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# The Ship of Democracy

Deborah Whitehall\*

## Abstract

*War, exile and democratic crisis organized the world-mind in the early 1940s around the transitive exigences of states. Political in origin, those trials also magnified the pressure points of international legal personality due to the disaggregation of territory, people and legitimate, being democratic, government. France presents the paradigm case worthy of attention for the unexpected recoding of the normative lines of state identity by the cultural internationalism of French scholars in exile. L'École Libre Hautes Etudes (l'ÉLHE) in New York stands out as the representative of a civic and cultural code of state identity framed by the cultural activism of esteemed intellectuals and contingent on ideas or rather, on the ideal of the free state. Their symbolic ship of democracy alerts internationalists to the aleatory meetings between different codes of statehood which disrupt, and might easily progress, the normative rules of state identity during crisis. Three such encounters matter now, anchoring this study about what happens to international law when democracy fails, for the recoding of legal standards by cultural agents of state: of rules of state recognition, of territorial sovereignty and of the meaning of legal internationalism after war.*

## 1 Two Codes of State

War, exile and democratic crisis reorganized the world-mind in the early 1940s around the transitive exigences of states. Political in origin, those trials also magnified the pressure points of international legal subjectivity due to the disaggregation of territory, people and legitimate, being democratic, government. France presents the paradigm case of the political unit undone by war and of the quintessential state according to the legal and political logic of international affairs. France was a 'democracy at bay' on 15 June 1940, caught by the populist mood in Europe but still with the outward signs of representative government, a free press and free speech. It ceased to be a democracy on 16 June 1940 when Marshal Philippe Pétain formed an authoritarian

\* Institute for International Law and the Humanities, University of Melbourne, Melbourne, Australia. Email: [deborah.whitehall@unimelb.edu.au](mailto:deborah.whitehall@unimelb.edu.au). The evolution of my text profited enormously from the thoughtful interlocutions of numerous readers, especially those who gathered for the EJIL 30th Anniversary Symposium International Law and Democracy Revisited, New York, 18–20 September 2019, and from the reviewers' comments.

government, ‘revised’ the constitution, surrendered to Germany and conceded to its terms.<sup>1</sup> Belgium and much of France were under Axis occupation until liberation in 1944.<sup>2</sup> What happened in the margins of exilic resistance for the liberation of France figures for international legal thought as a proposal for the re-designation of its quintessential state, as a cultural and civic quantity, when democracy failed.<sup>3</sup>

The call-out for national freedom included the unexpected recoding of the normative lines of state identity by the cultural internationalism of French scholars in exile. L’École Libre Hautes Etudes (*l’ÉLHE*) in New York figures for internationalists as the representative of a civic and cultural code of state identity framed by the cultural activism of esteemed intellectuals and contingent on ideas or, rather, on the ideal of the free state. Their institutional experiment reminds international lawyers of the aleatory meetings between cultural and legal standards of statehood which intensify during crisis along the same normative seams of assumed meaning. The question that remains from those encounters is how the cultural code of state advanced by *l’ÉLHE* extended the legal standard by insisting that state identity required a democratic indicator and by realizing the democratic demand as an organized cultural practice.

*l’ÉLHE* was a prominent, experimental site for French cultural activism during war.<sup>4</sup> The politicisation of culture, particularly in the production and sharing of knowledge,

<sup>1</sup> For near-contemporaneous responses to the crisis of democracy in France after June 1940, which survey the breakdown of democracy under Marshal Pétain, see, e.g., Woolf, ‘Democracy at Bay’, 11(4) *Political Quarterly* (1940) 335, at 335, 339–340; Brogan, ‘What Happened to France?’, 12(1) *Political Quarterly* (1941) 1; especially for an eye-witness account of the first eight months of the Vichy government, by a scholar at l’École Libre Hautes Etudes (*l’ÉLHE*), see Vaucher, ‘The “National Revolution” in France’, 57(1) *Political Science Quarterly* (1942) 7.

<sup>2</sup> For the terms of armistice that circulated in English, see, e.g., ‘“Armistice between France and Germany” signed in the Forest of Compiègne, 22 June 1940 6.50 p.m., German summertime’, 34 *American Journal of International Law (AJIL)* supplement (1940) 173; ‘“Armistice between France and Italy” signed at the Villa Incisa, near Rome 24 June 1940 7.15 p.m. Rome Time’, 34 *AJIL* supplement (1940) 178.

<sup>3</sup> For an introduction to the extensive literature about the French external resistance and the international networks that supported its work, see, e.g., Humbert, ‘The French in Exile and Post-War International Relief, c. 1941–1945’, 61(4) *The Historical Journal* (2018) 1041, at 1042–1043; Faucher and Humber, ‘Introduction: Beyond de Gaulle and beyond London: The French External Resistance and Its International Networks’, 25(2) *European Review of History* (2018) 195; S. Cornil-Frerrot and P. Oulmont, *Les Français Libres et le Monde* (2015); see also the contributions to the symposium dedicated to various iterations of the French resistance that coordinated around la France libre and substantiate wartime ‘resistance’ as an ‘international phenomenon’ by indicating its global reach through extraterritorial networks. ‘Beyond de Gaulle and beyond London: The French External Resistance and Its International Networks’, 25(2) *European Review of History* (2018).

<sup>4</sup> Emmanuelle Loyer’s historical study of émigré New York continues to set the standard for critical thinking about the wartime episode of *l’ÉLHE* and its significance for the wider circle of between 3,000 and 4,000 French exiles in Manhattan between 1940 and 1947. E. Loyer, *Paris à New York: Intellectuels et artistes français en exil 1940–1947* (2005), at 205–275; Chaubet and Loyer, ‘L’école libre des hautes études de New York: Exil et résistance intellectuelle (1942–1946)’, 4(616) *Revue Historique* (2000) 939. For further accounts, usually included as part of a broader study of French exile during war and in some cases focusing on the expatriate experience in wartime New York, see, e.g., Cornil-Frerrot and Oulmont, *supra* note 3; Friedlander, ‘L’école libre des hautes études’, in J. Friedlander, *A Light in Dark Times: The New School for Social Research and Its University in Exile* (2019) 152, at 164; Zolberg and Callamard, ‘The École Libre at the New School, 1941–1946’, 65(4) *Social Research* (1998) 921; New School for Social Research,

styled the scholars as agents of state. Their political-cultural endeavour also figured *l'ÉLHE* as an exilic platform for a new idea of the free or independent state. The notion of the free state signified both a cultural quantity and a civic or democratic destination in addition to the internal and external liberation of France from autocratic and foreign control. That project entailed articulating a cultural code of state that derived from France but acquired general pertinence for all states by its democratic imperative and its stakes in the outcome of war. The celebrated repute of the scholars selected for the initiative ensured internationalists were receptive to, and facilitated, the political and cultural cause identifiable with *l'ÉLHE*. Jacques Maritain, the eminent Catholic theologian, is notable for his prominence in the administration of *l'ÉLHE* but more so for his scholarly contributions to the conceptual refiguration of the idea of the free state and for his wartime association with internationalists with diplomatic conduct of war.

Maritain's intellectual and administrative activities at *l'ÉLHE* reflect the diversity of scholarly production and the splits in political allegiances between the scholars that caused ongoing internal frictions. For international thought, his innovative reframing of his personalist theology as a theory of state provides a prominent example of the institutional priority for freedom and democracy and, consequently, the collective influence on the idea of the state.<sup>5</sup> The specifics of his Thomist polemic for the liberation of the 'personalist' state turned him, consecutively, from a cultural agent into a civic agent and an internationalist who spoke for France and for a democratic model of state in general. His contribution represents the specific, transitory expression of cultural internationalism that deployed ideas to intervene in political debates relevant to the conduct of war, to make demands on the international community on behalf of France and, as all scholars hoped, to influence history. As a collective expression of such activism, *l'ÉLHE* figured a symbolic ship of democracy, fashioned by the temporal imperatives of populist government, war and foreign occupation in Europe, by the humanist traditions of the revolutionary state, by the opportunities of exile and by the grouping's iterative, democratic practices.

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*50th Anniversary l'Ecole Libre des Hautes Etudes Commemorative Booklet* (1993), New School Archives and Special Collections Digital Archive (NSA and SCDA), available at [https://digitalarchives.library.news-school.edu/index.php/Detail/objects/NS030105\\_000164](https://digitalarchives.library.news-school.edu/index.php/Detail/objects/NS030105_000164); Nettelbeck, 'Not under Bushels: The French Mind Abroad', in C. Nettelbeck, *Forever French: Exile in the United States 1939–1945* (1991) 88; Mathieu, 'À l'école de la résistance', *France-Amérique* (7 March 2013), available at <https://france-amerique.com/en/a-lecole-de-la-resistance/>; more generally, J. Melman, *Émigré New York: French Intellectuals in Wartime Manhattan, 1940–1944* (2000).

<sup>5</sup> Maritain's views about the political crisis of the modern democratic state dominate his wartime scholarship. J. Maritain, *À Travers le Désastre* (1944), which is a reprint of J. Maritain, *France My Country: Through the Disaster* (1941); J. Maritain, *Christianity and Democracy: The Rights of Man and Natural Law*, translated by Doris Anson (2011); J. Maritain, *Christianisme et Démocratie* (1943); J. Maritain, *Les Droits de l'homme et la loi naturelle* (1942); Maritain, 'Christian Humanism: Life with Meaning and Direction', 25(4) *Fortune* (1942) 106; Maritain, 'The End of Machiavellianism', 4(1) *Review of Politics* (1942) 1; Maritain, 'Integral Humanism and the Crisis of Modern Times', 1(1) *Review of Politics* (1939) 1; Maritain, 'The Person and the Common Good', 8(4) *Review of Politics* (1946) 419; Maritain, 'Religion and Politics in France', 2 *Foreign Affairs* (1942) 266; J. Maritain, 'Morale Preservation Defense Factor', *New York Times* (4 August 1940).

For internationalists, *l'ÉLHE* made the equivocations of juridical identity more transparent, highlighting how legal identifiers of states – territory, people, government and sovereignty – were susceptible to cultural contest and, consequently, to progress or adjustment as a cultural project. The scholars' cultural internationalism reimagined the state, unbound by legal restraints, and revealed the juridical category to be more indefinite, changeable, contingent, temporal and, consequently, susceptible to new forms of extraterritorial contestation. Their grouping exposes the contingent aspects of state identity which intensify as co-contingencies of international law and culture when democracy fails and resurfaces in exile. To notice that meeting at that axis draws out the ambivalence, equivocation or susceptibility to change that was present in cultural and legal classifications of the state and the unlikely, sometimes self-conscious, often generative, occasionally progressive and always suggestive pressure or elucidation that follows for legal meaning from the cultural translation – that is, how the reinterpretation of the state by cultural actors magnified and unexpectedly impinged on existing normative instabilities by the introduction of a different code of state. Three points of contact anchor this study about what happens to international law when democracy fails by exemplifying how cultural agents of state challenge legal standards relevant to the identity of states in international affairs: of rules of state recognition, of territorial sovereignty and of the meaning of legal internationalism after war.

## 2 Rallumer le pays des lumières

*L'ÉLHE* was the first francophone school in America, configured as a temporary refuge for French and Belgian scholars fleeing Europe.<sup>6</sup> It was also a hub for intellectual activism and the expression of a specific form of cultural internationalism that arose from civic concerns about the future of the democratic state. Cultural internationalism, for the purposes of studying *l'ÉLHE*, refers to the strategic effects of intellectual exchange both for diplomacy and for the normative grid by which states relate as sovereigns for the purposes of international law.<sup>7</sup> The cultural experiment redefined internationalism as a

<sup>6</sup> 'Declaration: École Libre des Hautes Etudes 1942', in *l'ÉLHE 1942: Course Catalogue* (1942), at 7, NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS050101\\_el1942sp](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS050101_el1942sp); Agreement between the New School for Social Research and the L'école libre des hautes études (1941), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000059](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000059); *Notes on the Contract between the New School and the Free School of Higher Studies, 'French University'* (1941), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000049](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000049). For the agreement affirming the independence of *l'ÉLHE* from the New School, see A Formal Agreement between the French Government and the New School for Social Research (1947) (not signed), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000057](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000057); Maritain, 'Statement on Purposes of the École Libre des Hautes Études' (16 February 1942), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000148](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000148).

<sup>7</sup> This definition reflects the non-static meaning of cultural internationalism which is often used as a catchphrase for the various activities of culture (memory, ideology, emotions, lifestyles, scholarly and artistic works or other symbols signifying 'structures of meaning') undertaken to link countries and peoples through the exchange of ideas and persons, through scholarly cooperation or through efforts at facilitating cross-national understanding. A. Iriye, *Cultural Internationalism and World Order* (1997), at 3.

spontaneous encounter between different codes of state that addressed, from different angles, the instabilities of space, boundaries, freedom, peoples and agency, which determine how a state becomes visible on the international plane and participates in world affairs. The cultural internationalist navigated the same pressure points that define the state in the legal imagination and which were unstable, practically and theoretically, during war.

