RETHINKING THE FOUNDATIONS: SOVEREIGNTY, COMMUNITY AND THE INTERNATIONAL LEGAL ORDER FROM A SOCIAL PLURALIST PERSPECTIVE

*Romel Regalado Bagares**

I. INTRODUCTION

International law at the crossroads between sovereignty and community?

Between equal rights, force decides.[1]

In international law and international relations, it is now a commonplace to say that state sovereignty as we know it has become anachronistic. We are told that we are now in the Post-Westphalian era, where a host of factors in the age of globalization has, for all intents and purposes, eroded the power of the hitherto almighty territorial state. After the state-building initiatives from the 17th to the 19th centuries, when political theory largely concerned itself with the state, to the exclusion of all other societal spheres, contemporary thinking would now want to relegate the state "as we knew it" to the dustbin of history.

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* MA in Christian Studies of Science and Society, (Social and Political Philosophy track, specializing in international legal theory), Faculty of Philosophy, Vrije Universiteit (VU) Amsterdam, the Netherlands (September 2007, *cum laude*); of the Philippine Bar (2004); B.A. (University of the Philippines, 1994); LIB, (University of the Philippines, 2003); member, Student Editorial Board, Philippine Law Journal (2002-2003); recipient, 1st Myres S. McDougal Prize for Best Paper in International Law and Jurisprudence and Dean Irene Cortes Prize for Best Paper in Constitutional Law, University of the Philippines College of Law (2003); Associate, Roque & Butuyan Law Offices, Makati City, Philippines. This is a slightly revised version of the author's MA thesis originally entitled *Beyond Sovereignty versus Community: A Social Pluralist Perspective on the International Legal Order*. As a work-in-progress, a book version of the thesis is forthcoming, to be published in Amsterdam under the newly established Amsterdam Christian Studies series of the Faculty of Philosophy, VU Amsterdam. I am indebted to Dr. Jan Willem Sap (first supervisor), Faculty of Law, VU Amsterdam, Dr. Sander Griffioen (second supervisor), Faculty of Philosophy, VU Amsterdam and Prof. Alan M. Cameron (external reader), School of Accounting and Commercial Law, Victoria University, Wellington, New Zealand, for their generous assistance to this academic endeavor. My thanks goes as well to Dr. D.F.M Strauss of the University of the Free State, Bloemfontein, South Africa, for his extensive comments on an earlier draft of this work. The usual *caveats* apply. Correspondence may be addressed to the author at rbagares@roquebutuyan.com.

[1] A famous phrase from Karl Marx, *quoted* in CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 8 (2005) [hereinafter, MIÉVILLE].

If, in the age-old Westphalian system, the bedrock principle is state sovereignty expressed in territorial control and the reified ability of the state to engage in inter-state relations so that any external influence or process that interacts with the state is seen as an interference with its sovereignty, [2] Wouter G. Werner writes that in the thawing of the Cold War, globalization, international governance and the fragmentation of states have given much fodder to suggestions that state sovereignty is now irreparably in decline or greatly diminished.

In particular, he identifies three main lines of critique aimed at state sovereignty: (1) globalists say that a borderless world made possible by technology now requires a global system of governance that effectively sidelines the territorial state[3]; (2) – and in a way, this builds on the first – globalized concerns, from the economy to the environment, can no longer be adequately served by state-centered systems and call for new forms of policy-making;[4] and (3), right within the state, a new threat has arisen, that of the phenomenon of "failed" or "quasi-states" unable to govern their own territories without outside help.[5]

Werner also notes the challenge that legal theory has foisted on state sovereignty, saying that on analytical and moral grounds, it has been faulted for being an ambiguous concept that is hard to define.[6] Indeed, not too long ago, some international law scholars have suggested that the famous *Lotus principle*,[7], according to which states are only bound by their express consent, is apparently gradually giving way to a more communitarian, more highly institutionalized international law, in which states funnel the pursuit of most of their individual interests through multilateral institutions – a development that contains as "much aspiration as reality."[8]

Yet in the wake of 9/11, the world must now reckon with the reality of a single superpower asserting its sovereignty while others call for an inter-dependent "international community."[9] Hence Andreas L. Paulus contends that "US perspectives have exerted a decisive influence on the concept of international community, gearing it away from governmental analogies towards the propagation

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[2] Rod Jensen, *Globalization and the International Criminal Court*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 166 (Ige F. Dekker & Wouter G. Werner eds. 2004)[hereinafter, Jensen].

