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# *Convergences and Divergences in European International Law Traditions*

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## **Abstract**

*This paper attempts to justify the claim that there are profound differences in the conception of the system of international law in the textbooks of various European countries. This is despite considerable cooperation among distinguished jurists in the context of the European Union and the International Court of Justice. The paper undertakes an inevitably controversial account of the method of a leading French textbook on international law alongside a leading German textbook, while placing them both in the context of a more representative selection of textbooks from the two countries. A method of comparative analysis is then used which draws from political theory to highlight more systematically the intellectual context of the two works. The conclusion is that the resolution of the differences between the two works rests outside the discipline, when understood strictly, in so far as they are rooted in divergences of traditions of state and nation. These can only be resolved as a matter of political decision in favour of 'an ever closer union' of European states. There are great strengths in both works and European intellectual traditions should be well able to accommodate them in a new synthesis, given a will to closer political union.*

## **1 Introduction**

In the context of the search of the European Union for a common foreign and defence policy it becomes interesting both from a theoretical and from a practical perspective to approach the discipline of international law to see if there are perspectives of method and substance which converge or differ among the various member states of the European Union. In this short paper it will be suggested that major differences, particularly between some French and German textbook writers, are attributable to different understandings of the nature of the state and its relation to its nation or population. Once these states become part of a common European federal state, the real foundation of the differences in method might disappear.

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Many further remarks concerning the methodological assumptions of this work are necessary. Two countries are chosen, apparently at random, France and Germany (including Austria). Many more are important. The Tower of Babel which is Europe remains a whirlwind of languages where pigeon English, and maybe pigeon French, give a misleading impression of levels of comprehension. Monolingualism is an immense danger in producing distortions of cultural understanding. The ambition here is to insist upon a reciprocity of cultural-linguistic understanding. It is simply inadequate to limit oneself to two countries. However, the present scope of the study does confront the increasing division between the French and the English language and the simple absurdity, within Europe, of the continued ignorance of the German language. Not enough attention is given to the problem of construction of identity in the absence of a common *maternal* language, where working translations are the norm. As clear a proof as can be needed can be given in terms of the virtual ignorance of European international lawyers of one another's international law traditions, an ignorance which is increasing.

A fundamental feature of the method of the study is to focus on manuals or textbooks of international law. What is of greatest interest is to see how the system of international law is constructed. This is the best way to grasp the nature of the juridical method which is being employed. It cannot be demonstrated in the space of an article that the choice of authors is representative. That requires a much larger work. However, the works chosen can be related to differing national traditions. They are more individual and original than the other collective and re-edited works. As such, and this is the decisive factor, it is quite easy to unravel the spirit of the works, even if contradictory.

This much said, it is intended to divide the presentation into two parts. The first will be more general and consider a methodological theme with respect to the textbooks of the two chosen countries. A consideration will be given to the rubrics of the state, the sources of law, and a particular methodological point, how the issue of the use of force is discussed. In the second part there will be an in-depth study which will focus on aspects of how two traditions are constructed, one German and one French. Here the ambition will be to go beyond attempting to illustrate that there are differences and that these differences of method and substance are both significant and coherent. While abandoning to some extent the claim of representability, for reasons of space, the aim will be to explore in depth and to challenge the national intellectual traditions. This will highlight a thesis that there may well be rather a superficial dimension to the hopes of European convergence — the principle that ignorance is bliss. The differences among international lawyers are profound and their resolution rests far outside their competence, because the differences are rooted in divergences of traditions of state and nation which can only be resolved as a matter of political decision in favour of 'an ever closer union' of European states.

It might appear that one theme so unites the textbooks that there should be no need to pursue differences whether of method or of substance. It is that international law rests on the consent of states and consists of the rules which they agree to apply in their relations with one another. All textbook writers agree to a certain formulation of

these propositions. It might also appear that such a consensus renders theory superfluous. For instance, why then ask the question whether international law is binding or even whether it exists?

These questions are not to be asked simply because we can see that states consider rules qua legal rules do exist, that they do accept that they have to conform their behaviour to these rules. This apparent consensus may be taken to rest on the Western liberal belief, more easily expressed negatively, that law can hardly have any other binding character than that traced back to consent. So, what unites the manual writers from the two countries — indeed it would lead one to question whether there are distinctive traditions — is greater than what divides them.

However, if one approaches more fully what the authors say about the bases (grounds) and sources (validity) of international law, it appears that they do not stop with the statement: states accept there is a law, but appear, perhaps not fully explicitly in some cases, to set themselves, as legal scientists, tests as to whether international law is law, and then they proceed, in different ways, to give answers which are only in varying degrees positive and which have marked implications not only for the bases of the law but also for the sources.

## 2 Themes and Methods

### A Germany

The textbook *Universelles Völkerrecht* (1984 edition) by Alfred Verdross and Bruno Simma is widely regarded as a most authoritative statement of German/Austrian international law doctrine during the time of the Federal Republic of Germany of 1949–1989. It is at present not a dominant textbook in use in German law faculties, partially because as a source of reference it is sharply dated. Much greater place is given to two important collective works, *Völkerrecht*, edited by Ipsen, and *Völkerrecht*, edited by Vitzthum.<sup>1</sup> While it is not possible within the span of an article to demonstrate very precisely the representative character of *Universelles Völkerrecht*, nonetheless Verdross and Simma are thought to reflect two features of Germany's situation which continue to be prominent and which are not exactly in harmony. First, there is its total commitment to the multilateralism of the United Nations as a constitution of the world community as well as the deep commitment to cosmopolitan

<sup>1</sup> Knut Ipsen (ed.), *Völkerrecht* (4th ed., 1999); and Wolfgang Graf Vitzthum (ed.), *Völkerrecht* (1997, with a second edition in preparation). Throughout this article, account will be taken of the positions presented in these works, bearing in mind, at the same time both their collective and reference (informational) character.

values in the Kantian tradition of German normative political theory.<sup>2</sup> Secondly, there is a commitment to the distinctively German view of the nature of the nation/*Volk* and its relationship to the state. This is an ethnic nation, which, at the time, did not enjoy full self-determination because of the partition of the country.