*L'ÉLHE* promoted cross-cultural understanding and the cross-fertilization of ideas by public programmes, in French and English, and an expansive curriculum on all aspects of French culture and civilization.<sup>8</sup> The elite grouping, styled as a *grande école* according to the logic of French *laïcité*, represented the most important figures in their respective fields of knowledge in France and Belgium. Prominent names included Gustave Cohen (medievalist), Henri Focillon (art historian), Jean Perrin (physicist), Henri Grégoire (philologist), Alexandre Koyré (philosopher), Jacques Hadamard (mathematician), Claude Lévi-Strauss (anthropologist), René Cassin (jurist), Henri Bonnet (historian), André Spire (poet) and Boris Mirkine-Guetzévitch (constitutionalist).<sup>9</sup> Many of the scholars were Jewish or, like Maritain, had Jewish connections and involuntarily resigned or left university posts in Europe.<sup>10</sup>

Diplomatic and institutional sponsorship from the Rockefeller Foundation and President Franklin D. Roosevelt's administration facilitated the initiative as a temporary ghetto for the brightest minds of France and Belgium to continue French culture in exile until, as both scholar and host expected, it was possible to 'reilluminate the torches of humane learning in a liberated France'.<sup>11</sup> The motif of a 'ghetto' made sense of the structural alliance between *L'ÉLHE* and the New School for Social Research in New York, which previously expanded its existing accommodation for refugee scholars from Europe in 1933, endorsing the mostly Germanic limb as a 'University in Exile'.<sup>12</sup> A 'ghetto' also expressed the activist gesture of the cultural initiative against the normative restraints of authoritarian or totalitarian regimes which restrict the revolutionary values of 'liberté, égalité and fraternité'.<sup>13</sup> Intellectual freedom was indivisible with the liberation of France and the recuperation of the democratic and humanist orientation of French political and cultural traditions.

Unlike its German neighbours, however, *L'ÉLHE* was beset by internal and external controversies arising from its ambiguous alliance to *la France libre*.<sup>14</sup> The American

<sup>8</sup> A comprehensive introduction to French culture and civilization was available through almost 200 courses on wide-ranging subjects including French literature, history, linguistics, art, theatre, science, anthropology, sociology, law, politics, e.g., *L'ÉLHE 1942: Course Catalogue*, *supra* note 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> E.g. Loyer, *supra* note 4; Chaubet and Loyer, *supra* note 4.

<sup>11</sup> 'French Learning in Exile', *New York Times* (13 February 1942), at 20.

<sup>12</sup> *Ibid.*; Friedlander, *supra* note 4, at 2.

<sup>13</sup> Those values were explicit in the institutional constitutional mandate. 'Declaration', *supra* note 6; 'Agreement', *supra* note 6.

<sup>14</sup> References to *la France libre* refer collectively to the controversial, extraterritorial claims of General Charles de Gaulle for international status as the military leader of France and its rival administration in exile against Marshal Pétain's government at Vichy in metropolitan France. For details of General de Gaulle's alternative projects for French liberation, also filtered as a project of a certain idea of France, see the recent biography by Julian Jackson, *A Certain Idea of France: The Life of Charles De Gaulle* (2019). For details about the controversies caused by de Gaullism at *L'ÉLHE*, see Loyer, *supra* note 4, at 205–244.

press followed General Charles de Gaulle's eagerness to recruit 'important new men' of French nationality who might platform his cause outside France.<sup>15</sup> Many scholars were unequivocally de Gaullist, including some who dominated the administrative direction of *l'ÉLHE* or frequently left New York on political assignment for la France libre in Algiers.<sup>16</sup> The exodus of larger numbers for the same purpose in 1944, including Jacques Soustelle, Paul Vaucher, Henri Bonnet, René Cassin, André Philip, Henri Laugier and Paul Arbousse-Bastide, eliminated political allegiances which clouded the institutional grouping's independence and which, during war, was integral to its civic experiments.<sup>17</sup> The de Gaullist clique was countered by others, including Maritain (vice-president) and Henri Gregoire (vice-president) who wondered if 'de Gaulle est-il démocrate?' and hesitated, at least until liberation, to tie their political and cultural project for freedom to la France libre.<sup>18</sup> The liberation of France and Belgium in August 1944 led to the departure of prominent members of *l'ÉLHE* and signalled the functional end of their joint cultural-political assignment.<sup>19</sup>

For the international lawyer, the legacy of the wartime experiment outlasts war by highlighting the instability of the legal categories relevant to states during political crisis and the susceptibility of existing indicators of state identity to new forms of statecraft and non-legal codes. The coalescence of democratic and international crisis exacerbated the effect of the scholars' cultural provocation on the international imaginary and made the encounter more likely. When *l'ÉLHE* opened in February 1942, everyone who identified with the free world was an internationalist of sorts, seized by the urgent crises of states and the need to navigate the obstacles to peace and restore democratic freedoms. The difference in the early 1940s was the receptivity of diplomatic circles in Great Britain or America to the cultural voice of France on its doorstep, which lobbied for international assistance and promoted its hopes through an idea of the state that was continuous with democratic freedom.

### 3 Projects of State Recognition

The political situation of France after German invasion and during occupation brought a parallel controversy between prominent jurists about the effects of intergovernmental recognition to life. Then, states routinely recognized governments as well as states and

<sup>15</sup> E.g. James McDonald, 'De Gaulle Urges More Recognition', *New York Times* (28 May 1942), at 3; 'France's Re-Entry into War Is Seen', *New York Times* (12 November 1942), at 7; 'Recognition Asked for Free French', *New York Times* (6 November 1941), at 11.

<sup>16</sup> E.g. René Cassin, Gustave Cohen (vice-president), Jean Perrin (vice-president) and Henri Focillon (president). Loyer, *supra* note 4, at 227–231; Nettelbeck, *supra* note 4, at 92.

<sup>17</sup> Loyer, *supra* note 4, at 236–237.

<sup>18</sup> Cornil-Frerrot and Oulmont, *supra* note 3, at 173; Hellman, 'The Anti-Democratic Impulse in Catholicism: Jacques Maritain, Yves Simon, and Charles de Gaulle during World War II', 33(3) *Journal of Church and State* (1991) 453, at 230–231, 454–457; C. Lanneau, *L'inconnue française: La France et les Belges francophones, 1944–1945* (2008), at 177.

<sup>19</sup> Loyer, *supra* note 4, at 236–237.

not, as is more usual now, only states.<sup>20</sup> The splitting of diplomatic recognition into state and governmental categories exaggerated the paradoxes generated by the prevailing view shared by jurists and political leaders that politics determines which entities enjoy legal status for the purposes of international law. Giving priority to political judgment in the midst of crisis heightens the dangers of an international community comprising entities which have legal status and, therefore, potential belligerent or neutral status for some states and not others or, more concerningly, of rival regimes with differential political and legal status. The problems generated by the political bent of recognition included the uncertain situation of France where no French government was perfectly in control, in the full sense of internal and external authority, of metropolitan France or its voice or actions in international affairs. *L'ÉLHE's* gesture to the juridical debate arises from its resignification of the 'people' as a civic value, which, in turn, contests the presumed neutrality and territorial centre typical of the legal frame of a state.<sup>21</sup>

### A Legal Questions of State Recognition

Interwar debates relevant to state sovereignty distilled in the early 1940s as a question about the legal effects of recognizing states and governments. These debates clarified that the recognition of states and governments were continuous and addressed the prevailing confusion that diplomatic regard determines international status for the purposes of international law.<sup>22</sup> That prominent émigré jurists, Hans Kelsen and Hersch Lauterpacht, led the conversation in the pages of the *American Journal of International Law* (1941) and the *Yale Law Journal* (1944) and generated further controversy by their efforts attests to the strategic significance of recognition to the conduct of war.<sup>23</sup> Lauterpacht's 1947 monograph on the subject reiterated the 'tendency to maintain that the crucial question of granting or refusing recognition is not one of

<sup>20</sup> Though de facto or de jure recognition of a new or exilic government is still possible and usually addressed in international law textbooks, state practice now tends to treat the diplomatic aspect which is always the active ingredient for international agency as a subsidiary factor for the purposes of state recognition. J.A. Frowein, 'Recognition', in *Max Planck Encyclopedia of Public International Law* (2020); S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), at 3–17, 115–116. This means, for example, questions of regime legitimacy are hypothetically relevant to the diplomatic recognition of states though there is not yet any rule or custom to that effect. Talmon, *ibid.*, at 7–8; Gathii, 'Introduction to the AJIL Unbound Symposium on Recognition of Governments and Customary International', 108 *American Journal of International Law (AJIL)* (2015) 199; de Wet, 'From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition', 108 *AJIL* (2015) 201; Roth, 'Whither Democratic Legitimism?: Contextualizing Recent Developments in the Recognition and Non-Recognition of Governments', 108 *AJIL* (2015) 213. It also distinguishes the significance of the historical practice of recognizing governments because, then, questions of regime legitimacy were directly relevant to intergovernmental recognition and, consequently, relevant to those debates about international status.

<sup>21</sup> *Ibid.*

<sup>22</sup> E.g. Brown, 'The Effects of Recognition', 36 *AJIL* (1942) 106; Borchard, 'Recognition and Non-Recognition', 36(1) *AJIL* (1942) 108.

<sup>23</sup> Lauterpacht, 'Recognition of States in International Law', 53(3) *Yale Law Journal* (1944) 385; Lauterpacht, *International Law*, Vol. 1, *Peace (L. Oppenheim)* (1947), at 120–146, especially 125–146; Lauterpacht, 'De facto Recognition, Withdrawal of Recognition, and Conditional Recognition', 22

international law' is inaccurate and allows 'abuses and aberrations of the function of Recognition'.<sup>24</sup> The appearance of *la France libre* shadowed the theoretical debate as the controversial exemplar of the risks of normative confusion and the need for additional caution, both of which increase when the legal stakes of recognition include political stakes relevant to belligerent status.

Kelsen and Lauterpacht encountered the practical complications of recognition during war as a theoretical problem with notorious variations. For both, not referring to contemporaneous events relevant to their polemic reflects the strategic sensitivity in America and Great Britain to the problem of recognition and their motivation for reigniting a much older debate.<sup>25</sup> Kelsen said in 1941, for example, that '[h]ardly any other question is more controversial, or leads in the practice of states to such paradoxical situations'.<sup>26</sup> Lauterpacht concurs, restating in 1944 that theoretical misunderstanding about the effects of diplomatic recognition is the root of the 'grotesque spectacle of a community being a State in relation to some, but not to other States' and was, consequently, 'a grave reflection upon international law'.<sup>27</sup> The danger was particularly acute when recognition of international status organizes the legal landscape of belligerency and neutrality and, consequently, conditions the strategic stakes of war.<sup>28</sup> Their solution was to use theory to argue that recognition depended on satisfaction of certain legal requirements rather than only on policy. Their analysis involved two steps: to separate the juridical effects of formal or legal recognition from politics and to clarify the scope of any legal obligation to afford legal recognition.

Both agree that a state or government does not acquire international status for the purposes of international law by reason of a political declaration of recognition by one state or government towards another.<sup>29</sup> Nor does legal recognition merely declare

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*British Yearbook of International Law* (1945) 164; Lauterpacht, 'Recognition of Insurgents as a De Facto Government', 3 *Modern Law Review* (1939) 1; H. Lauterpacht, *Recognition in International Law* (2013); Kelsen, 'Recognition in International Law: Theoretical Observations', 35(4) *AJIL* (1941) 605; H. Kelsen, *General Theory of Law and State* (1945), at 221–230; see also J.L. Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht (Handbuch des Völkerrechts)* (1928) (for a summary of the argument in English, see Kunz, 'Critical Remarks on Lauterpacht's "Recognition in International Law"', 44(4) *AJIL* (1950) 713; J. Fisher Williams, *Aspects of Modern International Law: An Essay International Law* (1939), at 109–110; P.C. Jessup, *A Modern Law of Nations* (1948).

<sup>24</sup> Lauterpacht, *Recognition in International Law*, *supra* note 23, at v.

<sup>25</sup> The legal problem of recognition was the subject of considerable theoretical attention after 1919. See, e.g., Kunz, *Die Anerkennung*, *supra* note 23.

<sup>26</sup> Kelsen, 'Recognition', *supra* note 23, at 605.

<sup>27</sup> Lauterpacht, 'Recognition of States', *supra* note 23, at 457–458.

<sup>28</sup> Lauterpacht, *Recognition in International Law*, *supra* note 23, at 163–164; Lauterpacht, 'Recognition of States', *supra* note 23, at 457–458.

