Book of International Law* 23 (1946): 1–53.

Leander, Anna. "Parsing Pegasus: An Infrastructural Approach to the Relationship between Technology and Swiss Security Politics." *Swiss Political Science Review* 27, no. 1 (2021): 205–13.

———. "Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program." *Leiden Journal of International Law* 26, no. 4 (2013): 811–32.

Leibniz, Gottfried Wilhelm. *The Monadology*. Translated by R. Latta. PLATO - Philosophy Learning and Teaching Organization, 1898. https://www.plato-philosophy.org/wp-content/uploads/2016/07/The-Monadology-1714-by-Gottfried-Wilhelm-LEIBNIZ-1646-1716.pdf.

Leutwein, Theodor. *Elf Jahre Gouveneur in Deutsch Südwestafrika*. Berlin: Ernst Siegfried Mittler und Sohn, 1907.

Lippmann, Walter. *The Phantom Public*. New York: Routledge, 1993.

List, Christian, and Philip Pettit. *Group Agency: The Possibility, Design, and Status of Corporate Agents*. Oxford: Oxford University Press, 2011.

Livy. *The Early History of Rome*. Translated by Aubrey de Sélincourt. Revised Edition. London: Penguin Classics, 2002.

Luhmann, Niklas. *Law as a Social System*. Edited by Fatima Kastner, Richard Nobles, Richard Schiff, and Rosemund Ziegert. Translated by Klaus A. Ziegert. Oxford: Oxford University Press, 2004.

———. *Social Systems*. Translated by John Bednarz and Dirk Baecker. Writing Science. Stanford, California: Stanford University Press, 1995.

Madley, Benjamin. "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe." *European History Quarterly* 35, no. 3 (2005): 429–64.

———. "Patterns of Frontier Genocide 1803–1910: The Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia." *Journal of Genocide Research,* 6, no. 2 (2004): 167–92.

Maitland, Frederic W. "The Crown as Corporation." In *Maitland: State, Trust and Corporation*, edited by David Runciman and Magnus Ryan. Cambridge: Cambridge University Press, 2012.

———. "Translator's Introduction." In *Political Theories of the Middle Age*, by Otto von Gierke. Cambridge: Cambridge University Press, 1900.

Malcolm, Noel. *Aspects of Hobbes*. Oxford: Clarendon Press, 2004.

Marks, Susan. "State-Centrism, International Law, and the Anxieties of Influence." *Leiden Journal of International Law* 19 (2006): 339–47.

Marx, Karl. *Economic and Philosophic Manuscripts of 1844*. Translated by Milligan. Moscow: Progress Publishers, 1959.

Matheron, Alexandre. *Individu et Communauté Chez Spinoza*. Paris: Les Éditions de Minuit, 1969.

Mayer, Otto. "Die Juristische Person Und Ihre Verwertbarkeit Im Öffentlichen Recht." In *Festgabe Für Paul Laband*. Tübingen: J.C.B. Mohr, 1908.

McGee, Kyle, ed. *Latour and the Passage of Law*. Critical Connections. Edinburgh: Edinburgh University Press, 2015.

Mégret, Frédéric. "L'étatisme Specifique Du Droit International." *Société Québécoise de Droit International* 24, no. 1 (2011): 105–29.

Melleray, Fabrice. "Léon Duguit et Georges Scelle." *Revue d'histoire Des Facultés de Droit et de La Culture Juridique, Du Monde Des Juristes et Du Livre Juridique*, 2001, 45–88.

Merkl, Adolf J., ed. *Festschrift Für Hans Kelsen Zum 90. Geburtstag. Herausgegeben von Adolf J. Merkl, René Marcic, Alfred Verdroß Und Robert Walter*. Vienna: Verlag Franz Deuticke, 1971.

Mertz, Marcel, Marc Jannes, Anna Schlomann, Enza Manderscheid, Christian Rietz, and Christiane Woopen. "Digitale Selbstbestimmung." Cologne: Cologne Center for Ethics, Rights, Economics, and Social Sciences of Health, 2018.

Milanovic, Marko. "State Responsibility for Genocide." *The European Journal of International Law* 17, no. 3 (2006).