To consider, first, the cosmopolitan aspect of the work, the treatment will not be comprehensive, because both Schieder and Capps return to this to explore its philosophical foundation and test its viability. I wish only to stress the importance of the approach for the quite concrete positions taken by the authors with respect to the use of force in relations among states. This is typical of German writing and is rooted in an idealist vision of the UN Charter.

For Verdross and Simma the consent of states is in fact not enough to ground international law. It is asserted (para. 76) that it is not possible to have an inter-individual law. There must be something built in and pre-supposed which binds the subjects of law and stands over them. So, the Constitution of an international community rests not on a formal treaty but on a *formlosen Konsensus* whereby states recognize each other as equal and subject to, especially, original norms necessary for the creation of further law. Verdross and Simma accept that a Hobbesian view of law, that states make stipulations which they then stand over, leaves the law in the suspended form of an *ought/sollen*. So the problem of classical political theory, that is, of a theory which belongs to a common European tradition, is recognized by Verdross and Simma: how to overcome the state of nature and enter civil society, the fundamental feature of which is that unilateral, subjective use of force by states is excluded.<sup>3</sup> It is a matter of overcoming the problem of the heterogeneous will of different sovereigns which will continue to be present even if there is a formal agreement among states, simply because they remain independent and in this sense have the power to ‘stand above their agreements’. Verdross and Simma accept this as a challenge for them as international lawyers, even though many would regard it as a matter of political theory.

The (perhaps) dramatic and confusing part of the argument of Verdross and Simma is precisely how or in what sense this transition from pre-civil to civil society has taken place in international society. The straight claim is made (para. 21) that Kant’s solution, the *Völkerbund* — where each state has its security not from its own power and will but from the solidarity of an international institution — is made positive law in the United Nations Charter. Kant’s is no normative idea, no mere *ought/sollen* any

<sup>2</sup> Verdross died in 1980 and the 1984 edition was the work of Bruno Simma who went on to be accepted as the editor-in-chief of the German commentary on the UN Charter, called *The Charter of the United Nations*, which contains contributions by virtually every German university professor of international law. Schieder elaborates more fully on Kant and contemporary German international relations theory in a separate article in this issue of *EJIL*.

<sup>3</sup> Capps deals comprehensively with this issue in a separate article in this issue of *EJIL*.

more, but is recognized as a purposive goal by states. This language, as used by Verdross and Simma, comes very close to Kant's idealist categorical imperative.<sup>4</sup>

What do these legal claims mean? They attach to Articles 1 and 2 of the Charter and to its Preamble. Yet Verdross and Simma do not deny (paras 99–101) the organizational defects of the Charter, that it is not a World State and that it does not even have an effective executive force. What is probably being said is that the character of international law as such (para. 34) has to make of the UN Charter a constitution of the international community. The particular state is not submitting to a heterogeneous will in so far as 'die sich zu einer auf Grund des Völkerrechts bestehenden Staatenverbindung vereinigen'. They do not lose their legal position as full, equal subjects of law as they remain, individually, directly under international law, i.e. not under one another.

Verdross and Simma say (paras 45–51) that while most obligations are relative, it has to be said that there can be no legal community unless there are norms which are absolutely valid. Even if states are built outside the inter-state community (rather than created by it) such states 'durch ihre Annerkennung des universellen Völkerrechts zu Gliedern der universellen Völkerrechtsgemeinschaft geworden sind'. The authors' answer appears to be metaphysical rather than political.<sup>5</sup> Their *formlosen Konsensus* refers not to what is agreed, the law resting on consent, but distinguishes what such norms presuppose. Commenting upon classical law of nature doctrines of the fundamental rights of states (e.g. of Pillet), they say (para. 77) there are no pre-social rights. Before one concedes the existence of the international law community, no international law rights can exist. So (para. 75), when states recognize each other as equal members of the community, they presuppose original norms which are the basis of the law and of the creation of further law, namely, subject-hood, good faith etc. Therefore the so-called primitive Hobbesian sovereignty of states is firmly reined in by the constitution of international society.

When it comes to consideration of the circumstances in which it is permissible to use force, Verdross and Simma treat the normative prescriptions of the Charter (Articles 2(4) and 51) as virtually absolute, supported by the 1965 UN General Assembly Declaration on Intervention and the 1970 Declaration of Principles of Friendly Relations Among States. Article 51 is taken (para. 1337) to exclude military action to defend one's citizens abroad. The Congo (1961) and Entebbe incidents do not constitute precedents to the contrary. One cannot argue that, simply because the UN is inactive, unilateral action is, somehow, legal. The prohibition of forceful self-help

<sup>4</sup> It is thought that such a strong position provides the motive for the huge undertaking which is Simma's edited work on the UN Charter. At the same time, in his long introduction to his *Völkerrecht*, 'Begriff, Geschichte und Quellen des Völkerrechts', Vitzthum does not endorse the idea of an overall system of international law. Many basic areas are not regulated (section 1.48) and the state's monopoly of force has not passed to international organizations (section 1.21).

<sup>5</sup> In Vitzthum's *Völkerrecht*, the chapter on international organization by Eckart Klein is premised on functionalism. At international and regional levels the interests of states can be organized and coordinated through inter-state organization (sections 4.1–4.11). In Ipsen's work the contribution by Volker Epping on international organization may be described alternatively as strictly positivist or as simply a thorough information base of the different types of organization in existence (chapter 7).

(para. 467) is the most basic development of the law at present. There can be (para. 469) no justification for a doctrine of necessity. There has to be an armed attack to which a response is then made. The failure (para. 473) of another state to protect one's citizens against attack abroad does not equal armed attack under Article 51. Citizens are not external positions of their countries. Also excluded are any armed humanitarian interventions, except through a decision of the Security Council. Bowett's idea (para. 480) that reasonable reprisals cannot be condemned because not condemned by the Security Council does not follow because this failure is politically motivated. The Court in the *Corfu Channel Case* says that such a failure by the Security Council makes no legal difference.<sup>6</sup>