<sup>29</sup> Despite differences between Lauterpacht and Kelsen, they agreed that a state does not become a state by reason of recognition of its government. Lauterpacht, 'Recognition of States', *supra* note 23, especially 125–146; Lauterpacht, *Recognition in International Law*, *supra* note 23; Kelsen, 'Recognition', *supra* note 23; Kelsen, *General Theory of Law and State*, *supra* note 23, at 221–230.



existing legal status.<sup>30</sup> The confusion disappears today because there is no dispute that recognition of a state only declares its legal status, which depends on the existence of certain conditions which, irrespective of intergovernmental status, constitute a state or government for the purposes of international law.<sup>31</sup> The clarification achieved by the contemporary approach satisfies the arguments offered by both Kelsen and Lauterpacht, which reflect their frustrations about the misunderstanding they perceived amongst some legal thinkers during the war. It was a mistake to suggest, they said, that international personality depends on political recognition and, without it, a state or government is invisible to international law.<sup>32</sup> They agree that the tendency to conflate international status (being a state) with international capacity (acting like a state in international relations) reflects the susceptibility of recognition to political abuse and the desirability of formal recognition.<sup>33</sup> The risk of confusion arises because formal recognition always substantiates or activates legal personality for practical purposes by enabling a state and its representatives to properly participate in international affairs. Legal recognition, they say, is constitutive of legal status in the sense of substantiating or enabling legal capacity after the assessment of juridical facts.

How the two jurists arrive at this juncture, however, is different. The variations in their approaches reflect Lauterpacht's objection to legal positivism and the critical retaliation against him by positivists that followed in the 1940s. Kelsen says legal recognition is 'cognition rather than re-cognition' and without it, 'the unrecognised community does not legally exist'.<sup>34</sup> That is, legal recognition is constitutive of legal personality and establishes legally relevant facts.<sup>35</sup> Lauterpacht agrees in principle that recognition is not declaratory of legal personality and that legal recognition has constitutive effects, yet disagreed with the version of the constitutive view articulated by Kelsen (and Josef Kunz, Giulio Diena and Arrigo Cavaglieri)<sup>36</sup> on the basis that it leaves recognition to political policy and without the rights and duties accompanying legal status that recognition confers.<sup>37</sup>

Lauterpacht says the constitutive theory proposed by positivists (which grouping includes and therefore gestures to Kelsen) refuses the right of a state or government to function when the juridical facts relevant to international personality are clear and must be recognized so that a state or government can fully function. His version of the constitutive theory 'means ... that although prior to recognition the community in question does not possess the ordinary rights of statehood, it is entitled to claim

<sup>30</sup> Both Lauterpacht and Kelsen criticize the view that recognition merely declares the existence of a state or government where it already satisfies – as a legal fact – the conditions for statehood outlined by international law. Lauterpacht, 'Recognition of States', *supra* note 23, at 422–424; Kelsen, 'Recognition', *supra* note 23, at 608–609.

<sup>31</sup> See Frowein, *supra* note 20, para. 10; Talmon, *supra* note 20.

<sup>32</sup> For criticism of constitutive-declaratory views, see, e.g., Lauterpacht, 'Recognition of States', *supra* note 23, at 419–424; Kelsen, 'Recognition', *supra* note 23, at 605–611.

<sup>33</sup> Kelsen, 'Recognition', *supra* note 23, at 608–609; see Lauterpacht, 'Recognition of States', *supra* note 23, at 422.

<sup>34</sup> Kelsen, 'Recognition', *supra* note 23, at 608–609.

<sup>35</sup> *Ibid.*

<sup>36</sup> Lauterpacht, 'Recognition of States', *supra* note 23, at 422, nn. 96–100.

<sup>37</sup> *Ibid.*, especially at 419–422, 433.

recognition' and overcomes, by the existence of a reciprocal duty to recognize, 'circumstances ... in which the dormant and unenforceable right may acquire legal effectiveness' and will, for practical purpose, be an 'imperfect right'.<sup>38</sup> The political act of recognition – for both camps – is different and indicative of the subjective judgment of willingness to engage in international relations with the recognized regime.<sup>39</sup> Only legal recognition activates full legal personality. It does not change the existence of the juridical facts necessary for legal personality but establishes those as a judge might of legal facts in dispute.<sup>40</sup> In this respect, formal recognition has 'a specifically constitutive character'.<sup>41</sup>

For Lauterpacht and Kelsen, the legal effects of recognizing states and governments are continuous because an effective government is necessary to statehood.<sup>42</sup> The practice of distinguishing the *de facto* and *de jure* status of governments during war complicates the distinction between political and legal agency.<sup>43</sup> In a legal sense, the division between *de jure* and *de facto* recognition of a government might reflect the provisional character of 'effective' control and consequently be a relevant legal fact but otherwise could not be abused by diplomatic whims to differentiate the manner and degree of an alliance.<sup>44</sup> The vulnerability of political recognition to such abuse and to the misapprehension of its elevated significance for legal personality threatens the authority of international law and explains why premature recognition may serve claims to legitimacy but is unlawful. Kelsen suggested abandoning the distinction to avoid that danger. Lauterpacht took a different tack by interpreting the hesitation or prevarication associated with *de facto* recognition (*de Gaulle's status*) into a conservative virtue that guards against premature recognition and the absence of 'effective' territorial control.<sup>45</sup>

How the constitutive theory, however stated, applies to avoid the political dangers of recognition involved a further, more striking controversy that, arguably, remains so. Kelsen suggested that there was no legal or political imperative to recognize a state or its government even though satisfaction of legal conditions for international personality can only be 'yes' or 'no'. He says '[s]uch an obligation, however desirable, is not stipulated by positive international law. Existing states are only empowered – they are not obliged – to perform the act of recognition'.<sup>46</sup> Lauterpacht, consistent with his critique of the positivist's priority for the choices of states, disagreed. He explained that 'the paramount logic of the duty of recognition flows irresistibly from the fact that a society cannot exist without members. When the rise of personality depends,

<sup>38</sup> *Ibid.*, at 454.

<sup>39</sup> The view prevails. Gathii, *supra* note 20.

<sup>40</sup> Kelsen, 'Recognition', *supra* note 23, at 605–606; Lauterpacht, 'Recognition of States', *supra* note 23.

<sup>41</sup> Kelsen, 'Recognition', *supra* note 23, at 609; Lauterpacht, 'Recognition of States', *supra* note 23, at 433.

<sup>42</sup> Kelsen, 'Recognition', *supra* note 23, at 615; Lauterpacht, 'Recognition of States', *supra* note 23.

<sup>43</sup> Kelsen, 'Recognition', *supra* note 23, at 612.

<sup>44</sup> E.g. Lauterpacht, 'Recognition of States', *supra* note 23, at 386–387, 418; Kelsen, 'Recognition', *supra* note 23, at 612–613.

<sup>45</sup> See all references at *ibid.*

<sup>46</sup> Kelsen, 'Recognition', *supra* note 23, at 609–610, 613.

as the constitutive view properly asserts, upon an act of the existing members, that act cannot be the result of arbitrary will, but one of duty to the society at large'.<sup>47</sup> For this reason, he called for the establishment of an enforcement mechanism for the duty of legal recognition of states and governments that possess international status as a question of law. His views about a right and corresponding duty of recognition were immediately controversial and do not yet prevail. The controversy leaves open, of course, the reality that fuller agency within a community of states of the kind sought by *la France libre* as the legal government of France requires both legal and political recognition.

Lauterpacht's post-war monograph extends and contextualizes his earlier polemic with specific attention to the problem of recognizing *la France libre*.<sup>48</sup> Unsurprisingly, given his advisory role to the allied war governments, he defended the correctness of *la France libre*'s de facto status and its differential status from other exiled regimes that fled Nazi invasion and immediately acquired de jure status.<sup>49</sup> The limited international regard for *la France libre* exemplified, in his estimation, the 'conspicuous caution' needed when the risks of abusing recognition for political advantage during war were 'particularly strong' and the 'function of recognition often assumes the complexion of belligerent policy and action'.<sup>50</sup> His remarks also repeated his controversial argument that there is a right to, and a reciprocal duty of, legal recognition for regimes in effective control of a territory and its people.<sup>51</sup> So far as his thesis was uncontroversial, and remains so, his response to the limited recognition of *la France libre* confirms that effective government for the purposes of legal recognition ignores the ideological or ethical judgment of legitimacy.<sup>52</sup> The juridical standard of control arises by consent or with the tolerance of the people or where an incoming, revolutionary regime is able and willing to fulfil its constitutional obligations.<sup>53</sup> The difference between *la France libre* and other exilic regimes was that the rival administration did not clearly have effective control over the population in metropolitan France. *La France libre* was not

<sup>47</sup> Lauterpacht, 'Recognition of States', *supra* note 23, at 454.

<sup>48</sup> Lauterpacht, *Recognition in International Law*, *supra* note 23, at 158–169, especially 163–165.

<sup>49</sup> Alongside de Gaulle's controversial claims, other governments in exile in London, including representatives of Belgium, Norway, Netherlands, Luxembourg, Czechoslovakia, Greece, the Netherlands, Poland and Yugoslavia, in addition to the Grand Duchy of Luxembourg in Montreal, Canada, all received formal recognition by Allied states after escaping German occupation. Oppenheimer, 'Governments and Authorities in Exile', 36 *AJIL* (1942) 568, at 568–572, 591–594; Dear and Foot (eds), 'Governments in Exile', in *The Oxford Companion to World War II* (2003, 2014 version), available at <https://www.oxfordreference.com/view/10.1093/acref/9780198604464.001.0001/acref-9780198604464-e-718?rsk=y=wQk2Sg&result=2>; 'Governments in Exile' (6 April 1942), CQ Researcher Archives, available at <https://library.cqpress.com/cqresearcher/document.php?action=print&id=cqresrre1942040600>; Talmon, *supra* note 20, at 3–9; Brad R. Roth, *Governmental Illegitimacy in International Law* (1999); see also *Allied Forces Act 1940* (UK), which regulated the legal status of the armed forces of the exiled governments in London.

<sup>50</sup> Lauterpacht, *Recognition in International Law*, *supra* note 23, at 163–165.

<sup>51</sup> *Ibid.*, at 159.

<sup>52</sup> See all references at *supra* note 20.

<sup>53</sup> Lauterpacht, *Recognition in International Law*, *supra* note 23, at 159.

the constitutional trustee of French interests nor could it claim, as other exilic regimes with de jure status did, legal continuity from a status formerly acquired.<sup>54</sup>

The evident objective of theoretical concern for recognition during the 1940s was to fortify the normative fence around state identity when fear threatened objectivity. Despite the controversies relating to the phrasing and consequences of the constitutive approach, each side of the debate exposed political considerations to be responsible for the equivocations which destabilized the rules relevant to state and governmental recognition and produced an unpredictable landscape of differential, and sometimes conditional, sovereignties. Further, each version agreed that effective governmental control was decisive in cases of exile to guard against the danger of premature recognition. The relevant standard was neutral to regime legitimacy or political advantages implicit in the decision for the recognizing state. When Lauterpacht explained the principle in the context of exile, he said effectiveness extends to inferences of civic ‘consent’ or ‘tolerance’ from constitutional continuity, if not existing, territorial control. The detail confirms the scholar’s tacit agreement with the prevailing equivocations among liberal states about the status of la France libre vis-à-vis other regimes without a territorial seat after hostile invasion. It also signals a further, differently nuanced challenge to the juridical identity of the state that also concerns the people and implicates the problem of exile.

## B *The People and the Concept of the State*

The history of *l’ÉLHE* addresses the juridical problem about the politics of recognition from a differently nuanced angle that alters the significance of a population for the purposes of international status. Rather than signifying a specific group in a specific location to which governmental control refers as an objective fact, the idea of the French people became a subjective, civic value. The temporary effect of the institutional experiment recovered state identity for political decision *and* consequently complicates the jurist’s expectation that effective control is a neutral measure that ignores questions of representative legitimacy. Superficially, the fractious history of *l’ÉLHE* agrees with the contemporaneous political incertitude about the proper international status of la France libre and the relevant theoretical quarrels among legal scholars about the rules of state recognition. More interesting for situating those questions in context, however, is the cultural resignification of the concept of the people or a population as a civic sensibility which arose from the scholarly endeavour. In each aspect, the political root of the problem of recognition in legal thought (which all textbook accounts reiterate) reappears as the same concern that state identity requires internal and external political capacity exercisable by a legitimate regime.

### 1 *Une Officine du Gaullisme?*<sup>55</sup>

Superficially, *l’ÉLHE* encounters the jurist’s problem of recognition via la France libre.<sup>56</sup> Recent histories of *l’ÉLHE* note the scholars’ idiosyncratic sympathies yet assess it as

<sup>54</sup> *Ibid.*, at 164–165.

<sup>55</sup> Chaubet and Loyer, *supra* note 4, at 959.

<sup>56</sup> E.g. Chaubet and Loyer, *supra* note 4; Loyer, *supra* note 4.