Mitchell, Timothy. "The Limits of the State: Beyond Statist Approaches and Their Critics." *The American Political Science Review* 85, no. 1 (1991): 77–96.

Montesquieu. *L'esprit Des Lois*. Paris: Libraire de Firmin Didot Frères, 1844.

Morgan, Karie L. "Remembering against the Nation-State: Hereros' Pursuit of Restorative Justice." *Time & Society* 21, no. 1 (2012): 21–38.

Moyn, Samuel. *The Last Utopia: Human Rights in History*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2010.

Naffine, Ngaire. "The Body Bag." In *Sexing the Subject of Law*, edited by Ngaire Naffine and Rosemary Owens. Holmes Beach, Florida: Gaunt & Sons, 1997.

———. "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects." *The Modern Law Review* 66, no. 3 (2003): 346–67.

Naffine, Ngaire, and Rosemary Owens, eds. *Sexing the Subject of Law*. Holmes Beach, Florida: Gaunt & Sons, 1997.

Nijman, Janne. "'Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium." In *International Law and Religion*, edited by Martti Koskenniemi, Mónica García-Salmones Rovira, and Paolo Amorosa. Oxford: Oxford University Press, 2017.

———. "Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword." *European Journal of International Law* XX, no. XX (2019): 1–10.

———. "Leibniz's Theory of Relative Sovereignty and International Legal Personality: Justice and Stability or the Last Great Defence of the Holy Roman Empire." *New York University School of Law: International Law and Justice Working Papers*, History and Theory of International Law Series, no. 2 (2004).

———. *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*. 1st ed. The Hague: T.M.C. Asser Press, 2004.

Nolte, Georg. "From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Tradtitional Primacy of a Bilateral Conception of Inter-State Relations." *European Journal of International Law* 13, no. 5 (2002): 1083–98.

Nutkiewicz, Michael. "Samuel Pufendorf: Obligation as the Basis of the State." *Journal of the History of Philosophy* 21, no. 1 (1983): 15–29.

O'Donoghue, Aoife. "'The Admixture of Feminine Weakness and Susceptibility': Gendered Personifications of the State in International Law." *Melbourne Journal of International Law* 19 (2018): 227–58.

Olivier, Pierre. *Legal Fictions in Practice and Legal Science*. Rotterdam: Rotterdam University Press, 1975.

Onuf, Nicholas G. "Civitas Maxima: Wolff, Vattel and the Fate of Republicanism." *The American Journal of International Law* 88 (1994).

Orford, Anne. *International Authority and the Responsibility to Protect*. Cambridge: Cambridge University Press, 2011.

———. *International Law and the Politics of History*. Cambridge: Cambridge University Press, 2021.

Ost, François, and Michel van de Kerchove. *De La Pyramide Au Réseau ? Pour Une Théorie Dialectique Du Droit*. Bruxelles: Presses de l'Université Saint-Louis, 2010.

Overeem, Patrick. *The Politics-Administration Dichotomy: Toward a Constitutional Perspective*. 2nd Edition. Boca Raton: CRC Press, 2012.

Palladini, Fiammetta. "Pufendorf Disciple of Hobbes: The Nature of Man and the State of Nature: The Doctrine of Socialitas." *History of European Ideas* 34 (2008): 26–60.

Pardo, Michael S., and Dennis Patterson. *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience*. Oxford: Oxford University Press, 2013.

Parfitt, Rose. *The Process of International Legal Reproduction*. Cambridge: Cambridge University Press, 2019.

Parrochia, Daniel. *Philosophie Des Réseaux*. Paris: Presses Univesitaires de France, 1993.

Penny, H. Glenn, and Matti Bunzi, eds. *Worldly Provincialism: German Anthropology in the Age of Empire*. Ann Arbor: The University of Michigan Press, 2003.

Perelman, Chaim, and Paul Foriers. "Présomptions et Fictions En Droit, Essai Synthèse." In *Les Présomptions et Les Fictions En Droit*. Bruxelles: Bruylant, 1974.

Philippopoulos-Mihalopoulos, Andreas. "Atmospheres of Law: Senses, Affects, Lawscapes." *Emotion, Space and Society* 7 (2013): 35–44.

———. "In the Lawscape." In *Law and the City*. Abingdon: Routledge-Cavendish, 2007.