The second fundamental theme of *Universelles Völkerrecht* promises to bring the text into contradiction with itself.<sup>7</sup> The discussion of the elements of statehood in the text does not have to conflict with the explanations which bind Germany into an international legal order. However, the relationship between state and nation is distinctive. Verdross and Simma argue (para. 380) that a state is not simply an association of people for individual goals, but is, once again, a *civitas perfecta* of those belonging to it, which provide the state the primary basis of its authority, a personal rather than a territorial jurisdiction. A population of a state must be a permanent association of people tied together by blood.<sup>8</sup> The state territory is not simply the spatial dimension of the jurisdiction of the state, but the secured space (*den gesicherten Raum*) of the people, which has organized itself into a state (para. 380). The root of the authority of the state is the *personality principle* of Germanic law, whereby every member of the tribe (*Stamme*) is under the authority of the legal order of its community. The authority of the state over everyone on its territory is becoming more important but *it cannot push into the background* the personal dimension which is the most important to the state, an association of persons based upon personal loyalty between the state and the nation (*Staatsvolk*) (para. 389). The authors stress sharply exactly what they are saying. Naturally it would be possible to have a purely territorial view of the drawing of the boundaries of the world, but then there would be no *Heimatstaaten* and no *Staatsangehörige*, both concepts which suppose the attachment of particular people to one another and to a place. Without this dimension the state

<sup>6</sup> In Vitzthum's *Völkerrecht* the treatment of the use of force by Michael Bothe corresponds substantially, i.e. in chapter 7, 'Friedenssicherung und Kriegsrecht'.

<sup>7</sup> There is no explicit treatment of the possible contradiction. However, in the next section, the analysis of Döhring's work will suggest that the two parts present different paradigms to confront different problems.

<sup>8</sup> 'Bei einem Staatsvolk muss es sich um einen dauerhaften Personenverbund handeln, der in der Geschlechterfolge fortlebt ...' Different from standard British and French definitions. The authors cite a German court case which refers to the celebrated strong concept of the population as a *Schicksalsgemeinschaft* (a community of destiny).

would not be the organization of a people but an administrative region of a world state.<sup>9</sup>

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

Much later in the manual (para. 509) there is an extensive consideration of the principles of respect and promotion of the right of self-determination of peoples. In terms of a common European history the oppression of one people by another begins with the Dutch and the Spaniards in the early seventeenth century. Oppression by one people of another leads to the latter insisting on withdrawing from the political community which it constitutes with the former. When India claimed in its ratification of the Covenant of Civil and Political Rights, with respect to Article 1 which refers to the right of self-determination of peoples, that it applied only to people under a foreign jurisdiction and not to countries already independent, the Federal Republic replied formally in August 1980 that the right of self-determination is valid 'für alle Völker und nicht nur für Völker unter Fremdherrschaft'. Any restriction is contrary to the clear expression of the Covenant (para. 510). The central idea is that where a people (*Volkgruppe*) suffers discrimination, with the result that the people is no longer represented fully, the sense also of the 1970 Declaration of Friendly Relations Among States applies. There no longer exists a government which represents the entire people in an equal manner. Examples are Bangladesh and Northern Ireland. Article 1(4) of the 1977 First Protocol to the Geneva Conventions of 1949 reaffirms the right of military resistance on the part of discriminated peoples. The only restriction the authors seem to allow in their argument is that it can happen that certain peoples are so small that they will, in any case, only seek autonomy (para. 512). They accept that the United Nations practice opposes what they are

<sup>9</sup> It is here that the collective and reference character of the other textbooks present problems. In Ipsen's work, chapter 2, on the state as the normal subject of international law, stresses the unity of a state not in terms of language, culture or religion etc., but simply their living together under a common legal system (para. 5). However, the long chapter 6 on peoples ('Völker im Völkerrecht') by Hans-Joachim Heintze is much closer to the main text, especially para. 27.4.

saying. Once exercised the right of self-determination is exhausted in the UN view. However, such a perspective ignores the well-known history of how the post-colonial states were constructed in disregard of ethnic distinctions. More fundamentally, the notion of the exhaustion of a right once exercised, has no scientific basis.<sup>10</sup>

## B France

Combacau and Sur offer a very strong contrast to these German visions.<sup>11</sup> Again the question arises: why this work? The answer has to do with the appropriateness of the book for the general spirit of French foreign policy and the dominant place of the French state in thinking about both law and foreign affairs. If multilateralism remains a major part of German thinking, maintaining the grandeur of the French state as a world power is a cornerstone of French thinking. This position has two aspects which make it very complex. The primary aim is to assert the independence of the French State (with a capital S) but in France's reduced post-war situation this is best achieved by harnessing a strong European Union to French ends, a fundamental aspect of which includes opposition to American, and, if need be, American–British hegemony. Binding associations are necessary and law, especially treaty law, has a part to play in creating them, but their aim is to augment national strength and profile. By their nature they can claim no universal or absolute normative value. They are competitive and retain their individualistic character even at a collective level. So it is recognized that beyond a European Union which is driven forward under French impetus, international society is dominated by conflicts of interest which can easily become threatening to national security and which are not effectively mediated by international organizations such as the United Nations or the International Court of Justice.<sup>12</sup> The textbook by Combacau and Sur provides a consistent and penetrating

<sup>10</sup> This has remained a virtually standard German position if one considers the whole chapter by Heintze, 'Völker im Völkerrecht', cited above, which is a systematic, 40-plus pages treatment. While Heintze regards appeal to an external right of self-determination as exceptional, compared to the preservation of the territorial integrity of states, he gives general grounds for the exercise of the right. In contrast, in Vitzthum's work in the relevant chapter, chapter 3, Kay Hailbronner in 'Der Staat und der Einzelne als Völkerrechtssubjekte' dismisses the legal character of a right to self-determination in less than one page (sections 3.24–3.25). At the same time, he recommends a practical conflict-prevention strategy in the face of demands of collective groups. Appropriate autonomy measures can anticipate conflict between a state and its minorities (sections 3.26–3.29). This approach is grounded in a functionalist assumption that stable state structures should ensure a law of international relations which guarantees individual and, where appropriate, minority group rights (sections 3.4–3.6).

<sup>11</sup> In Jean Combacau and Serge Sur, *Droit International Public* (1st ed., 1993) (the one used here unless otherwise stated). There is now a fourth edition of 1999.