'une officine du Gaullisme' or 'une sorte de *brain trust* de la France libre'.<sup>57</sup> The reality was, however, more complex. Despite General de Gaulle's efforts to adopt *L'ÉLHE* as the cultural representative of la France libre in America, a formal institutional alliance was never forthcoming. The lasting perception of solidarity conceals a lesser bargain that was more practical and tenuous than the image of a brain trust suggests. *L'ÉLHE* received significant financial donations from la France libre, advertised the pledge of the rival regime to recognize its diplomas in post-war France and occasionally functioned as a publicity platform for the ambitions of the Free French in New York. General de Gaulle was also a familiar presence at *L'ÉLHE in situ* or, more often, as a correspondent or by proxy of the expanding de Gaullist clique, many of whom campaigned for his greater diplomatic regard in America and who, by 1941 or 1942, held official positions in his administrative regime at Algiers. Consistent with the French émigré scene in New York and with international attitude, those who campaigned in America for liberation and allied assistance did not, however, necessarily or consistently support the political ambitions of la France libre or its leader.<sup>58</sup> What distinguishes *L'ÉLHE* from other French émigré intellectuals in New York who hoped for allied victory yet were wary of la France libre, was its collective opposition to Vichy. Not for Vichy or necessarily or consistently for la France libre, *L'ÉLHE* stood for a free France.

The nuances of the scholars' collective polemic against Vichy, including by those who supported la France libre, were left to the idiosyncratic expression of individual scholars. René Cassin, who lectured at *L'ÉLHE* and led la France libre's Comité Juridique, used legal principles to argue for international recognition of la France libre, not in French but, as was usual for the émigré clique in its foreign campaign for assistance, in English.<sup>59</sup> His question, 'Vichy or Free France?', was rhetorical and disputed the limited international status of la France libre on the grounds that it presented, consistent with public perception abroad, the only alternative to undemocratic rule. The effect refashions the problem of intergovernmental recognition as contingent on political factors which are referable to the people, as a civic category, rather than the national interests of recognizing states.

The parameters of the legal category of state identity shift in Cassin's analysis of the problem of recognition to allow for a different idea of the French people that depends on objective facts. Cassin criticized the limited, de facto recognition of la France libre by suggesting that the only existing alternative 'is both illegal and illegitimate' from a 'legal and moral point of view'.<sup>60</sup> His argument against the de jure recognition of the French regime at Vichy relies on the civic consequences of its violation of the 1884 Constitution, which mandates 'the republican form of government'.<sup>61</sup>

<sup>57</sup> Chaubet and Loyer, *supra* note 4, at 959, 968.

<sup>58</sup> See all references at *supra* note 4.

<sup>59</sup> E.g. Cassin, 'Vichy or Free France?', 20(1) *Foreign Affairs* (1941) 102; R. Cassin, *Les Hommes Partis de Rien: Le réveil de la France abattue (1940–41)* (1975), at 61–62; on Cassin's role in the Comité Juridique, which drafted rules applicable to the rival administration, see, e.g., J. Winter and A. Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (2013), at 134–184.

<sup>60</sup> Cassin, 'Vichy or Free France?', *supra* note 59, at 106.

<sup>61</sup> *Ibid.*, at 107.

The consequence was an illegal ‘pseudo-government’ that acceded to enemy occupation and, in so doing, denied the ‘self-determination of the people’, both internally and externally, by refusing the people’s constitutional status as the true voice of France. Importantly, the ‘mortal defect’ of the new Constitution was that it ‘deprived the nation of its freedom of action both at home and abroad’.<sup>62</sup> That is, the failure of democracy impacted on the international legal question because it restricted the people’s voice as the voice of France for the purposes of international affairs. Adherents of the constitutive approach to state identity would automatically disagree but fail, in so doing, to hear an important counter-argument circulating among jurists about the civic aspect of state identity that is relevant to regime recognition.

Cassin reflects on the normative plausibility of separating the legal and political category of state identity. He argues, consistent with the non-subjective aspect of recognition, that the principle of *res gentium* relies less on the domestic legitimacy of a government than on its capacity to enforce its authority for the purposes of intergovernmental recognition.<sup>63</sup> The real and effective status of la France libre as a Free French government confirms its claims to de facto recognition by the allied governments.<sup>64</sup> He goes further and asks whether la France libre qualifies as the de jure government of France. He says yes. The result is to extend the status of a legal government forced into exile with a rival government in exile which attempts to represent the national will by liberating the people from unconstitutional, illegal rule.<sup>65</sup> Cassin concludes:

Any force which represents the will to save the national patrimony and liberate the national territory is a legitimate force. In the comity of nations, it should have a position of equality. Free France, and Free France alone, represents the will of the French people. It should be treated as if it were France.<sup>66</sup>

The theoretical relevance of such remarks for legal debates about recognition arises from the framing of polemic as a normative inquiry which shares the thematic compass preoccupying international lawyers. The difference relates to Cassin’s attention to the people as a civic element in assessing international status. That the internal sovereignty of the people had international significance, making the people the voice of France, shifted the idea of the people as a legal quantity tied to a place. It also reflects the agreement between the de Gaullist clique and others at *l’ÉLHE*, Maritain included, who imagined themselves as the civic and cultural agents of France. The consequence of identifying the state with its people reduces international capacity—by the intellectuals’ collective institutional demand—to a democratic quantity.

## 2 A Civic Identifier of State

The resignification of the ‘people’ as a civic standard arose from the activist character of cultural production at *l’ÉLHE*, including its expression in polemical texts.<sup>67</sup>

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at 110.

<sup>64</sup> *Ibid.*, at 111.

<sup>65</sup> *Ibid.*, at 112.

<sup>66</sup> *Ibid.*, at 112.

<sup>67</sup> Maritain was among numerous exiled French scholars who wrote about the crisis of French democracy after June 1940. See, e.g., Maritain, *Travers le Désastre*, *supra* note 5; R. Picard, *La Démocratie Française*:

The democratic sensibility of all scholars brought the idea of a people to life as a civic category – not only as a population – and reimagined, as a consequence, the objective measure of state identity that was neutral to political intention. This shift self-consciously designated the *L'ÉLHE* and its members as cultural agents of the state. It also put pressure on the normative imperative of territory and a fixed population by shifting the idea of France to its civic and cultural identity. The scholar's France presented an idea of France as an international person that was referable to the political agency of its people rather than to the fixed criteria of a certain government, territory and stable population. The public profile of the intellectual experiment presented a code of state defined by an idea, an unexpected cultural representative and a new, civic measure of legitimacy. These presented an alternative to the legal code of state that attached international status to whichever regime, democratic or not, with effective control.

The idea of France or the state as a civic quantity was clear from the outset of the initiative. In a speech at *L'ÉLHE* early in 1942, for example, Maritain explained that the scholars' loss of faith in the Vichy regime revealed the importance of the cultural agent's 'faith in France, France which is not a government, but a people, a soul, a memory, a hope, an indestructible vocation'.<sup>68</sup> The institutional mandate reiterated the same principle and used the civic reference, especially its democratic orientation, to advance its international claim for assistance.<sup>69</sup> *L'ÉLHE* identified with the principles of independence, equal respect and liberty gifted to all democracies by French philosophical traditions. Its hosts assumed the imprint of the scholar's ideological DNA on the American Constitution and the ethical mandate that followed, where '[p]olitiquement, nous Américains, sommes à demi Français, à demi Anglais. Notre douleur devant les épreuves de la France a quelque chose d'inconsciemment filial'.<sup>70</sup> *L'ÉLHE* was an extension of the joint purpose of those states. The reason pared back to cultural affiliations about the democratic destiny of the state: 'Les unes et les autres ont le même but et servent le même idéal. La guerre et la défense contre la barbarie, en resserrant leur amitié'.<sup>71</sup> *L'ÉLHE* and its hosts envisaged it as the cultural and civic agent of the French people with responsibility to dedicate scholarly activities to the preservation of national values and to advancing the strategic goals of liberation.<sup>72</sup>

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*Hier – Aujourd'hui – Demain* (1944); J. Benda, *La Grande Épreuve des Démocraties* (1942); É. Giraud, *La crise de la démocratie et le Renforcement du Pouvoir exécutif* (1938); Cassin, *Les Hommes Partis de Rien*, *supra* note 59; Vaucher, *supra* note 1.

<sup>68</sup> Maritain, 'Statement on Purposes', *supra* note 6, at 1; see also, 'Statement about the Opening of the École Libre des Hautes Études' (February 1942), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000095](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000095).

<sup>69</sup> E.g., 'Declaration', *supra* note 6, at 7; 'Statement about the Opening', *supra* note 68.

<sup>70</sup> *L'ÉLHE 1942: Course Catalogue*, *supra* note 6, at 5; 'Declaration', *supra* note 6, at 7; Agreement, *supra* note 6, arts 4, 12: 'Politically, we Americans, are half French, and half English. Our suffering before the trials of France are unconsciously filial' (author's translation).

<sup>71</sup> 'Declaration', *supra* note 6, at 7.

<sup>72</sup> *Ibid.*, at 7.

Exile was critical to the characterization of France as a cultural and civic idea. Exile enabled intellectual freedom when uninhibited political and scholarly exchange was impossible in occupied France or under the Vichy regime. Exilic organization also disturbed the nexus between population and territory as the geographical reference for national identity which arises in the place of cultural origin and by civic belonging as citizens of a nation-state. The clustering of exiles as the representative of shared cultural values, especially language, is unremarkable in times of forced migration.<sup>73</sup> More radically for the international concept of state, the reframing of the people as a civic quantity detached from place challenged the expectation that territory is always a necessary indicator of state identity in international affairs. The effect extended, rather than substituted, how a state is visible and audible on the international stage and by whom. The scholars regularized the international stature of the cultural and civic idea of France. The receptivity to *l'ÉLHE* and its cultural campaign for the free state in New York, or among internationalists who ordinarily utilised the vocabulary of politics, diplomacy and law, regularized the intellectuals' shared idea of France.

Maritain's *À Travers Désastre* (1941) presents one version of the institutional claim for a civic indicator of state.<sup>74</sup> The text immediately assumed prominence as an anti-Vichy guidebook, an intellectual anchor for *La Résistance*, due to its clandestine circulation in France in the early 1940s, and as a manifesto for *la France libre*.<sup>75</sup> Partisanship was not, however, Maritain's intention.<sup>76</sup> Rather, his intention was to explain the mistakes which led to the military, political and moral defeat of France. Maritain concludes that strategic errors in battle were symptoms, not triggers, of the Machiavellianism of the ruling classes which left the French people politically demoralized and morally alienated from the Catholic Church. The negative impact of reactionary politics on Catholicism and public life in France momentarily defeated, without sterilizing, the civic motivation necessary for internal and external liberation. Though the text faults the military and governing elite at the helm of the French disaster and sympathizes with any who support national liberation, Maritain's intended reader is the ordinary French citizen, and collectively the French people, to whom he attaches responsibility for liberating France.<sup>77</sup>

He cautioned the reader (and its American counterpart) against binding its faith in France to a government, leader or state because '[a]près tout cependant ce n'est pas dans un homme, c'est dans le peuple de notre pays que nous avons notre meilleure espérance'.<sup>78</sup> Maritain was optimistic of an emergent Christian renewal in the French

<sup>73</sup> On the importance of the French language to the civic and strategic projects of *l'ÉLHE* and, more generally, on the clustering of French cultural refugees in New York during World War II, see, e.g., 'Declaration', *supra* note 6, at 7; Loyer, *supra* note 4; Nettelbeck, *supra* note 4.

<sup>74</sup> Maritain, *Travers le Désastre*, *supra* note 5.

<sup>75</sup> Loyer, *supra* note 4, at 225–244.

<sup>76</sup> Maritain introduces *À Travers le Désastre* with an emphatic explanation of his lack of partisanship. Maritain, *Travers le Désastre*, *supra* note 5, at 12–13.

<sup>77</sup> *Ibid.*, at 11; see also Maritain, 'Religion', *supra* note 5, at 281.

<sup>78</sup> Maritain, *Travers le Désastre*, *supra* note 5, at 121: 'After all however it is not in a man, it is in the people of our country that we have our best hope' (author's translation).



people, especially among the youth, encouraged by the pre-war revival of Thomism by Catholic philosophers and by the activities of progressive clergy in France. He says, '[u]n peuple peut vivre dans une démocratie en voie de désintégration, et n'être pas désintégré lui-même dans l'ordre plus profond de la vie des personnes', even where civic virtues such as humanity, industry and charity 'peuvent être un moment comme stupéfiées; elles subsistent toujours'.<sup>79</sup> The enthusiasm many have for General de Gaulle should be circumspect, according to Maritain, because unqualified zeal for 'son pseudo-gouvernement' forgets that faith in France begins and depends less on military success than on the 'civilized' attitude of its people.<sup>80</sup>

The text is, despite Maritain's claim to objectivity and non-partisanship, a civic and philosophical polemic about state identity. His plan for national liberation depended on convincing his readers that 'the France of religious faithfulness and spirituality' and 'the France of human emancipation' ultimately depended on them as political agents and Christians.<sup>81</sup> The state appears to Maritain as an instrument of the body politic which exists for, not by, the human person. This means that the integrity of a state depends on the provision of justice and on institutional support for the free development of its people. A state is not, in other words, identifiable by abstract personification but, rather, is referable to the democratic and humanist attitude and experience of its people.<sup>82</sup> Repeated references to the 'true vocation' of France in *À Travers Désastre* remind readers that the state is indivisible with its civic and spiritual inclination to liberty which is integral to the collective conscience of the people.<sup>83</sup> Maritain says, for example, 'la France croit d'une manière indéterminable à sa vocation, et il est plus facile d'arracher la peau d'un Français que de lui arracher cette foi'.<sup>84</sup> Losing sight of the difference between the state (which is an institution subject to the body politic) and the human being (which, for Maritain, is the extension of spiritual intelligence) is the reductionist strategy of totalitarian ideology, which denies plurality and the intelligence of human personality.<sup>85</sup> It also forgets that the political state can survive alongside repressive governments as a civic sensibility with or without territorial presence. *L'ÉLHE* elucidates, by its collective experiment, that the free state can and did exist along a cultural and political axis by the efforts of those who exploited the institutional opportunities of exile to resist Vichy. The scholar's evangelical faith in France, as a political

<sup>79</sup> Maritain, *Travers le Désastre*, *supra* note 5, at 43–47: 'A people may live under a democracy that is dissolving without itself dissolving its more profound personal life' (at 43) (author's translation); 'Even where civic virtues may be stupefied, they still persist' (at 46–47) (author's translation); see also at 146–142.