Pisier, Évelyne. *Le Service Public Dans La Théorie de l'Étatcle Léon Duguit*. Paris: Librairie générale de droit et de jurisprudence, 1972.

Plato. *The Republic*. Translated by P. Shorey. Reprint. Cambridge, Massachusetts: Harvard University Press, 1969.

Pohle, Julia. "Digital Sovereignty. A New Key Concept of Digital Policy in Germany and Europe." Research Report. Berlin: Konrad-Adenauer-Stiftung, 2020.

Pohle, Julia, and Thorsten Thiel. "Digital Sovereignty." In *Practicing Sovereignty: Digital Involvement in Times of Crises*, edited by Bianca Herlo, Daniel Irrgang, Joost Gesche, and Andrea Unteidig. Bielefeld: Transcript Publishing, 2021.

Pool, Gerhardus. *Samuel Maharero*. Windhoek: Gamsberg Macmillan, 1990.

Portmann, Roland. *Legal Personality in International Law*. Cambridge: Cambridge University Press, 2010.

Pottage, Alain. "The Materiality of What?" *Journal of Law and Society* 39, no. 1 (2012): 167–83.

Pound, Roscoe. "Law and the Science of Law in Recent Theories." *Yale Law Journal* 43 (1934).

Pufendorf, Samuel. *Of the Law of Nature and Nations: Eight Books*. Edited by Jean Barbeyrac. Translated by Basil Kennett. 4th Edition. London: Printed for J. Walthoe et al., 1729.

———. *On the Duty of Man and Citizen According to Natural Law*. Edited by James Tully. Translated by Michael Silverthorne. Cambridge: Cambridge University Press, 1991.

———. *The Present State of Germany*. Translated by E. Bohun. Indianapolis: The Online Library of Liberty, 2007. http://oll-resources.s3.amazonaws.com/titles/1890/Pufendorf_1367_EBk_v6.0.pdf.

———. *Two Books of the Elements of Universal Jurisprudence*. Translated by W. Abbott. 1931 Edition. Indianapolis: Liberty Fund, 2009.

Pugliese, Joseph. *State Violence and the Execution of Law: Torture, Black Sites, Drones*. New York: Routledge, 2014.

Reinhold, Theresa. "State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11." *American Journal of International Law* 105, no. 244–286 (2011).

Ricoeur, Paul. *Le Juste*. Paris: Esprit, 2001.

———. *Oneself as Another*. Translated by Kathleen Blamey. Chicago: University of Chicago Press, 1995.

Rigaux, François. "Hans Kelsen on International Law." *European Journal of International Law* 9 (1998): 325–43.

Riley, P., ed. *Leibniz: Political Writings*. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press, 1988.

Ritter-Petersen, Helgine G. *The Herrenvolk Mentality in German South West Africa 1884–1914*. Doctoral Dissertation. Pretoria: University of South Africa, 1991.

Rohrbach, Paul. *Deutsche Kolonialwirtschaft,*. Berlin and Scho¨neberg: Buchverlag der Hilfe, 1907.

Rosser, Christian. "Johann Caspar Bluntschli's Organic Theory of State and Public Administration." *Administrative Theory & Praxis* 36, no. 1 (2014): 95–110.

Rumelili, Bahar. "Integrating Anxiety into International Relations Theory: Hobbes, Existentialism, and Ontological Security." *International Theory* 12 (2020): 257–72.

Runciman, David. *Pluralism and the Personality of the State*. Cambridge: Cambridge University Press, 1997.

———. "What Kind of Person Is Hobbes's State? A Reply to Skinner." *The Journal of Political Philosophy* 8, no. 2 (2000): 268–78.

Rust, Conrad. *Krieg Und Frieden Im Hererolande*. Leipzig: Kittler, 1905.

Saastamoinen, Kari. "Pufendorf on the Law of Sociality and the Law of Nations." In *The Law of Nations and Natural Law 1625–1800*, edited by Simone Zurbuchen. Early Modern Natural Law: Studies & Sources. Leiden: Brill, 2019.

Saccaro-Battisti, Giuseppa. 'Changing Metaphors of Political Structures.' *Journal of the History of Ideas* 44, no. 1 (1983): 31–54.