<sup>12</sup> These perspectives of French foreign policy elites are culled from two volumes: Marie-Christine Kessler, *La Politique Étrangère de la France, Acteurs et Processus* (1999) especially at 153–165; and Maxime Lefebvre, *Le Jeu du Droit et de la Puissance: Précis de Relations Internationales* (1997) especially at 68, 72, 105, 123–130, 151, 158–160 and 192–205. Both of these authors retain close links with the Institut des Sciences Politiques in Paris, the pathway for students, through their examinations, for the École National d'Administration and the Ministry of Foreign Affairs. I have also explored the impact of these themes on French international law doctrine in numerous articles, and, in particular, in 'L'Union européenne à la recherche d'un droit des relations extérieures', in Alain Fenet and Anne Sinay-Cytermann (eds), *Union Européenne: Intégration et Coopération* (1995) 245–256.

analysis of law, the state and international affairs which appears rather close to this vision of France in international society.

Clearly, Combacau and Sur believe there is an international law which, again, rests on consent. The law is treated as a standard of conduct for states. The difficulty is in pinning down in what sense states observe it, i.e. under what circumstances and to what extent. In this essay the quite limited aim, given the context of possible cooperation with Germany, is to highlight the questions: whether there is an international legal constitution, what is the nature of the state, its relation to the nation and the consequences of such analysis for the use of force, particularly in the context of claims for self-determination of peoples.

In the view of these authors (pp. 28–29) if a state commits itself to a rule it is because it needs a regulated conduct, on the part of others, which it can only have by allowing itself to be regulated. The risk of deregulation is for it a powerful restraint on its emancipating itself from the rules which it consents to have imposed. Reciprocity means that one qualifies one's own act as a response to another act. This thereby follows a logic of subjectivity which underlies the whole system. Because of the lack of hierarchy of norms (p. 28) states recognize that no act can be declared invalid objectively, as each state can literally camp on its own position. It can pretend to its own representation of acts and situations, and this representation remains subjective as far as any third person is concerned. The definitions of the objective and the subjective which Combacau and Sur use are taken from their understanding of French public law. That is (p. 19), the objectivity of internal or domestic law rests on the distance of the power of the state from the individuals who are equal before it. A law has been made objectively because it has been made without the consent of the individuals who are equal before it (pp. 20–22). Hence international law (p. 23) by its very nature ignores the phenomenon of power. The individual interests of states do not (p. 24) represent a public interest. Objective law, that is, constitutional law, does not exist at the international level. That is, there is no equivalent to the state as a guarantor of law, which can designate (determine) the significance of juridical acts or facts (situations).

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

Despite the United Nations Charter (p. 75) one has in international law only legal acts by states without any systematic links between them. Rather than a system of law there are only a series of international engagements proper to each state, which

represent only an external projection of its internal law. So, Combacau and Sur argue that a central place among the institutions of international law belongs to the *acte juridique unilatérale*, as a projection of one's own view, to be accepted by others, keeping oneself free of inconvenient external rules. This is not affected by the fact that the unilateral push to power can take on a collective character. The numbers of states involved does not change the subjective character of their engagement.

This entire analysis makes little sense unless one explores further the concept of the state, and hence of law, which underlies it. While both are firmly rooted in a European tradition which is not exclusively French, namely, Hobbesianism, nonetheless Hobbesianism is receiving at present its most explicit, and maybe lucid, exposition among these French authors. In virtually 100 pages Combacau sets out the implications of his understanding of the state for international law. His starting point is that the history of the state is not a legally justiciable matter. There is an almost mysterious character about the origins of the state. The fact of the state is taken to have come before the theory of the state, in the history of the sixteenth and seventeenth centuries (pp. 265–268). He says of those who have originally founded the state 'ce sont eux qui . . . ont fait dériver de leur propre idée de l'État des règles légales concernant son mode de formation; leur propre naissance n'est donc pas justiciable . . .' (p. 265). According to international law the elements which define a state are government, territory or population. However, it is necessary not to confound the conditions for the emergence of the state with the institutions which are proper for the functioning of a state once effectively constituted. This means, effectively, that the elements are necessary to determine whether a state has come into existence, but international law need not concern itself with them afterwards. To confuse the two dimensions of the state just mentioned 'C'est prendre son avoir pour son être.' It is the actual corporate character of the state which counts. A state as a structure is inconceivable (p. 268) if it does not have a constitution which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity (*les agissements du fait du corps social*) constitutes already, can be imputed to the legal corporative body (*corps de droit*) which it claims to become (p. 268). What is missing from this analysis is a clear statement as to why and in what senses it does not matter to international law how the *corps social* becomes a *corps de droit*.

However, the reasoning can be pieced together from other parts of the work by both authors. Sur says of the relationship between state and nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. The law prefers the stability of frontiers to their being put in question and it prefers to guarantee the rights of minorities to allowing secession (p. 73). Sovereignty itself signifies a power to command. As Combacau says (p. 226) sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginning of the institutions of the state are a matter of fact because, by definition, the state does not

pre-exist them — that is, the institutions have not come into being by a constitutional procedure. They may claim a legitimacy from a struggle which the collectivity has led against a state which it judges oppressive, but international law is indifferent to the internal organization of collectivities. Nothing requires that organs be representative, but merely that they have power ‘de quelques moyens qu’ils aient usé pour le prendre et qu’ils usent pour l’exercer’ (p. 269).<sup>13</sup>

Once so constituted the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements which compose it. It is this reasoning which allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the consequence that the greater or lesser modification of the spatial basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognized (pp. 219–220).