<sup>80</sup> For Maritain's reflections on General de Gaulle and warning against de Gaullism, see *ibid.*, at 118–122, especially 120.

<sup>81</sup> Maritain, 'Religion', *supra* note 5, at 273–274; Maritain, *Travers le Désastre*, *supra* note 5, at 43, especially 145–155.

<sup>82</sup> The same argument is put in analytical terms shortly after the war in Maritain, 'Person and Common Good', *supra* note 5, at 447–449; especially Maritain, 'The People and the State', in *Man and State* (1951) 1.

<sup>83</sup> Maritain, *Travers le Désastre*, *supra* note 5, at 149.

<sup>84</sup> *Ibid.*, at 153: 'France has an unshakeable trust in her vocation; it is simpler to skin a Frenchman than to take away this faith from him' (author's translation).

<sup>85</sup> *Ibid.*, at 148–150.

state, continues as a personalist-democratic vocation whatever its temporal circumstances or geographical placement or affiliations.<sup>86</sup>

Maritain elaborates the political theory of the state introduced in *À Travers Désastre* in later texts where he again contests the abstract, juridical concept insofar as it recognizes both free and undemocratic states.<sup>87</sup> The state he describes does not erase the institutional indicators of states. Rather, his idea attaches constitutive significance to the sovereignty of a people and not the control exercised by a government in a specific place over its residents. Maritain suggests, for example, that the ‘State is inferior to the body politic as a whole, and is at the service of the body politic as a whole’ and so is ‘endowed with topmost authority not by its own right and for its own sake, but only by virtue and to the extent of the requirements of the common good’.<sup>88</sup> The consequence is to conceive the state as a civic quality which becomes visible through indicators of plurality, justice, liberty and institutions dedicated to the political and spiritual vigour of the human person. Maritain denies ‘genuine Sovereignty can by any means be ascribed to the State’ because it is always an ‘instrumental agency of the body politic’ and ‘is not and has never been genuinely sovereign’.<sup>89</sup> Internally, the State is subject to the body politic, and, externally, a government merely represents the people.<sup>90</sup> The political state exists in the civic spirit of its people rather than a place or a specific government.

For the international lawyer, Maritain’s state adjusts the familiar centre and meaning of sovereignty, from the geographical, institutional or constituent numbers and actual control, to the civic sensibility which might sometimes exist apart from, or despite, those familiar, tactile features. The theoretical possibility of geographical displacement is moot until the political state becomes impossible in its traditional location. *L’ÉLHE* became that experimental axis where culture and politics combined to salvage the political state in exile. That project progressed in parallel to legal disagreement about international status and reworked its driving concern. The civic indicator substitutes the objective criteria of ‘effective’ government, place and territory with a subjective, political measure. Theoretically, the international status based on a civic measure was not referrable to the interests of the recognizing state and so did not aggravate the risks for aberration or abuse which follow, especially for belligerent status in war. The cultural idea of state depended on the political interests of the French people in the internal and external determination of France. Yet, in that further respect, the cultural project agreed with the jurist’s ambivalent regard for both *la France libre* and for the Vichy regime. Neither option was viable as the *de jure* or *de facto* representative of the French people as a political question. For the American administration, *L’ÉLHE* was a cultural agent of France with political and strategic relevance to its military and political ambitions for Europe.<sup>91</sup>

<sup>86</sup> Maritain, *Travers le Désastre*, *supra* note 5, at 153.

<sup>87</sup> Maritain, ‘Person and Common Good’, *supra* note 5; especially Maritain, ‘People and the State’, *supra* note 82, at 27.

<sup>88</sup> Maritain, *Man and State*, *supra* note 82, at 13–14.

<sup>89</sup> *Ibid.*, at 42–43.

<sup>90</sup> *Ibid.*

<sup>91</sup> See correspondence between General de Gaulle and Maritain and between Maritain and Roosevelt. Hellman, *supra* note 18.

## 4 Extraterritorial Sovereignty

The cultural and civic project of state was contingent on (meaning, allowed by, responsive to, inspired by and conditioned by) exile. Territorial displacement defined how *L'ÉLHE* appeared and was heard as a cultural analogue of the free state. For international legal thought, the appearance of a cultural analogue of state reconceives the principles of sovereignty or independence familiar to the international lawyer which assume a territorial referent. The *Palmas Case* (1928) confirms, for example, that the principle of state sovereignty is the 'exclusive competence of the State in regard to its own territory', which is 'the point of departure in settling most questions which concern international relations'.<sup>92</sup> Sovereignty is typically a 'situation recognised and delimited in space' by 'so-called natural frontiers' or 'outward signs of delimitation'.<sup>93</sup> The cultural analogue spontaneously detached international identity from territory and reattached it to culture and civic intention, altering the outward signs of the French state in a symbolic and practical sense. The code of state identifiable with the organized cultural enterprise shifted the legal conversation about the legal limits of external sovereignty to the political and ethical characteristics which qualify a state to participate in international affairs. These matter for state sovereignty not merely hypothetically, as an intellectual proposition, but also as a practical consequence of the scholar's participation in the affairs of states as an agent of France.

### A A Cultural Analogue of France

As a cultural analogue of France, the institutional project reimagined the French state as a sensibility which was divisible from its territorial origin and cultivated the scholars' cultural authority to acquire international support for the liberation of France. Such reimagining and cultivating exploited the opportunities of geographical displacement afforded to the group on account of its members' individual and collective prestige: to speak as cultural agents of France, when unfettered speech was not possible in France, and to be seen and heard from the authoritative vantage of an American-sponsored bilingual school. *L'ÉLHE* functioned, aside from controversies arising from its ambiguous partisanship for la France libre, as an exilic platform for a cultural argument about French sovereignty and as an analogue for its expression.

The international status of *L'ÉLHE* arose from the international significance of French cultural and political traditions and, importantly, from what the exilic revival of French culture signalled for the survival of democracy in general. French cultural identity was identical with the republican tradition which France gifted to the occidental world.<sup>94</sup> The late night séance inaugurating *L'ÉLHE*, for example, confirmed that the

<sup>92</sup> *Island of Palmas Case (or Miangos) USA v. The Netherlands*, 4 April 1928, reprinted in UNRIIA, vol. 2, 828, para. 8.

<sup>93</sup> *Ibid.*

<sup>94</sup> American newspaper reports about the *L'ÉLHE* highlight the linkages between intellectual liberty, the common democratic heritage of France and America and the liberation of France from Fascist suppression. See, e.g., 'Excerpts from Editorials on the Founding of the *L'ÉLHE*' (1941–1942), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000142](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000142). For Maritain's restatement of the same perspective as shared by all scholars at *L'ÉLHE*, see, e.g., Maritain, Draft Report on Inauguration Party (14 February 1942) with Handwritten Notes (in French) (15 February 1942), especially at 3 NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000096](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000096).

joint cultural and political purposes between the scholars and their hosts arose from the French roots of American democracy.<sup>95</sup> Maritain's inaugurating address to 3,000 guests comprising notable expatriates and New York's cultural, political and social elite signalled to the 'l'amitié intellectuelle et idéologique franco-américaine', scholarly collaboration 'à la victoire de la démocratie américaine' and to the revolutionary sensibility expressed by the Star-Spangled Banner, la Marseillaise, la Brabançonne and the Chant du Départ.<sup>96</sup> Such textual associations confirm the cosmopolitan setting and the cosmopolitan foundations for extending hospitality to scholarly enterprise. Specifically, Maritain's words identify his strategic goals for the liberation of France with the restoration of its democratic tradition and its continuation as the original blueprint for freedom abroad. The pertinence of the French democratic tradition in America gave the cultural experiment a symbolic status for the democratic future of France and, more pragmatically, for the democratic stakes of war for all democratic states.

The roots of liberty which were 'consacrés à la France' and identifiable with *l'ÉLHE* shaped its extraterritorial expression of French sovereignty.<sup>97</sup> The cultural agent of France spoke for French freedom in the broadest sense of internal and external liberty. Such agency depended not on governmental status or territorial origin but, rather, on the speaker's cultural authority, its persistent agitation of democratic standards, foreign hospitality and an institutional framework dedicated to its cause.<sup>98</sup> Those elements signified the exilic project as a project of state by cultural agents of state, but also, by cultural agents of the free state and by that designation, by cultural agents of the quintessential state.

They were not, as Hannah Arendt noticed was common among other French intellectuals in New York in the same period, merely bohemians who stayed in hotels and 'lived' in the cafés where they could 'escape from political action into some theory which merely talks about action, that is, into activism'.<sup>99</sup> The institutional framework distinguishes *l'ÉLHE* from other international networks of French cultural and political resistance, including the émigré artists, writers, musicians, dancers and other intellectuals who congregated in the newly fashionable 'Manhattan Montparnasse' in the 1940s. Faculty members were simultaneously political and cultural agents of the French state with international status. The configuration of *l'ÉLHE* as an institution allowed the reimagining of political space as the location of iterative exchange detached from territory *and* the reimagining of cultural space as the location of political

<sup>95</sup> 'Ecole Libre Opens as Exiles' Project', *New York Times* (15 February 1942), at 31; 'French Learning in Exile', *New York Times* (13 February 1942), at 20; *New York Herald Tribune* (12 February 1942) in 'Excerpts from Editorials', *supra* note 94.

<sup>96</sup> *Ibid.*; see also Maritain, 'Draft Report', *supra* note 94, at 1, 5; Maritain, 'Statement about the Opening', *supra* note 68. 'La Seance Inaugurale de l'École Libre des Hautes Etudes [Invitation]' (1942), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000085](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000085); 'Ecole Libre Opens as Exiles' Project', *New York Times* (15 February 1942), at 31.

<sup>97</sup> Maritain, 'Statement on Purposes', *supra* note 6, at 3.

<sup>98</sup> International legal debates about the meaning of state sovereignty, as a political and/or legal indication of state autonomy, continued a much longer, extensive tradition of theoretical dispute traceable from the 16th century. See, e.g., textbook analysis of statehood and references in L. Oppenheim, edited by H. Lauterpacht, *International Law: A Treatise*, vol. 1, *Peace* (5th edn, 1947), at 116–20, paras 67–70.

<sup>99</sup> Arendt, 'French Existentialism', in *Reflections on Literature and Culture* (2007) 115.

action by and between citizens and, by their efforts, between an ideal of France and the world. If Arendt asks could it be that *cultura animi* or taste have something to do with politics, the scholar's question is how it could salvage an ideal of France by re-igniting democratic contest in exile for the world to see.<sup>100</sup> The supplement from *L'ÉLHE* to international conversations about state sovereignty arose from such ideas, evident in Maritain's oeuvre dedicated to the personalist state, which mobilized as an international form of statecraft dedicated to democratic values.

The scholar was self-conscious of its international significance as a cultural agent of free France and of the future of the free state. *L'ÉLHE* identified from its beginning with the 'new liberty of the world' which tied the traditions of French philosophy, revolutionary history and literature to its American audience and explains why the curriculum prioritized these subjects as being of 'particular interest' for its local students.<sup>101</sup> Its representative status, as a symbol and voice of democratic freedom, was also the perception of its hosts. The American press repeatedly commended *L'ÉLHE* as the expression of the 'just cause' shared by 'fighting humanists' and on which the prospects of freedom in all free nations hinged. Though all scholars lobbied for the ideals underpinning the American administration's hopes for victory, their objectives reached beyond the present stakes of war. There was an expectation that knowledge production was necessarily and more generally an international task because 'modern scholarship has always been international' and draws heavily on the 'studies of scholars of other nations'.<sup>102</sup> The cultural enterprise, nevertheless, always intended to be temporary. This meant it existed, as the *New York Times* reported, to contribute to the enrichment of American knowledge and cultural life but, more significantly, for the 'sake of the French people and their representatives here' who might maintain its democratic traditions until liberation restored France 'among the leading nations of world'.<sup>103</sup>

Its institutional structure, which was essential to the effectiveness and audibility of its normative gesture, was also two-sided. Both its illustrious faculty and its hosts conceived *L'ÉLHE* as a cultural proxy of France in America and as a cross-cultural transaction. Its institutional organization depended on diplomatic invitation and on the financial support and hospitality of the political, intellectual and business elite in America. The joint initiative began as a means of enriching its hosts through cross-cultural understanding and knowledge exchange and self-consciously gestured to world events. *L'ÉLHE* opened in February 1942, soon after America became a formal belligerent in the allied effort against Germany on 11 December 1941 and

<sup>100</sup> Arendt, 'The Crisis in Culture', in *Between Past and Future: Eight Exercises in Political Thought* (2006), at 194, 206–208, 211, 213–215; Arendt, 'Culture and Politics', in *Reflections on Literature and Culture* (2007), at 179.