Salomon, Albert. "Review: Otto Gierke: Natural Law and the Theory of Society, 1500-1800 with a Lecture on the Ideas of Natural Law and Humanity." *American Journal of Sociology* 48, no. 2 (1942): 254–58.

Sands, Philippe. "Twin Peaks: The Hersch Lauterpaht Draft Nuremberg Speeches." *Cambridge Journal of International and Comparative Law* 1 (2012): 37–44.

Santner, Eric L. *The Royal Remains: The People's Two Bodies and the Endgames of Sovereignty*. Chicago: University of Chicago Press, 2011.

Sarkin, Jeremy. *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia*. Westport, Connecticut: Praeger, 2008.

———. *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*. Cape Town: Boydell & Brewer, 2011.

Scelle, Georges. "Le Droit Public et La Théorie de l'État." In *Introduction à l'étude Du Droit*, edited by Léon Julliot de la Morandière, Vol. I. Rousseau, 1951.

———. *Précis de Droit Des Gens : Principes et Systématique*. 2 vols. Paris: Sirey, 1932.

Scheuler, Peter. *Die 'Eingeborenen' Deutsch-Südwestafrikas: Ihr Bild in Deutschen Kolonialzeitschriften von 1884 Bis 1918*. Cologne: Rüdiger Köppe Verlag, 1998.

Schindler, Dietrich. "J.C. Bluntschli's Contribution to the Law of War." In *Promoting Justice, Human Rights and Conflict Resolution through International Law / La Promotion de La Justice, Des Droits de l'homme et Du Règlement Des Conflits Par Le Droit International*, edited by Marcelo Kohen. Leiden: Brill, 2006.

Schlag, Pierre. *The Enchantment of Reason*. Durham: Duke University Press, 1998.

Schmitt, Carl. *Hamlet Or Hecuba: The Intrusion of the Time Into the Play*. Translated by Simona Draghici. Plutarch Press, 2006.

———. *Le Nomos de La Terre*. Paris: Presses Univesitaires de France, 2001.

———. *Political Theology: Four Chapters on the Concept of Sovereignty*. Translated by George Schwab. Chicago: University of Chicago Press, 2005.

———. *The Concept of the Political*. Translated by George Schwab. Expanded Edition. Chicago: The University off Chicago Press, 2007.

———. *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. Global Perspectives in History and Politics. London: Greenwood Press, 1996.

———. *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*. Translated by Alfred Clement Goodson. Berlin: Duncker & Humblot, 1963.

Schramm, Bérénice. *La Fiction Juridique et Le Juge: Contribution à Une Autre Herméneutique de La Cour Internationale de Justice*. Bruxelles: Bruylant, 2018.

Scott, James C. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press, 1999.

Searle, John. *Making the Social World: The Structure of Human Civilization*. Oxford: Oxford University Press, 2010.

Shapin, Steven, and Simon Schaffer. *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life*. 2nd ed. Princeton, NJ: Princeton University Press, 2011.

Shibles, Warren A. *Metaphor: An Annotated Bibliography and History*. Whitewater, Wisconsin: The Language Press, 1971.

Shilliam, Robbie. *German Thought and International Relations: The Rise and Fall of a Liberal Project*. New York: Palgrave Macmillan, 2009.

Skinner, Quentin. "A Genealogy of the Modern State." In *Proceedings of the British Academy*, 162:325–70. The British Academy, 2009.

———. "Hobbes and the Purely Artificial Person of the State." *The Journal of Political Philosophy* 7, no. 1 (1999): 1–29.

———. "Meaning and Understanding in the History of Ideas." *History and Theory* 8, No. 1 (1969): 3-53.

———. "The Limits of Historical Explanations." *Philosophy* 41, No. 157 (1966): 199–215.

———. "The Sovereign State: A Genealogy." In *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*. Edited by Hent Kalmo and Quentin Skinner. Cambridge: Cambridge University Press, 2014.

———. "The State." In *Political Innovation and Conceptual Change*, edited by Terrence Ball, James Farr, and Russel L. Hanson. Cambridge: Cambridge University Press, 1989.

———. "Thomas Hobbes: Picturing the State." Presented at the Public Lecture at Uppsala University, Uppsala, Sweden, January 24, 2018. https://www.youtube.com/watch?v=YPxvfoVqqH4&.