Combacau does play further with the notion that the formation of a state is a matter of fact. He says that this is true, but in a sense such is equally true of a national legal system. The question remains how facts acquire legal significance. It is when the law states that they have it — and the same is true of international law. It is international law which decides that the elements of a state acquire the legal

<sup>13</sup> This theory of the state, it will be argued in the next section, is, in terms of the history of the theory of the state, early modern, absolutist in character. As it is the lynch-pin of the whole presentation of a French position, in the sense that both an epistemology of law and particular rules on the use of force are seen to follow from it, it is essential to consider whether the views of these authors are unrepresentative of their international law colleagues in France. In Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public* (6th ed., 1999), the authors say that for the definition of the elements of a state, among the terms population, nation and people, only the first is accepted. Disagreement is total on the meaning of the term ‘nation’. The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination, would be unlimited territorial claims. Once a state is created, it confiscates the rights of peoples (at paras 267 and 407–408). In the recent collective volume edited by Denis Alland, *Droit International Public* (2000), Hervé Ascensio provides a very lucid third chapter on the state as a subject of international law. Using virtually identical metaphors to Daillier and Pellet, he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, after which the people effaces itself once again behind the state (para. 91). He draws a distinction between the sociological and juridical definition of the state, one which Kelsen had tried to overcome, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law (paras 73–75). The drive for self-determination may be one fact contributing to the appearance of new states. In his *Droit International Public* (4th ed.) Pierre-Marie Dupuy gives extensive attention to the relationship between the classical definition of the state and the right of self-determination of peoples, saying that the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts (para. 133). He looks to international recognition as a solution, with the qualification that there are no clearly objective criteria to identify what is a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be a question whether the traditional elements of the state, which express effectivity, are reunited in a particular case (paras 30–34 and 130–132). Dominique Carreau’s *Droit International* (5th ed., 1997) treats the state in the juridical (Kelsen sense) as a sphere of jurisdictional competence accorded by an international legal order and does not look any further into any of the issues examined here.

significance which makes them a state in international law. Combacau accepts there is no international equivalent to a state's power, internally, to confirm the legal significance of an event. It is left to each state to follow its own will. In international law there is no objective means of legal confirmation (pp. 273 and 276). Combacau chooses to require states to act as correctly as a state, internally, when it gives a certificate of birth to an individual (p. 283). In other words *the state should behave objectively*.

From this analysis of law and the state follows everything that can be said about the nature of obligation in international law. Priority has to be given to the unilateral acts of states as sources of law, as unilateralism is a given fact of the external juridical policy of states and a function of the relativity of the power of states. Unilateral juridical acts obey a logic of relativity which dominates the totality of international obligations (p. 92). The authority of these unilateral acts is not founded on an external rule, which either does not exist or is deliberately put aside. The obligation of such an act rests on good faith alone and not on the consent of the states interested (p. 97).

Hence, for these authors, it is still possible to speak of the original and primitive liberty of states rather than of an international constitution which bestows legal identity on states and thereby integrates them into a legal community which they do not predate — the position of Verdross and Simma. Combacau argues that international law consists of the limits on this primitive liberty. The law of the state (*le droit étatique*) is still unilateral, resting upon an exclusive and discretionary power (p. 226). It is hardly surprising that Combacau can point to and accept the consistent rejection by states of a right to secession as part of the right to self-determination of peoples (p. 262). In the same spirit of 'legal subjectivity and relativity', as has already been seen, Sur returns always to his point of departure. The primary concern is whatever is required for the security of the state, in the judgment of that state. So definitions of security are subjective. He believes it useful to say that it is international law which recognizes to each state its right to security. Thus the state remains free to decide what this requires. The UN Charter cannot exclude individual traditions of security (pp. 620–621).

When it comes to a consideration of the law relating to the use of force, consistently with what the authors have already said, Sur takes issue (p. 619) with the very idea of juridical idealism in the face of the rhetorical character of the rules of the Charter. It might be asked whether international law is incapable of recognizing issues tied to the inequality of power among states and the prevalence of interest in international relations. The rhetoric of the conquest of violence by law is faced with a practical disenchantment. If peace is the legal postulate, one may say that law must be able to distinguish licit and illicit violence. Either one insists upon the enforcement of rules or one denies international law. Sur tries to find a halfway house in the face of these sentiments (p. 620). Every legal system admits a measure of violence and private justice, provided its use is regulated. Nonetheless, the UN Charter concepts of peace and security are not clearly defined. To threaten or employ force is not the same as to commit aggression. The concept of security is subjective and international law recognizes to each state its right to security. So, the state is (p. 621) free to decide for

itself what this requires. The UN offers collective security but it cannot exclude the maintenance of individualist traditions of security. There is a permanent tension here and, despite its terms, the Charter merely regulates rather than prohibits recourse to force.

No systematic approach to the interpretation of the Charter is possible (p. 630). For instance, reprisals are clearly prohibited but UN resolutions remain merely condemnatory of the use of force (p. 632). Again, it is difficult to distinguish when a threat to use force is supposed to be illicit since such threats are implicit in certain doctrines of security, e.g. nuclear deterrence and collective security (p. 633). The whole field of language used is seen by Sur to be subjective (p. 638). Concluding generally, Sur argues that states have a more instrumental than legal view of legal texts and use them opportunistically and casuistically to their own advantage.<sup>14</sup>

### 3 The State and the Nation: Stages in the History of International Law

When the question is posed how far is it possible to look to a convergence of such divergent positions, it will be necessary to attempt to go beyond the texts themselves to

<sup>14</sup> In a section entitled 'Recourse to the use of force outside the hypotheses foreseen by the Charter' (paras 570–571), Pellet and Daillier do not support the subjectivism of Combacau and Sur theoretically, but in practice they confirm it, e.g. by saying that with respect to humanitarian intervention it is neither clearly approved nor disapproved by states. One cannot say that the failure of the UN to react to severe internal problems of states has led to a clear legal diminution of the powers of the Security Council. However, any appeal by a faction in a civil war for outside support of their right to self-determination must be illicit outside the context of decolonization. The style of the argument is positivist, particularly in placing great weight on the decisions of the ICJ in the *Corfu Channel Case* and the *Military Activities Against Nicaragua Case*. In the work edited by Alland (*supra* note 13), Philippe Weckel deals with the use of force in chapter 11. His approach is positivist, holding states to the terms of the Charter and citing the same cases as Pellet and Daladier. The 1999 Kosovo intervention is of doubtful legality. The failure of the UN does not authorize one state to substitute itself to another in the exercise of the latter's territorial competence. Nonetheless, there are nuances in Weckel's position. The use of force to suppress attempted secession beyond the colonial context is not prohibited, but state practice condemns indiscriminate and excessive use of force in internal conflict and obliges the parties to negotiate their differences. Also the Security Council, with respect to maintaining peace, really functions as a diplomatic forum, formally approving agreements reached in more informal fora such as the Group of 8 (paras 484–488 and 499–502). The approach of Dupuy is to stress the primacy of the UN Charter and especially the Security Council with respect to the use of force and the limits on appeals of states to a right of intervention and self-defence. If the Security Council is not always active, this is not because of weaknesses of law but of the states which use the Council. Legal improvements, if any are needed, would be in the direction of the control of the very wide discretion of the Security Council. Nonetheless, the latter has suffered a great loss of authority after 1993 compared to 1990–1991 (paras 531–541). In line with his juridical view of the nature of the state and the hierarchy of norms, particularly of international over national law, Carreau adopted a view very close to Verdross and Simma, that the Charter is the supreme law of world society and that no use of force outside its terms is permissible. There is no interest to analyse contrary state practice. Armed reprisals etc. are always prohibited. The only exception is that states may use force to prevent fundamental violations of human rights even of nationals of the state violating the rights (at paras 153–160 and 1313–1327).