<sup>101</sup> Maritain, 'Draft Report', *supra* note 94, at 3; see also former American ambassador to Belgium, David Henan Morris, 'Speech on Ecole Libre', at 3, NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000097](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000097).

<sup>102</sup> 'The Effect on American Scholarship of the University in Exile' (circa. 1942), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000104](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000104).

<sup>103</sup> 'Ecole Libre Opens as Exiles' Project', *supra* note 95, at 31; 'French Learning in Exile', *supra* note 95, at 20; *New York Herald Tribune*, *supra* note 94.

after German invasion of France in June 1940. The interests of both scholar and host in allied victory and the consequential liberation of France shaped their mutual expectation of joint purpose against Germany.<sup>104</sup>

Strategic additions to the curriculum substantiated the scholar's argument for the survival of France as a political unit and the imperative, during war, for international and Pan-American solidarity in supporting its cause.<sup>105</sup> The curriculum deliberately engaged with the international crisis, for example, by introducing French perspectives on international relations and on the political principles common to democratic states.<sup>106</sup> The founding documents of the *L'ÉLHE* go further in confirming that the political ambitions of the cultural enterprise were continuous with its intellectual pursuits. The institutional mandate, for example, deliberately recycles democratic principles – liberty in thought, internal politics and international relations – to articulate a claim for the free state.<sup>107</sup> All scholars agreed to principles that the people shared 'en France et dans les nations démocratiques' as these formed the basis for 'la libre nation' and '[I]a même solidarité fraternelle les unit à la France libre et aux alliés'.<sup>108</sup> War explained the precarity shared by the French intelligentsia and all democracies and, consequently, the receptiveness of Americans to extend philanthropic, institutional and diplomatic hospitality to an intellectual elite at risk in Europe.<sup>109</sup>

The chain of correspondence between General de Gaulle and Maritain and between the scholar and President Roosevelt between 1940 and 1943 confirms the international significance of the *L'ÉLHE* as an extraterritorial agent of France.<sup>110</sup> From as early as the days preceding the surrender of France to Germany, Maritain appealed to Roosevelt to support French morale and the liberation of France.<sup>111</sup> He spoke personally and as the vice-president of *L'ÉLHE* in regular exchanges that demonstrate the mutuality of interest that identifies the scholar as of equal importance to President Roosevelt as the Americans were for Maritain. The effect succeeded in fixing Maritain's

<sup>104</sup> *Agreement*, *supra* note 6.

<sup>105</sup> *Ibid*. For copies of the curriculum catalogues, see listings of the NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Browse/objects/facet/collection\\_facet/id/228](https://digitalarchives.library.newschool.edu/index.php/Browse/objects/facet/collection_facet/id/228).

<sup>106</sup> The curriculum deliberately engaged with the international crisis by introducing French perspectives on international relations and political principles common to liberal states, including courses open to non-degree enrolments on, for example, 'Liberty and Determinism' and 'Big Philosophical Problems: The Idea of Man in Modern Times' (Maritain); 'Intellectual Relations between France and America' (Gilbert Chinard); 'Problems of International Organisation' (Henri Bonnet); 'Problems of International Law' (Joseph Nisot); 'Races and Racism' (Lévi-Strauss); 'The Political Economy of the European Powers and the War' (Robert Valeur); 'Foundations of the State' and 'The Influence of Montesquieu in America' (Henri Rolin); 'Minorities Laws in Europe between the Wars' (Max Lasersohn); 'French Foreign Policy' (Amé Leroy); 'Parliamentary Government' (Henri Laugier) and 'Reconstruction after War' (van Zeeland). *L'ÉLHE 1942: Course Catalogue*, *supra* note 6.

<sup>107</sup> See, e.g., 'Declaration', *supra* note 6, at 7; 'Statement about the Opening', *supra* note 68.

<sup>108</sup> 'Declaration', *supra* note 6, at 7; *Agreement*, *supra* note 6, arts 4, 12: '[I]n France and in democratic nations' as these formed the basis for the 'free nation' and 'the same fraternal solidarity unites them with France Libre and the allies' (author's translation).

<sup>109</sup> Chaubet and Loyer, *supra* note 4.

<sup>110</sup> For an overview of some of the key exchanges between Maritain and De Gaulle/Roosevelt, see, e.g., Hellman, *supra* note 18; Jackson, *supra* note 14.

<sup>111</sup> Maritain's renown in the USA as the leading Catholic scholar in the world made him an attractive friend for President Roosevelt who relied on the support of Catholic constituents. Hellman, *supra* note 18.

reputation as a friend of American democracy and as a true democratic voice of free France against the growing perception in England and America that General de Gaulle wanted power.<sup>112</sup> It also checked the de Gaullist sensibility of other personalities at *L'ÉLHE* by making the political sympathies of individual scholars proof of the collective's intellectual plurality rather than of institutional branding. President Roosevelt repeatedly cautioned Maritain against closer allegiance with General de Gaulle and made it clear, in official correspondence to the *L'ÉLHE*, that American efforts to liberate France should not rely on the military assistance of the fighting French.<sup>113</sup>

The exilic character of *L'ÉLHE* immediately distinguished the cultural claim to participate in international affairs from legal expectations relevant to state sovereignty. Though the legal category of sovereignty is susceptible to full and not-full, as well as internal and external, expressions, it implies a political (not cultural) representative with 'independence all round, within and without the borders of the country'.<sup>114</sup> That is, international law assumes a territorial referent for sovereignty which defends or advances the interests of the territorial unit and its people in international affairs. *L'ÉLHE* highlights the intangibility of external agency that begins at a territorial origin identifiable with the juridical state, but does not depend on physical continuity between the agent and such territory. Sovereignty, in its cultural, democratic and exilic orientation, existed aside from territory when cultural identity became a new form of statecraft in the circumstances of exile and, consequently, of participating in international affairs. Here, the participatory element occurs not as difference (as marked by a territorial boundary signifying the place represented in international affairs) but, rather, as the linkages which relate the cultural agent to political agents elsewhere. In its external aspect, the legal frame for state sovereignty assumes a certain receptivity to that figure in its diplomatic activities. The scholar was a self-appointed agent of France, like General de Gaulle, and similarly lacked control internally or externally of France as a place. The difference between *L'ÉLHE* and Vichy or la France libre, however, was its diplomatic status, which followed from its exilic proximity and its effort to speak not merely for France but also for the ideal democratic state.

## B *Statecraft and Recrafting International Society*

The pattern of intellectual endeavour at *L'ÉLHE* staged it as politically more significant than as only a spontaneous and opportunistic exilic axis by which French cultural agents gave voice to the strategic concerns of France in international affairs. The cultural form of internationalism mobilized the scholars as agents of state as well as practitioners of an idealistic form of statecraft. In that further respect, the scholars argued for a model of the democratically orientated state that was necessary for peaceful

<sup>112</sup> *Ibid.*, at 466.

<sup>113</sup> *Ibid.*, at 461, 466. A prominent example is the letter President Roosevelt wrote to congratulate *L'ÉLHE* on its early success, which arrived in parallel with the public news of the British-American invasion of North Africa, which campaign did not involve la France libre or consultation with General de Gaulle. Nettelbeck, *supra* note 4, at 98–99.

<sup>114</sup> *Ibid.*

international relations. The effect introduced democracy as a relevant standard for the internal and external independence, freedom and agency of a state in parallel to the usual disinterest of legal codes of sovereignty in the political orientation of states.

The focus of legal debates about sovereignty during the 1930s and early 1940s followed a different tack that was reactive to the risks of war or war strategy. These debates left aside, as is usual for the legal questions of statehood, the political orientation of states to focus on the outer limits of external sovereignty. Independence ‘all round’, as Lauterpacht suggested, created an almost unlimited option for sovereign states to go to war without regard for the legal restrictions on belligerency.<sup>115</sup> Georg Schwarzenberger, who was the vice-dean of the Faculty of Laws (at University College London) during the war, rearticulated the dilemma as the interplay of the dynamic ‘vortex of power politics’ and the static or rigid character of law which limits sovereignty only by consent.<sup>116</sup> He says ‘it is the function of the conception of State sovereignty, and of the *liberum veto* of the sovereign State to maintain intact the supremacy of the rule of force over the rule of law in international society’.<sup>117</sup> Power politics, which he explains as the by-product of the *liberum veto*, left peace increasingly unlikely because the procedural and legal apparatuses for international security agreed after 1919 failed to inhibit rearmament and the peaceful resolution of disputes most likely to lead to rupture.

International lawyers understood state sovereignty to be the lever controlling the authority or effectiveness of law. Their response to it, and, more particularly, to its priority for principles of *liberum veto*, crystallized in the discussion of the concept of vital interests.<sup>118</sup> The phrase frequently appeared in reservation clauses to compulsory arbitration agreements in the early 20th century but became, in the lead up to war, a conduit for theoretical comment on the subjective ‘right of each state to define its own interests for itself’.<sup>119</sup> The notoriously slippery category, broadly defined as interests necessary to the self-preservation, independence, safety and survival of states, legitimated self-help. For international lawyers, it functioned as an entry for legal discussion about the inability of law to maintain order against the political will of sovereigns. Differences of opinion about the proper function or capacity of international law generated different responses.<sup>120</sup> What was common in the legal conversation, however, was the observation about the dynamic, unstable and political character of international society that was prone to rupture. Lauterpacht criticized states (and internationalists) for

<sup>115</sup> For legal discussions of state sovereignty as a pretext which states use to legitimate belligerent action and ultimately, participation in war, see, e.g., Brierly, ‘War and the Law’, in J. Brierly, *The Outlook for International Law* (1944) 19, at 19–32; H. Lauterpacht, *The Function of Law in the International Community* (2011); Lauterpacht, *Peace*, *supra* note 98, at 113–120; J. Brierly, *The Law of Nations* (1942), at 247–259; Schwarzenberger, ‘The Sovereign State’, in G. Schwarzenberger, *Power Politics: A Study of International Society* (1941) 84.

<sup>116</sup> Schwarzenberger, ‘Sovereign State’, *supra* note 115, at 89–93, 202–203.

<sup>117</sup> *Ibid.*, at 92.

<sup>118</sup> Brierly, *Outlook*, *supra* note 115, at 33–60; Brierly, ‘Vital Interests and the Law’, 22 *British Yearbook of International Law* (1944) 51; Brierly, ‘The Relation of International Law to International Peace’, 13 *Cornell Law Quarterly* (1928) 385, at 396–397; Lauterpacht, *Function of Law*, *supra* note 115, at 147–153, 181–190.

<sup>119</sup> Brierly, *Outlook*, *supra* note 115, at 38.

<sup>120</sup> See references at *supra* note 118.



frustrating the pacifist function of law, conceived as a system or framework for international relations, by defining certain, political disputes as non-justiciable.<sup>121</sup> A less rigid, realistic response to unfettered state sovereignty called ‘for a strengthening of the social bond between them, not for the clamant assertion of their rights, but for a more insistent reminder of their obligations towards one another’.<sup>122</sup> Though the problems of law were inextricably bound to politics, international lawyers did not address how politics might strengthen the rule of law and the mutual objectives of association. What astute observers perceived, evident in Professor James Brierly’s realism, was that neither a wholly legal, nor a wholly political, approach was the answer.<sup>123</sup> The question was taken up by the spontaneous gesturing of cultural activism to both political and legal conceptions of state when the survival of the democratic state was imperative.

The different logic of sovereignty identifiable with *l’ÉLHE* shifts the negative attributions of *liberum veto* familiar to international lawyers. Sovereignty as democratic freedom, within and beyond territory, enables the positive aspects of political dynamism or heterogeneity for the international community. *L’ÉLHE* was a cultural enactment of the democratic proposal for a free or sovereign state. In a speech given on the first day of classes, Maritain confirmed that the joint purpose of scholars at *l’ÉLHE* was to further ‘disinterested knowledge’ and ‘freedom’.<sup>124</sup> The republican trope of France, being the trope for the modern democratic state, was identifiable with the intellectual’s freedom of conscience, expression and of association. The Constitution establishing the *l’ÉLHE* was conditional, for example, on the scholars’ pledge ‘to remain free men in their thought, their teaching, and their work ... without regard to questions of race or religion’ and, specifically, to pursue such activities without the restraint of political or ideological bias.<sup>125</sup> The only restraint was on research ‘that detracts from the spiritual freedoms and the fundamental rights of men and of citizens, such as they are conceived by modern democracies’.<sup>126</sup> To speak for intellectual freedom (which is the opportunity of *laïcité*) is to speak politically and meant in exile, to speak as an agent of the free state and of France as the quintessential example.<sup>127</sup> All scholars, irrespective of factional divisions or individual bias, envisaged themselves as possessing responsibility, as Maritain suggests, to influence the ‘concrete logic of the events of history’.<sup>128</sup>

Though descriptions or responses to the *l’ÉLHE* typically frame their political proposal as a claim to re-establish French democracy, the concept had specific political and spiritual significations for Maritain.<sup>129</sup> These had international significance beyond the specific concerns of *À Travers le Désastre* to address the civic attitude of the

<sup>121</sup> Lauterpacht, *Function of Law*, *supra* note 115, at 181–190, 442–446.