———. *Visions of Politics Volume 2: Renaissance Virtues*. Cambridge: Cambridge University Press, 2002.

Smith, Helmut W. "Talk of Genocide." In *The Imperialist Imagination: German Colonialism and Its Legacy*, edited by Sara Friedrichsmeyer, Sara Lennox, and Susanne Zantop. Ann Arbor, Michigan: University of Michigan Press, 1998.

Sousa Santos, Boventura de. "Law: A Map of Misreading. Toward a Postmodern Conception of Law." *Journal of Law and Society* 14, no. 3 (1987): 279–302.

Spinoza. "A Political Treatise." In *The Chief Works of Benedict de Spinoza*, translated by R. H. M Elwes. George Bell and Sons, 1891.

Spinoza, Benedict de, and R. H. M Elwes. *The Ethics*. The Project Gutenberg, 2001.

Stapelbroek, Koen, and Antonio Trampus, eds. *The Legacy of Vattel's Droit Des Gens*. Cham: Palgrave Macmillan, 2019.

Star, Susan Leigh. "The Ethnography of Infrastructure." *American Behavioral Scientist* 43, no. 3 (1999): 377–91.

Star, Susan Leigh, and Anselm Strauss. "Layers of Silence, Arenas of Voice: The Ecology of Visible and Invisible Work." *Computer Supported Cooperative Work* 8 (1999): 9–30.

Steinberg, Justin. "Spinoza's Political Philosophy." In *The Stanford Encyclopedia of Philosophy*, 2008. https://plato.stanford.edu/entries/spinoza-political/#TracPoli.

Steinmetz, George. "From 'Native Policy' to Exterminationism: German Southwest Africa, 1904, in Comparative Perspective." *UCLA: Department of Sociology*, Theory and Research in Comparative Social Analysis, 2005. https://escholarship.org/uc/item/11z1k021.

Stoler, Ann Laura. *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*. Berkeley: University of California Press, 2010.

Stolleis, Michael. *Public Law in Germany, 1800-1914*. Oxford: Berghahn Books, 2001.

Stone, Dan. "White Men with Low Moral Standards? German Anthropology and the Herero Genocide." *Patterns of Prejudice, Institute for Jewish Policy Research* 35, no. 2 (2001): 33–45.

Straumann, Benjamin. "The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality." *Journal of the Philosophy of History* 14 (2020).

Suárez, Francisco. *On Efficient Causality: Metaphysical Disputations 17, 18, and 19*. Translated by Alfred J. Freddoso. New Haven: Yale University Press, 1994.

Sutter, Laurent de. "Plasma! Notes on Bruno Latour's Metaphysics of Law." In *Latour and the Passage of Law*, edited by Kyle McGee. Critical Connections. Edinburgh: Edinburgh University Press, 2015.

Telman, Jeremy. "The Reception of Hans Kelsen 's Legal Theory in the United States: A Sociological Model." *L'Observateur Des Nations Unis, Valparaiso University Valparaiso University Legal Studies Research Paper No. 08-03*, 2008.

Teubner, Gunther, ed. *Autopoietic Law: A New Approach to Law and Society*. Berlin, New York: Walter de Gruyter, 1988.

———. "Global Bukowina: Legal Pluralism in the World-Society." In *Global Law Without a State*, edited by Gunther Teubner. Dartmouth: Brookfield, 1997.

———, ed. *Law As an Autopoietic System*. Hoboken, New Jersey: Blackwell Publishing, 1993.

———. "Rights of Non-Humans? Electronic Agents and Animals as New Actors in Politics and Law." *Journal of Law & Society* 33 (2006): 497–521.

———. "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy." *Law & Society Review* 31, no. 4 (1997): 763–88.

———. "The Many-Headed Hydra: Networks as Higher-Order Collective Actors." In *Corporate Control and Accountability: Changing Structures and the Dynamics of Reguations*, edited by Joseph McCathery, Sol Picciotto, and Colin Scott. Oxford: Oxford University Press, 1993.

———. "The Two Faces of Janus: Rethinking Legal Pluralism." *Cardozo Law Review* 13, no. 5 (1992): 1143–1462.