the wider national contexts from which they emerge. It will also be necessary to idealize the texts in the sense that one attempts to imagine that one returns them to their historical roots to see, in pragmatic terms, what difficulties they are attempting to face and, hence, whether there might be other ways of confronting such difficulties. This means a creative challenging of the assumptions of at least one if not both of the approaches. It may well be that they contain internal contradictions or that at crucial stages it can be argued that they have taken wrong turns.

On the face of it, it may appear that the French and German approaches start from different premises and are not reconcilable. The heuristic device which will be used to develop this argument will be to present the critical explanations of Hobbesianism by Agnes Lejbowicz in her *Philosophie du Droit International*<sup>15</sup> and, for Germany, to present Karl Döhring's views of the right of self-determination of peoples in his *Völkerrecht*.<sup>16</sup> While the latter text, written by an international lawyer, takes the format of a manual and the former is written by a philosopher, both provide 'free ranging' and stimulating play with the implications of their relative national perspectives. At the same time to develop the quite separate German sympathy for Kantian theory would be to accept that some Germans and some French address exactly the same problem, the anarchy of international society, even if they do not agree as to whether an answer is possible.<sup>17</sup>

### A France

Both the roots and the implications of the French perspective need to be understood. Combacau appears to say (p. 265) that the fundamental feature of the development of the state can be traced to the eighteenth and nineteenth centuries when it came to be accepted that the state was a moral person in the sense of a corporate entity somehow separate in every way, i.e. from those who govern and those who are governed and indeed from the territory governed.<sup>18</sup> This formal, immaterialist concept of the state represents well how the Combacau and Sur manual understands the state as a moral person, i.e. a corporate body, similarly to how a company might be defined under national legislation. Obviously shareholders, managers and assets can change, probably infinitely, without affecting the identity of the company. Legal significance is determined by legally valid acts of the state, which is completely independent of the identity of its members. The primary difficulty with this approach is what it conceals. Law can only be a matter of what states agree in dealing directly with one another. Yet conflicts in contemporary international society are recognized, or considered, by Combacau and Sur, to come with great frequency from the Hobbesian nature of

<sup>15</sup> Agnes Lejbowicz, *Philosophie du Droit International* (1999).

<sup>16</sup> Karl Döhring, *Völkerrecht* (1998).

<sup>17</sup> An issue pursued by Capps and Schieder in their articles in this issue of *EJIL*.

<sup>18</sup> An argument which has been developed by his student, E. Jouannet, in her doctoral thesis, 'L'Emergence doctrinale du droit international classique, Emer de Vattel et l'école du droit de la nature et des gens' (1993).

international society.<sup>19</sup> Order exists only within states. Hence objective legal meaning one can only be that defined by the state in relation to its own citizens. In the anarchy of relations with other states all is subjective. This is the theoretical French position which Lejbowicz identifies as Hobbesian, quite simply in the sense that, as she puts it, in its relations with its own citizens, the state functions as a corporate entity, a moral person, while in its relations with others it ceases to have this character and becomes simply an individual facing other individuals in a state of nature.

There is a large measure of consensus among French international lawyers, with the exception of Carreau, that the state is a historical fact not a juridical entity, so far as concerns international law. The hostility to the legal character of a right to self-determination of peoples is also widely shared and the only disagreement is as to the future usefulness of the UN and particularly the Security Council.

Lejbowicz analyses the French position graphically.<sup>20</sup> The state which passes the frontier of its internal (i.e. national) law thereby de-juridicizes its fictive construction so as to make itself once again a natural person. The sovereign remains sovereign, not by virtue of any law, but by virtue of the power that it imposes on other states. At the international level the state ceases to be a fictive person, i.e. it ceases to represent, it simply *is*. Its proper aim is to preserve its being and to increase its power, a power which it exercises with violence, deception, economic wealth, or by whatever means. Lejbowicz insists particularly on the absence of a contract for international society.<sup>21</sup> That states are, as it were, placed equal to one another means that they are transformed from public persons inside their frontier to private persons at the level of international civil society, where the Hobbesian struggles prevail. This is precisely why Lejbowicz calls for a reversal of Hobbes' decision to dispense with classical, i.e. medieval, natural law. Standards are needed which cross state frontiers and stress a natural state of fraternity, inspired by a return to a recognition of the other as the same, where all persons are accepted as having a common nature, and where inequality and difference promote sentiments of affection, rather than fear and the desire to coerce.<sup>22</sup>

The second crucially Hobbesian aspect of the French theory of the corporate body of the state is that, again following Lejbowicz,<sup>23</sup> it removes the distinction between the representative and the represented, so as to make it appear that they are unified. The mask of the state causes the disappearance of the multiplicity of persons who have rendered possible the artifice of the state. The wills of all its members form only one will

<sup>19</sup> Jouannet provides an interesting link between the corporate nature of the state and the shaping of rules by states in their relations with one another as corporate bodies. She attributes this development to Vattel. The difficulty is that Vattel is a follower of Locke and did not have a 'realist' view of international society. For reasons of space it is not possible to discuss here more fully Jouannet's views, and, anyway, there is no spirit of Locke in Combacau and Sur. However, the criticisms made here of their approach do not have the same force as applied to Vattel. For another history of Vattel tracing Locke's influence, see Francis Ruddy, 'The Origins of the Ideas of Vattel' (PhD, Cambridge, 1969).

<sup>20</sup> Lejbowicz, *supra* note 15, at 143 *et seq.*

<sup>21</sup> *Ibid.*, at 405 *et seq.*

<sup>22</sup> This theme will be pursued further in the final section.