<sup>122</sup> J. Brierly, *The Law of Nations* (1936), at 41.

<sup>123</sup> Brierly, ‘International Peace’, *supra* note 118, at 396–397.

<sup>124</sup> Maritain, ‘Statement on Purposes’, *supra* note 6, at 1; Morris, *supra* note 101.

<sup>125</sup> Agreement, *supra* note 6, clause 4; *Notes on the Contract*, *supra* note 6.

<sup>126</sup> Agreement, *supra* note 6, clause 4.

<sup>127</sup> Maritain, ‘Integral Humanism’, *supra* note 5.

<sup>128</sup> *Ibid.*, at 1.

<sup>129</sup> The key themes reiterate through Maritain’s wartime oeuvre dedicated to political questions. See the sources in note 5 above.

French people in the context of military defeat and anti-democratic control by Vichy.<sup>130</sup> Maritain's proposed ideal of democracy involved reworking the values of liberty and fraternity underpinning the revolutionary tradition within the framework of his personalist philosophy. The revolutionary vocabularies of *liberté*, *fraternité*, *égalité* form an iterative thread in his wartime writings, defining his idea of the state as a personalistic democracy, also a new democracy, a true democracy and a Christian democracy, and allude to the Vichy regime and the French people as the target of his protest.<sup>131</sup>

A personalistic democracy is a fraternal city and a free city, but it alters the traditional concern for the individual or ego identifiable with the republican model of man and citizen by attaching greater importance to the spiritual intelligence of the person or self. For Maritain, individualism could not redeem France from its present crisis because it encourages fragmentation rather than societal cohesion. The defeated, authoritarian or war-state was the extreme proof of the destruction which results from dividing the things of the world – the economic or political system – from the things of spirit.<sup>132</sup> Maritain intended to liberate French Catholicism from the hold of anti-democratic rulers who inspired an anti-clerical aversion among the people who feared restraint in matters of conscience and politics.<sup>133</sup> The return to spiritual faith was necessary to overcome the crises of democracies, identifiable with Vichy or other authoritarian regimes, because such faith stimulates living intelligence, which directs the individual to God and towards the common good of each other.<sup>134</sup> These were the characteristics of a 'sane political society' oriented by 'a common task inspired by the ideal of liberty and fraternity, tending, as its ultimate goal, toward the establishment of a brotherly city wherein the human being will be free from servitude and misery'.<sup>135</sup> Each scholar's different contribution to that project characterized him or her as a democratic agent whose audience expanded along with the societal character of the task. That was the distinctive political opportunity of institutional exile. It also took the concept of the state back to the people.

<sup>130</sup> Maritain, 'Integral Humanism', *supra* note 5, at 5.

<sup>131</sup> Maritain, *Rights of Man*, *supra* note 5, at 98–100. Maritain understands the American motto 'freedom, justice, happiness' to be analogous to the French: *liberté, fraternité, égalité*. Maritain, *Christianity and Democracy*, *supra* note 5, at 20.

<sup>132</sup> Maritain, 'Christian Humanism', *supra* note 5, at 166.

<sup>133</sup> For details of pre-war conservatism in French Catholicism which lent support to right-wing political movements such as Action Française and its continuation as the official policy of the Vichy regime, see, e.g., Maritain, 'Religion', *supra* note 5, at 266–267, 270–271; Maritain, *Travers le Désastre*, *supra* note 5, at 66–69; Hellman, 'Vichy Background: Political Alternatives for French Catholics in the Nineteen-Thirties', 49(1) *Journal of Modern History* (1977) 11, at 11; Franck, 'The Future of Representative Democracy in France', 24 *Foreign Affairs* (1946) 224. Some early responses to Maritain's thesis, including by his admirers, were sceptical whether it succeeded in avoiding the errors of clericalism and secularism that it targeted. See, e.g., Reinhold, 'A Frenchman States His Credo for Tomorrow', *New York Times* (5 September 1943), at 8; Carmichael, 'Jacques Maritain Discusses the Shortcomings of Democracy', *New York Times* (11 June 1944), at 23.

<sup>134</sup> Maritain, *Christianity and Democracy*, *supra* note 5, at 68–73; Maritain, 'End of Machiavellianism', *supra* note 5, at 10–11.

<sup>135</sup> Maritain, *Christianity and Democracy*, *supra* note 5, at 99–100.

For Maritain, the scholar's immediate task was to reform education in line with personalist values and, further, to cast its pedagogical net more broadly by appealing to the intelligence and free will of the public in Europe and America.<sup>136</sup> Both tasks particularize the broad institutional pledge to 'l'indépendance de la recherche, le respect de la personne humaine, la garantie de la liberté spirituelle' and its expression through curriculum design and public programmes designed to assure the survival of those values during war.<sup>137</sup> For Maritain, the primary purpose of education is to encourage a democratic state of mind.<sup>138</sup> That perspective identifies the state as a civic sensibility which depended on the efforts of cultural actors to inspire the love of freedom through ideas. The scholar's means included bridging the heterogeneity among different branches of learning (bringing scientists, philosophers, lawyers and theologians into the same room) and cultivating in students a freer 'person' who pursues (spontaneously, autonomously and expansively) the transcendent truths necessary for societal cohesion.<sup>139</sup> Such wisdom hooked educational purposes to the democratic goals of national liberation which depended, according to Maritain, on 'the conquest of internal and spiritual freedom to be achieved by the individual'.<sup>140</sup> He argued that the duty of the scholar was to avoid the mere logic of ideas and doctrines and to develop, instead, his intellectual talents, creative energy and rational faculties in parallel to making the forces of the physical world the instrument of freedom.<sup>141</sup> Maritain's contributions included public courses on 'Liberty and Determinism' or 'The Idea of Man in Modern Times', participation in numerous interdisciplinary conferences and prolific publication of polemical texts about what to do about the crises of the anti-democratic state.<sup>142</sup>

*L'ÉLHE* was a cultural analogue for France, a stage for civic complaint and, through its outreach programmes, a democratic project for a new idea of sovereignty and international relations. The bridge between scholarship and the state was the expression of 'integral humanism' because it integrated humanist philosophy into the practical questions facing the world.<sup>143</sup> When the international lawyer encountered frustration

<sup>136</sup> See especially extended wartime discussion about how personalist democracy depends on reforming pedagogy and scholarship. J. Maritain, *Education at the Crossroads* (1971). For post-war elaborations of the same philosophy, including the political significance of education, see J. Maritain, *The Education of Man* (1967).

<sup>137</sup> '[T]he independence of research, the respect for the human person, the guarantee of spiritual liberty' (author's translation); 'Declaration', *supra* note 6.

<sup>138</sup> Maritain, *Crossroads*, *supra* note 136, especially at 109–118; Maritain, 'End of Machiavellianism', *supra* note 5, at 14–15; see also Maritain, *Christianity and Democracy*, *supra* note 5, at 28.

<sup>139</sup> For Maritain's explanation of democratic goals education via interdisciplinary exchange and individual liberty, see, e.g., Maritain, 'Morale Preservation', *supra* note 5, at 60; Maritain, *Crossroads*, *supra* note 136, at 10–12.

<sup>140</sup> Maritain, *Crossroads*, *supra* note 136, at 11. For a discussion about the genesis of democracy as a state of mind, see, e.g., Maritain, 'The True Essence of Democracy', in Maritain, *Christianity and Democracy*, *supra* note 5, 35; Maritain, 'Religion', *supra* note 5, at 266.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

and planned for peace by consent, it repeated the same logic of freedom that allows war. The scholar's plan for liberation or peace began with the meaning of freedom. Consequently, the scholar entered the international imagination as an innovator as much as a claimant of the free state.

## 5 Cultural Internationalism

Each aspect of the scholar's contribution was self-consciously French and biased towards values identifiable with a specifically European form of internationalism.<sup>144</sup> Akira Iriye's history of culture and contemporary international relations notes the consistency of the French derivative from the 18th century through to the French influence on the International Institute of Intellectual Cooperation (IIIC), the interwar antecedent to the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>145</sup> Its director, Henri Bonnet, was the interwar director of the IIIC and an honorary professor at *I'ÉLHE* and the first post-war French ambassador to the USA. His address at the New School for Social Research in 1946, marking the cooperation between French professors and the New School, described the important role of France in realizing that the responsibilities of culture for peace arose from its long history of 'cultural leadership throughout the world'.<sup>146</sup> The same sensibility is visible, according to Iriye, in Jean-Jacques Rousseau's 18th-century proposal for a European society of states which share 'the same religion, the same international law ... customs, literature, commerce, and ... a kind of balance of power' and concentrates in the wartime example of *I'ÉLHE* and its legacy for the part of culture in legal internationalism after war.<sup>147</sup> More recent efforts to share cultural authority in international affairs radically progress, without completing, the humanist vision that the French scholars identified with themselves. No fully multicultural form of cultural internationalism exists when the humanist projects of international law are still at risk from the priorities which include and exclude entitlement according to power. Though *I'ÉLHE* did not solve that dilemma, it is an antecedent of the cultural vision for a more plural, more democratic world or, in Maritain's mind, a personalist international society.<sup>148</sup>

Several remarks follow for understanding the legacy of the cultural internationalism identifiable with *I'ÉLHE*. First, the crisis inspiring *I'ÉLHE* was symptomatic of the crisis of the late modern nation-state and called for international solutions in all fields of endeavour, especially law. Second, humanist values were integral to intellectual and legal proposals for salvaging the democratic state and the international community and reflected an emergent priority for human rights. The concretization

<sup>144</sup> Iriye, *supra* note 7, at 3–4.

<sup>145</sup> *Ibid.*

<sup>146</sup> Bonnet, 'Draft of a Joint Statement by Henri Bonnet' (15 November 1946), at 1–2, NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000056](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000056).

<sup>147</sup> F.H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (2010), at 3–4.

<sup>148</sup> Maritain, *Rights of Man*, *supra* note 5; Maritain, *Christianity and Democracy*, *supra* note 5.

of humanist values into a material plan of action preoccupied numerous scholars including Maritain and Bonnet and, famously, Cassin. Third, the cultural project identifiable with *l'ÉLHE* transfigured cultural agents into agents of state – of France as the representative free state – and, by those efforts, into international agents who helped design post-war international law.

First, the idea of the free state cultivated at *l'ÉLHE* responded to a national example of a world situation and assumed that the future of cultural and national freedom depended on cooperative solutions. Satisfaction of the scholar's civic complaint immediately depended on allied victory but also on a communal strategy to address the shortcomings of all democracies of which France was merely an example.<sup>149</sup> Maritain's personalist argument exemplifies the expansion of the corrective task outward from the crisis of France to modern society in general, and that each required international attention. For him, the war situation and the French situation reflected 'the existential state of human life' or the 'crisis of civilization' and, consequently, needed a whole-of-civilization plan.<sup>150</sup> As early as 1939, Maritain identified Nazism, communism and fascism as proof of the 'cake of starch in alcohol', which also characterized the modern democratic tradition in France, leading democrats to mistake humanism for anthropocentrism and the true liberty of the person for the 'myth of democracy of the individual'.<sup>151</sup> Maritain later discovered that his proposal for a true or integral humanism required adaption of personalism to the existing framework of individual rights.<sup>152</sup> What was clear in the development of that conception, however, was that a return to spirit would not solve the dilemmas within states without an outline for a new spiritual and social world.<sup>153</sup>

Maritain's intervention was clearly utopian and qualified by a religious evangelism that was not believed in common and assumed an automated reflex or shift in collective conscience.<sup>154</sup> He repeatedly explained in 1942 and 1943, for example, that the 'creation of a new world will not be the work of war but the force of vision and will and of the energies of intellectual and moral reform which will have developed in the collective conscience and in the responsible leaders' and that the return to spirit 'transforms from within, the very life of the group and tends to integrate all of humanity into a community of nations and peoples in which men will be reconciled'.<sup>155</sup> The new imaginary of the person will yield, according to the religious polemic, a new organized international community.<sup>156</sup> How the conception of the person could reorganize and, consequently, transform the international community was more sketchy. Alongside the evangelist's call to spiritual revolution was a sobering sense

<sup>149</sup> Speeches and other publicity material from *l'ÉLHE* archives typically link the collaborative efforts that were necessary to support an Allied victory with the post-war need for international solidarity and collaboration. H. Bonnet, 'Press Release of Interview at *l'ÉLHE*' (10 June 1943), NSA and SCDA, available at [https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105\\_000150](https://digitalarchives.library.newschool.edu/index.php/Detail/objects/NS030105_000150).