The California Law Review, ed. *Essays in Honor of Hans Kelsen Celebrating the 90th Anniversary of His Birth*. South Hackensack: Fred B. Rothman & Co., 1971.

Thirlway, H. W. A. *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law*. Leiden: A.W. Sijthoff, 1972.

Thompson, Edward P. "Patrician Society, Plebeian Culture." *Journal of Social History* 7, no. 4 (1974): 382–405.

Tollefsen, Deborah. "Collective Intentionality and the Social Sciences." *Philosophy of the Social Sciences* 25 (2002).

Tuck, Richard. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford: Oxford University Press, 1999.

———. *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge University Press, 2016.

Vattel, Emer. *Le Droit Des Gens, Ou Principes de La Loi Naturelle*. Indianapolis: Liberty Fund, 1758. https://oll.libertyfund.org/titles/vattel-le-droit-des-gens-ou-principes-de-la-loi-naturelle-vol-1.

Vedder, Henrich. *South West Africa in Early Times: Being the Story of South West Africa up to the Date of Maharero's Death in 1890*. Translated by Cyrill Hall. London: Routledge, 1966.

Vick, Brian. "The Origins of the German Volk: Cultural Purity and National Identity in Nineteenth-Century Germany" 26, no. 2 (2003): 241–56.

Vollenhoven, Cornelis. *Die Drei Stufen Des Völkerrechts*. The Hague: Martinus Nijhoff, 1919.

Warner, Marina. *Monuments and Maidens: The Allegory of the Female Form*. Berkeley: University of California Press, 2000.

Weber, Cynthia. "Review: A Genealogy of Sovereignty. By Jens Bartelson." *The American Political Science Review* 91, no. 1 (1997): 228–29.

Weber, Klaus A. E. "Kolonialismus Und Rassismus in Der Alltagsküche." Heimat- und Geschichtsverein für Heinade-Hellental-Merxhausen e.V., 2022. https://hgv-hhm.de/cms/front_content.php?idart=1545.

Weinstein, Joshua I. *Plato's Threefold City and Soul*. Cambridge: Cambridge University Press, 2018.

Wendt, Alexander. "How Not to Argue against State Personhood: A Reply to Lomas." *Review of International Studies* 31, no. 2 (2005): 357–60.

———. *Social Theory of International Politics.* Cambridge: Cambridge University Press, 2001.

———. "The State as Person in International Theory." *Review of International Studies* 30, no. 2 (2004): 289–316.

Wiener, Norbert. *Cybernetics: Or Control and Communication in the Animal and the Machine*. Cambridge, Massachusetts: MIT Press, 2019.

Wilcox, Lauren B. *Bodies of Violence: Theorizing Embodied Subjects in International Relations*. Oxford: Oxford University Press, 2015.

———. "Dying Is Not Permitted: Guantánamo Bay and the Liberal Subject of International Relations." In *Bodies of Violence*. Oxford Studies in Gender and International Relations. Oxford: Oxford University Press, 2015.

———. "Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare." *Security Dialogue* 48, no. 1 (2016): 11–28.

Wolff, Christian. "Ius Gentium Methodo Scientifica Pertractatum." In *The Classics of International Law*, edited by James Brown Scott, translated by Joseph H. Drake. Oxford: Clarendon Press, 1934.

———. *Ius Gentium Methodo Scientifica Pertractatum*. Edited by James Brown Scott. Translated by Joseph H. Drake. The Classics of International Law. Oxford: Clarendon Press, 1934.

Zimmerer, Jürgen. "Colonialism and the Holocaust." In *Genocide and Settler Society*, edited by Dirk Moses, translated by Andrew H. Beattie. New York: Berghahn Books, 2004.

———. "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination." *Patterns of Prejudice* 39, no. 2 (2005): 197–219.

Zimmerman, Andrew. "Adventures in the Skin Trade: German Anthropology and Colonial Corporeality." In *Worldly Provincialism: German Anthropology in the Age of Empire*. Ann Arbor: The University of Michigan Press, 2003.

Zurbuchen, Simone. "Emer de Vattel on the Society of Nations and the Political System of Europe." In *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, edited by Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit. Oxford: Oxford University Press, 2017.