<sup>23</sup> Lejbowicz, *supra* note 15, at 141 *et seq.*

in the sense that the state can be considered to have only one head. Not one citizen nor even all the citizens together can be taken to be the body of the state. It is Hobbes who makes his own the geometric representation of political space, a representation defined ‘par le partes extra partes de la géometrie cartésienne’. This is precisely how Combacau defines the state as an institution. It offers also a Hobbesian picture of the relationship of state power *with its own citizens*. What is more important is that this perspective is, in a pragmatic sense, useless, when a very large aspect of the problems of order in international society concern questions of internal legitimacy of states, i.e. how they are constituted. Here Combacau and Sur can merely note that many states do not satisfy the conditions for the maintenance of order that one would reasonably expect. More seriously their response to claims of ethnic or other minorities to secede from their oppressors can only be to deny and reject them. Legal definition, in the sense of meaning and obligation, can only come from the state and the state has to have an overwhelming capacity to suppress. It is only other states which can and sometimes do limit this power, but they will do so driven by a logic which is essentially similar.

### **B Germany**

The reflections of Döhring are diametrically opposed to those of Combacau and Sur. His work covers most of the ground of a manual, but it is not a mere reference work, collecting opinions and leaving the reader to choose among them. Döhring offers a rigorous logic to his defence of the right to self-determination of peoples as a human right. It is possible for a majority within a state to coerce into submission a minority, as a matter of empirical fact. However, this power brings with it no compelling authority. There is no force in the argument that every life in common requires acceptance of rules because this leaves open the question whether any particular life in common is necessary. That is, the presence of two ethnic groups in one state does not have to persist. Contemporary revolutions and wars show that continuing to live in peace together is not always desired. The people of a state (*Staatsvolk*) does not have to be homogeneous, but if it is not the state must be able to postulate values which can hold together the cultural differences of its peoples and those states which are not able to, will not endure (*nicht überlebensfähig*).<sup>24</sup>

The starting point of this analysis is that the greatest threat to security of a state is from within, not from other states. The greatest cause of this threat is the unrepresentative, coercive state which oppresses its large ethnic minorities. While Döhring can point to the same interpretation of the same UN documents to support himself as Verdross and Simma, he goes much further, treating the United Nations, a framework of collective security, as largely irrelevant to the types of problems caused by internal repression of one ethnic group by another. Döhring defines ethnic groups as distinguished by language, religion, race and culture and as situating themselves on a distinct territory. Döhring, just as Verdross and Simma, has already defined the population element of a state as a *Schicksalsgemeinschaft* and he treats the right of self-determination of peoples as a fundamental principle of *jus cogens*. Since the people

<sup>24</sup> Döhring, *supra* note 16, at 3–4.

are the essential substrate of a state, it is not surprising that it can survive the collapse of the state, i.e. the Somalis and Somalia. The right of self-determination of peoples is not confined to the colonial world and it is clear both that a right must bring with it the means to defend it — or it is not a right — and that collective self-defence must mean the right of another to come to one's assistance, whether it is an individual or group right that it violated.<sup>25</sup>

It only remains to ask whether Döhring places any limits on the right of secession of a people whose *Eigenart* is not respected.<sup>26</sup> He says there has to be discrimination which goes so far as to violate fundamental rights, so that no alternative to the use of force to defend these rights exists. He cites prohibition of religious observance, confiscation of goods, torture and forced labour. In this case not merely does Döhring not confine the right to secession to the colonial sphere, he does not even consider that one exercise of the right necessarily exhausts it. If intolerable discrimination arises again, so does the right to secession.<sup>27</sup> The difficulty with this apparent restriction to extreme discrimination is that Döhring remarks how the United Nations does not now have to do only with violence among states, but also with human rights violations in the context that a minority struggles for its right to self-determination. In other words, any claim of an ethnic group to autonomy will usually provoke such a violent reaction by state authorities that extreme discrimination will come about, thereby triggering a right to secession.

Döhring ties the right to secede to that of individual human rights. Even if the conflict remains internal the *erga omnes* character of human rights means that other states may intervene, and also, almost by the way, the United Nations.<sup>28</sup> If an individual has rights in international law — human rights — he must have the means to defend them when the United Nations cannot act. To see whether defensive action is justified it is better to abandon reference to the Charter. To prevent these violations is not to launch oneself into a war in the classical sense. The point is that there is a right of the individual to defend himself as a subject of international law (*ein eigenes Selbstverteidigungsrecht*) in support of which any other subject of international law may intervene. If a state has a right to aid another state it has equally a right to aid either an individual or a group.<sup>29</sup>

If one comes back to Döhring's starting point, he has placed the active obligation on a multinational state to ensure a value framework to bridge cultural difference. He recognizes the dangers of his approach in considering the defensive right of self-determination in the context of the definition of aggression. In 1974 the relevant UN resolution makes an exception to the illegality of the use of force which effectively exempts the typical conflicts of the time.<sup>30</sup> Equally a state which suffers a revolt by a minority claiming a right to self-determination will resist its dissolution by making the

<sup>25</sup> *Ibid.*, at 28–29, 71–73, 197–198, 242–246 and 330–337.

<sup>26</sup> *Ibid.*, at 336.

<sup>27</sup> *Ibid.*, at 338–340.

<sup>28</sup> *Ibid.*, at 197–198.

<sup>29</sup> *Ibid.*, at 322 and 434–436.