<sup>150</sup> Maritain, 'Christian Humanism', *supra* note 5, at 173; Maritain, 'Integral Humanism', *supra* note 5, at 9.

<sup>151</sup> Maritain, 'Integral Humanism', *supra* note 5, at 6–7.

<sup>152</sup> See, e.g., Maritain, 'Person and the Common Good', *supra* note 5, at 449.

<sup>153</sup> *Ibid.*

<sup>154</sup> Maritain, *Christianity and Democracy*, *supra* note 5, at 40.

<sup>155</sup> *Ibid.*, at 4, 40, 56.

<sup>156</sup> *Ibid.*, at 20, 56.

that his person must adapt to the vocabularies and techniques of governance familiar to democracies. That meant meeting the internationalist and the responsible leader in their realm and securing the future of the free state with law. A law of the person that might count for all persons was fashionable, as Lauterpacht and Cassin agreed, and could dovetail the international projects already underway.

Second, international human rights gave the free state identifiable with *l'ÉLHE* another life after war. Cassin's renown as a key contributor to the post-war legal design gives belated moral recognition to the ambitions of the de Gaullist faction and broadens the scope of its claim for national liberty during war by refiguring liberation as a universal status.<sup>157</sup> Others emphasize Maritain's influence on the development of human rights theory, including his brief part in the consultative preparations for the 1948 Universal Declaration of Human Rights, which included philosophical reports administered by UNESCO.<sup>158</sup> These studies are not always unreservedly favourable. Samuel Moyn, for example, is less appreciative of Maritain's 'rendition' of personalism than Annabel Brett, for example, on account of the conservatism which shaped the French scholar's concept of the person in the 1930s before war led him to adapt his theory for a theory of human rights and which lingers as its negative annotation.<sup>159</sup> Critics are also uneasy about the unevenness of the secular thought experiment which relaxed the theologian's adamant rejection of individual rights expressed at the start of war or the lack of precision by which it derives rights from natural law.<sup>160</sup> Brett more sympathetically explains that rights were necessary to substantiate Maritain's earlier person by securing its place in the world and to give a language to the personalist instinct of natural law which is immutable yet still developmental in its secular expression.<sup>161</sup> What these studies discern without theorizing, however, is the constitutive correlation between Maritain's rights thinking and his changing attitude to the state. War was the window prompting the translation of Maritain's theory of personalism into a theory of human rights, as Moyn notes, but the turn-around was not merely about rejecting statolatry or distancing himself from Vichy but also marks a more creative, intellectual initiative for a different kind of state and a new kind of international order.<sup>162</sup> In this respect, Maritain's theory of human rights reflects the

<sup>157</sup> Winter and Prost, *supra* note 59, at 221–264.

<sup>158</sup> Moyn, 'The Human Person and the Reformulation of Conservatism', in S. Moyn, *Christian Human Rights* (2015), at 73–88, especially 68, 80; Brett, 'Human Rights and the Thomist Tradition', in P. Slotte and M. Halme-Tuomisaari, *Revisiting the Origins of Human Rights* (2015), 82, especially at 82–87, 99; Woodcock, 'Jacques Maritain, Natural Law and the Universal Declaration of Human Rights', 9 *Journal of the History of International Law* (2006) 245. Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

<sup>159</sup> Moyn, *supra* note 158, at 67–68, 73–75, 83.

<sup>160</sup> For critical perspectives, see, e.g., Moyn, *supra* note 158; see also Brett, *supra* note 158, at 84–88; J. Finnis, *Thomas Aquinas* (1996), at 124–125.

<sup>161</sup> Brett, *supra* note 158, at 84.

<sup>162</sup> Moyn and others generally identify war and opposition to Vichy as the turning point in Maritain's personalism and the beginning of his interest in human rights, yet characterize the shift as opportunistic – 'either a stroke of a master, or a sleight of hand, or both' – that was more about distancing his ideas from the conservative state and its misappropriation of religion than rethinking the modern state. Moyn, 'Human Person', *supra* note 158, at 82–86.

exilic adaption of ideas for the secular purposes of liberating France and protecting freedom through international action.

Remembering *l'ÉLHE* in Maritain's 1942 proposal for human rights identifies the free state as the very thing that inspires the creative adaption of his personalist philosophy for international perspective. In *The Rights of Man and Natural Law* (1942), he explains the instinctive correlation between a true democracy of the human person and the natural law logic underpinning positive laws which effect the translation of personalism into rights.<sup>163</sup> His attention focuses on constitutional guarantees, though gestures explicitly to the expansion of his rights argument to *jus gentium*, which is the ultimate guarantee for principles of universal value which, after all, transcend the state.<sup>164</sup> Each form of law follows the 'dynamism which impels the unwritten law to flower forth in human law and to render the latter more perfect and just in the very field of its contingent determinations'.<sup>165</sup> Rights are necessary to the proper translation being embedded in the mind of natural law:

The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights.<sup>166</sup>

The abstraction of human value clarifies for Maritain as human rights, civic rights and the rights of workers.<sup>167</sup> How rights could figure on the international plane awaited post-war elaboration, notably by Maritain's contributions to a 1947 UNESCO report on the philosophical principles of human rights.<sup>168</sup> The integrity of the earlier articulation remained, as did its alliance with the imaginary of freedom envisaged by Roosevelt's Four Freedoms which the philosopher first perceived corresponded to the 'yearnings' of *jus gentium* and awaited fulfilment in 1942 by positive laws.<sup>169</sup> The legacy of the free state for the internationalist was the certainty that the human person mattered not merely for the freedom of France but also for the common good of civilization.

Third, *l'ÉLHE* represents the re-skilling of Maritain and others as internationalists as a consequence of their political activism during war. Others, such as Bonnet, fortified earlier diplomatic experience and assured their prominence in post-war international affairs as the strategic, international voice of culture. Bonnet, who became the first post-war ambassador to Washington and the French delegate to

<sup>163</sup> Maritain, *Rights of Man*, *supra* note 5, at 106–138.

<sup>164</sup> *Ibid.*, at 109–113 and Appendix.

<sup>165</sup> *Ibid.*, at 110.

<sup>166</sup> *Ibid.*, at 106.

<sup>167</sup> *Ibid.*, at 136–138.

<sup>168</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) Committee on the Philosophical Principles of the Rights of Man to the Commission on Human Rights of the United Nations, 'The Grounds of an International Declaration of Human Rights', UNESCO Doc. Phil./10 (31 July 1947); J. Maritain (ed.), *Human Rights: Comments and Interpretations: A UNESCO Symposium*, Doc. UNESCO/PHS/3(rev.) (25 July 1948).

<sup>169</sup> *Ibid.*: Maritain, *Rights of Man*, *supra* note 5, at 111.

the United Nations Security Council, signed the 1942 United Nations Declaration in December 1944 on behalf of France.<sup>170</sup> He used his diplomatic posting to continue to lobby all states for increased intellectual cooperation as the premise of peace. At an address at the *Federation de l'Alliance Française* in New York in 1946, he commented on the intellectual imperative: 'Sometimes it seems to some people that debates in the U.N. are difficult and some will think there is a lack of understanding among the nations ... but these discussions are necessary to establish a network of security based on intellectual cooperation and to establish and maintain peace'.<sup>171</sup> Claude Levi-Strauss, the cultural counsellor attached to the French embassy, reiterated Bonnet's view. Evident was not a new method of being international but, rather, recognition that all international negotiations required cross-cultural understanding and receptivity to each other's differences. That task – the mere speaking and listening to another – was political and international and derived from culture.

The scholars' re-identification as political agents happened in conjunction with their exilic experiment and had strategic significance. Cassin, Cohen, Bonnet and Perrin were among the members of the de Gaullist faction who divided their energies between faculty duties and political assignments for the rival administration. Though Maritain resisted formal alliance with *la France libre* until the end of war, his diplomatic talents were clear much earlier. The double role of cultural agents as international agents of state during war anticipated their future political and diplomatic functions. It also leaves lasting traces which repositioned how prominent intellectuals could adapt ideas for issues of worldwide concern. The scholars left their intellectual refuge with new political competence and reminders about who can shape the international imaginary and its future.

## 6 A Ransoming of the State

Retrospectives usually judge *l'ÉLHE* as less remarkable as a French University – with few completed degrees and fewer students than non-degree enrolments and visitors

<sup>170</sup> E.g. Henri Bonnet, the historian, interwar diplomat and former director of International Institute of Intellectual Cooperation (1931–1945), was vice-president of the 'France forever' Committee (1941–1943), Information Commission on the Comité Français de Libération Nationale; Minister of Information of the French Provisional Government (June 1943–September 1944); and, from 1944–1954, French ambassador in Washington. 'Biographical Summary, Henri Bonnet', UNESCO Archives, available at <https://atom.archives.unesco.org/bonnet-henri>; see also 'Henri Bonnet Signing the U.N. Declaration' (January 1945), Harry S Truman Library Archives, available at <https://www.trumanlibrary.gov/photo-graph-records/99-88>. For a copy of the text, see 'The Declaration by United Nations' (1 January 1942), at 2, available at <https://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&page=37&searchType=advanced>.

<sup>171</sup> 'World Cooperation Is Asked by Bonnet', *New York Times* (28 April 1946), available at [https://timesmachine.nytimes.com/timesmachine/1946/04/28/91612694.pdf?pdf\\_redirect=true&ip=0](https://timesmachine.nytimes.com/timesmachine/1946/04/28/91612694.pdf?pdf_redirect=true&ip=0).



– tha as a controversial political platform beset by internal divisions.<sup>172</sup> A different legacy follows from recalling how cultural activism reframed state identity and reset France in the world mind as a free state. The effect of the group experiment was not merely to ‘ransom the time’, as Maritain said was the task of culture, but, rather, to hold to ransom the idea of the state for its people and for international society.<sup>173</sup> For Maritain, ransoming the state meant taking up the theological invitation of St. Paul to use faith and ideas to reroute how a community responds to crisis:

*Look therefore carefully how ye walk, not as unwise, but as wise, ransoming the time, because the days are evil.*<sup>174</sup>

The difference between Maritain’s idea of a free and unfree France was identical with the choice separating the wise and unwise or the true and false state. *L’ÉLHE* represented the positive election to be free, which prevailed for every scholar irrespective of disputes about the legitimacy of la France libre. Freedom was liberation in every respect, within and beyond the state, and entailed recuperating democratic intention in cultural and political endeavour. The institutional exercise enabled the French intellectual as an agent of France, invested in its specific experience of war, and as an agent of a cultural idea of state that was continuous with civic disposition.

International law did not escape implication. The meaning and destiny of the sovereign state was the problem that the late modern crisis of the nation-state rearticulated as a general concern. Though the *L’ÉLHE* did not alter the boundaries of state identity, it entered the legal imaginary by the suggestion of its parallel reworking of territory, population, government and sovereignty. These were not the fixed coordinates framing the French scholars’ cultural principle of the state. Their exilic dislodgement and reorganization as a hub of French culture and civic complaint reorganized France along a democratic axis as a living, unfolding and cross-cultural experiment – a non-legal code of state. The instability of the normative code for state identity became manifest in the cultural translation, which manoeuvred, not merely theoretically but also practically, for audience in diplomatic spheres relevant to the conduct of war. Legal anxieties about the coordinates of state identity also manifest in crisis and snap into place when the world is more certain and principles and diplomatic habits make sense of the existing order. When principles did not give a satisfactory political solution for the situation of the quintessential state, intercultural cooperation and understanding clarified how and by whom the free state survives and refigured the trigger points of the normative frame.

<sup>172</sup> For example, most histories of *L’ÉLHE* focus on the ambiguous alliance between its administration and la France libre by detailing internal institutional disputes, General de Gaulle’s material and political contributions to *L’ÉLHE* and his efforts to use it for strategic purposes, the participation of individual scholars in the diplomatic and governmental programmes of the rival government at Algiers or the controversies between certain scholars and other French émigrés about which leader should receive civic support from those hoping for the liberation of France. See Loyer, *supra* note 4; Zolberg and Callamard, *supra* note 4, at 940–941.

<sup>173</sup> J. Maritain, *Ransoming the Time* (1941); see also Maritain, ‘Integral Humanism’, *supra* note 5.

<sup>174</sup> *Ibid.*, cover page.

The ransoming of the state by French intellectuals at *L'ÉLHE* was a ransom for culture and for the part that culture plays in promoting the high objectives of international understanding, cooperation and democratic freedom. Those objectives are, as Bonnet wrote in 1946, the source of agreement among all 'internationally minded people' and the demands each makes, irrespective of its intellectual achievement or political bias, on the standards which assure 'a world which can have full confidence in the power of law'.<sup>175</sup> Whether those standards require a democratic state is moot until democracy fails and international crisis forces the question, paraphrased by cultural agents of state, as one of universal concern.

<sup>175</sup> Bonnet, 'Security through the United', 246 *Annals of the American Academy of Political and Social Science* (1946) 13, at 18.