[3] Wouter G. Werner, *State Sovereignty and International Legal Discourse*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 128 (Ige F. Dekker & Wouter G. Werner eds. 2004)[hereinafter, Werner].

[4] Werner, *supra* note 3 at 128; It is also argued that globalization brings attendant difficulties to the Westphalian system, inasmuch as it recognizes the existence of processes that indicate a growing interconnectedness among states. *See* Jensen, *supra* note 2, at 166.

[5] Werner, *supra* note 3, at 128.

[6] *Id.* at 130.

[7] S.S. Lotus (France v. Turkey), P.C.I.J ser. A, no. 10 (1927), at 18, says: " Restrictions upon the independence of States cannot be presumed... ."and that that therefore, States "have a wide measure to act" under international law, subject only to express prohibitions.

[8] Bruno Simma & Andreas L. Paulus, *The International Community: Facing the Challenge of Globalization*, 9 EJIL 277 (1998).

[9] I place this phrase in quotation marks because as will be seen in the subsequent chapters of this work, it is a contested concept that needs to be problematized.

of liberal values in an inter-State setting" [10] (and therefore, in rejection of a truly global governance). As a new form of terrorism arises, we witness the transformation of the international legal order into "a new kind of networking of orders of state sovereignties, where a large number of national, regional, and global agencies crisscross to fashion unusual, even extraordinarily shifting, yet vital strategic alliances."[11]

Thus, we have a tug-of-war between (state) sovereignty and (international) community. Is there a way out of this deadlock? Is a "third way" at all possible – one that is able to reconcile the irresolvable antinomy between these two values or rights?

A. HERMAN DOOYEWEERD AND THE REFORMATIONAL TRADITION IN PHILOSOPHY

Here we turn to the philosophy of the Dutch philosopher and jurist Herman Dooyeweerd (1894-1977), for many years professor of jurisprudence at the *Vrije Universiteit Amsterdam* (Free University). He was not formally trained as a philosopher but began an academic career as a legal scholar. His doctoral dissertation at the Free University in 1917 was on the Cabinet in Dutch Constitutional Law. After earning his doctorate, he would work as a civil servant, first in the city government of Leiden, then in the national Department of Labor. Then he became a researcher and assistant director of the Abraham Kuyper Institute at The Hague. It was there where he began to work out his thought, plunging head-long into an intense philosophical project.[12] Kuyper, an accomplished theologian and politician who started the first organized political party in Europe, the Anti-Revolutionary Party, had founded the Free University in 1880 on the idea that Calvinism was a world-and-life-view with implications for the whole of life and expressed in the principle of sphere sovereignty, or *souvereiniteit in eigen kring*. Kuyper would later on spell out the ramifications of this *Weltanschauung* in his famous 1898 lectures at Princeton University.[13]

But the task fell on Dooyeweerd to elaborate in a coherent and systematic way Kuyper's ideas, so as to provide a framework for Christian scholarship in the

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[10] Andreas Paulus, *US Influence on the Concept of "International Community", in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 89 (Michaël Byers & Georg Nolte, eds., 2003) [hereinafter, I Paulus].

[11] Upendra Baxi, *Operation 'Enduring Freedom': Towards a New International Law and Order?* A paper read at the *Kalinaw*-Asian Peace Alliance Conference, University of the Philippines, Diliman, Quezon City, Aug. 29, 2002.

[12] C.T. McIntire, *Introduction*, in THE LEGACY OF HERMAN DOOYEWEERD: REFLECTIONS ON CRITICAL PHILOSOPHY IN THE CHRISTIAN TRADITION xi (C.T. McIntire, ed. 1985) [hereinafter, LEGACY].