<sup>30</sup> *Ibid.*, at 240–242.

same claim. There will be a collision of norms as in constitutional law and the principle of *jus cogens* will give no direction.<sup>31</sup> Nonetheless, for Döhring the starting point remains that the empirical coercive power of the majority within an existing state is merely that. The democratic aspect of self-determination means that, in Döhring's view, the state has a duty to give a minority the institutional possibility to express itself, in order to be able to determine the will of the minority group.<sup>32</sup>

### C *Comparative Historical Perspectives*

The contradictions between these French and German perspectives may be explained if it is seen that the state and the nation are stages in the history of international law. It is doubtful if one can avoid progression from the French to the German paradigm, except for the substantial qualifications that, depending on one's perspective — whether that of state or nation — both paradigms are working themselves out vigorously at present and from both sources the dangers posed by the unilateral use of force remain large. The paradigm progression means only that one cannot escape from ethnic conflict and violence into the illusion that the fiat of the state, as a matter of legal epistemology, can resolve such conflict. As Bartelson has brilliantly explained,<sup>33</sup> Hobbesian, statist thinking has its roots in a Renaissance politics of conspiracy and espionage of sovereign princes. States, in this model, do not approach one another as comparable institutions retaining their character as moral persons, in the municipal law sense. Bartelson explains how the modern state, born of the wars of religion, wants to forget the birth which has traumatized it. This is the real meaning of the desire of Combacau to argue that one need not look to a theoretical origin of the state because its concrete foundation preceded the emergence of the concept of the state, the birth of which remains non-justiciable (p. 265). The state has become, as a subject of French public law, the subject of the distinction made by Descartes between the immaterial subject and the material reality which it observes and analyses. In this scheme knowledge supposes a subject and the subject is the Hobbesian state which names but is not named, observes but is not observed, a mystery for whom all has to be transparent. It is the first problem of this theory of knowledge to find security, which lies, for it, in a one-way rational control and analysis of others by itself.

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

<sup>31</sup> *Ibid.*, at 324.

<sup>32</sup> *Ibid.*, at 335.

<sup>33</sup> Jens Bartelson, *A Genealogy of Sovereignty* (1996).

Lejbowicz tries to deconstruct and reconstruct this French Hobbesian perspective. Together with Bartelson one can see how she changes the terms in which some kind of international organization of nations may be necessary to fill the lacunae in a system based only on the self-determination of peoples. The state as such has to be left behind. It is because states confront one another as *facts* and not as corporate bodies or *moral persons* that the identities of the persons who compose them are fundamental. So Lejbowicz argues that where these brute facts confront one another one must return to the natural state of fraternity, which makes it impossible for humanity to be captured by one person alone. The inspiration of the *jus naturale* is that we return to recognize the other as similar, as reflections of the self, images of the self to be found in others because we have a common origin. It is the forces of exclusion which found state particularism, the opposite of mutual comprehension. The enemy is not on the outside but within the self, an evil which each has to rework. State law creates frontiers but without a human space between them. It is the confusion of languages which God has created which ensures an inevitable anthropological distance among peoples and engages them in a perpetual quest for mutual understanding. 'L'imaginaire du relationnel se construit avec le iusnaturalisme de la *societas amicorum* sur le présupposé d'un milieu de communication déjà ouvert . . .'<sup>34</sup>

Lejbowicz thereby provides a wider context of the Western humanist tradition in which the arguments of Bartelson need not appear so alarming. Bartelson suggests the inevitability of accepting peoples, not states, as a starting point for the definition of international society. Since the revolution of linguistic nationalism, of Herder and Vico, there is no point of return. The exercise of giving a name, of which juridical recognition is only a part, refers directly to language and, with it, to the history of the nation. There are no mysterious powers, detached from society, which can determine a signification by decree, by the employment of words which reflect their monopoly of power and their capacity to coerce. In this sense Döhring is stating the obvious in distinguishing the power from the authority of the majority controlling a state apparatus. Instead of the state it is mankind that emerges from the subordination to the prince to become the sovereign of its own representations and of its concepts. The words are not *there*, as they were for Descartes, to represent passively, functioning as a mirror to reflect something external to the subject. It is the activity of the subject itself which creates its own world of experience and which gives itself the words with which to express itself. So language is a reflection of the experience of the individual and of the collectivity to which it belongs. Thus it is language which becomes the subject of interpretation. Language in its dense reality can explain to us the history of the institutions which are rooted in that language. The world of institutions is made by men and thus one can arrive at a comprehension of them *through a knowledge of the self*.<sup>35</sup>

There is no running away from individual responsibility, which is what statist shrieking against ethnicity means. Individual responsibility must be harnessed to

<sup>34</sup> Lejbowicz, *supra* note 15, at 407–416, quotation at 416.

<sup>35</sup> Bartelson, *supra* note 33, at 188–201.

binding moral imperatives. However, the author has argued in another place<sup>36</sup> that the nation, once organized into a state, as both Verdross and Simma and Döhring put it, behaves rather like the classical state *in its international relations*. Such a conclusion is hardly surprising if one remembers that Herder, the originator of the idea of the ethnic group, stresses always and only the unique and individual character of the group and never how it can hope to relate and communicate effectively and humanely with other groups.<sup>37</sup> The argument was intended to explain the behaviour of Western European states in relation to the Bosnia massacres and, more recently, it has equal applicability to the Chechnya debacle. Indifference beyond frontiers is not the same as the menace and threat of Hobbes. However, ethnicity does not easily afford a basis for international order. So, much of Döhring's analysis, concerned with justifying outside assistance to an ethnic group, is likely to fall on deaf ears because of this indifference beyond frontiers. It is submitted that the most serious difficulty, at least for international lawyers considering a common European foreign policy, is precisely the tendency for the nation, organized into a state, to adopt the behaviour patterns of the state, thereby making the paradigm of Combacau and Sur quite actual, but at the same time in contradiction with the basis of legitimacy and indeed *raison d'être* of the nation-state. In conclusion, it is suggested, rather eclectically, that what is needed is the following. Döhring is correct in so far as concerns the future formation of states along ethnic lines. Combacau and Sur, and the French generally, are wrong to ignore this. However, the newly constituted ethnic states still lack a basis for the construction of an international community together. While more indifferent than aggressive in their relations to one another they still face one another across a normative vacuum. In this sense the analysis of Combacau and Sur retains actuality. The response of Lejbowicz to such Hobbesianism is preferred by the present author.<sup>38</sup> None of this is demonstrated philosophically in the present article. Rather, it is hoped merely to show, by contrasting various paradigms, how the resources of European culture which produce divergences can also be drawn upon to demonstrate convergences.

<sup>36</sup> Carty, 'Myths of the International Legal Order', 10 *Cambridge Review of International Affairs* (1997) 1–23.

<sup>37</sup> See further I. Berlin, *Three Critics of the Enlightenment, Vico, Hanning, Herder* (ed. Henry Hardy, 2000), who nonetheless offers an extremely sympathetic account of Herder.

<sup>38</sup> Capps also provides a philosophical rather than historical critique of Hobbesianism in favour of Kant.