[13] For an excellent account of the development of Kuyper's thought as he outlined it in the *Stone Lectures*, *see* PETER S. HESLAM, CREATING A CHRISTIAN WORLDVIEW: ABRAHAM KUYPER'S LECTURES IN CALVINISM (1998).

various special sciences.[14] Standing in the tradition of social pluralist thought identified with John Calvin, Johannes Althusius, Groen Van Prinsterer and Kuyper, Dooyeweerd would subsequently develop a theoretical account of a universal modal structure of creation as well as of particular societal structures and inter-relationships as a professor of jurisprudence at the Free University.[15] The centerpiece of Dooyeweerd's general political and social philosophy is a systematic account of Kuyper's principle of sphere sovereignty, which, as I will attempt to demonstrate here, has profound implications for international law.

By any account, Dooyeweerd stands as a profound thinker whose systematic thought has only begun to be recognized internationally for what it is: an original Christian critique of all theoretical thought claiming for itself the status of an autonomous (or neutral and objective) practice.[16] Indeed, his philosophical system, formally called the *Philosophy of the Cosmonomic-Idea*, may be said to have anticipated what for some time now, has been fashionably called the various postmodern movements, especially in its unrelenting critique of what Dooyeweerd called "the pretended autonomy of theoretical thought."[17] But more than that, Dooyeweerd towers as an original philosopher who has few peers among Christian thinkers in the 20th century.[18]

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[14] As L. Kalsbeek would say of Kuyper: "[he] did not develop the fundamental principles of his worldview into a coherent, systematic Christian philosophy that could serve as the theoretical framework for a [distinctively] Christian scholarly enterprise in the natural sciences, the social sciences, and the literary disciplines." See Kalsbeek, *infra* note 19 at 18. Rene Van Woudenberg explains the difference between Kuyper's and Dooyeweerd's conception of sphere sovereignty thus: "[i]n Kuyper the term expresses a *sociological* principle, designed to guarantee the independence of various spheres of life. In Dooyeweerd and Vollenhoven it expresses an ontological, or as they themselves prefer to say, a *cosmological* principle, which guarantees the irreducibility of the various aspects of reality" [italics in the original]. Rene Van Woudenberg, *infra* note 37 at 6.

[15] I James W. Skillen, Development of Calvinistic Political Theory in the Netherlands, With Special Reference to the Thought of Herman Dooyeweerd (Nov. 9, 1973) 380 (unpublished Ph.D. dissertation, Duke University, on file with the Free University of Amsterdam library) [hereinafter, I Skillen, *Calvinistic Political Theory*].

[16] Arguably, Dooyeweerd was a brilliant autodidact who set himself against the prevailing Kantian and Husserlian philosophies of his day. In this he would work on a collaborative project with his brother-in-law, Dirk H.T. Vollenhoven, who started in mathematics and ended up as a serious scholar of the history of philosophy with his own distinctive method. Dooyeweerd's own followers acknowledge the difficulties he faced in the task of propagating his thought beyond Dutch shores, primarily, the lack of good translations of his work available to the English-speaking world, and the complicated system he has constructed with its own specialized terminology – not to mention its very own Dutch pecularities – requiring a sustained and patient engagement. On this point *see* David S. Caudill, *infra* note 22, at 82-83. Of late, the Dooyeweerd Center at Redeemer University in Ontario, Canada, has done a very significant project to publish new translations, updated editions of his long out-of-print works and new scholarship from around the world influenced by his philosophical system. An example of the latter is the essay-anthology entitled CONTEMPORARY REFLECTIONS ON THE PHILOSOPHY OF HERMAN DOOYEWEERD (D.F.M Strauss & Michelle Botting eds., 2000).

[17] I HERMAN DOOYEWEERD, THE COLLECTED WORKS: IN THE TWILIGHT OF WESTERN THOUGHT, SERIES B, VOL. 4 (James K.A. Smith ed., & D.F.M. Strauss, gen. ed., The Edward Mellen Press 1999) (1960) [hereinafter, I DOOYEWEERD, TWILIGHT].

[18] Prof. G.E. Langemeijer, then chairman of the Royal Dutch Academy of Sciences, though not a follower of the philosopher, called Dooyeweerd "the most original philosopher Holland has ever produced, even Spinoza not excepted." *See* G.E. Langemeijer, *An Assessment of Herman Dooyeweerd*, *in* L. KALSBEEK,

Of his work of more than 200 publications,[19] his *magnum opus*, the three-volume *De Wijsbegeerte der Wetsidee*– first published in the 1930s[20] and subsequently translated (with substantial revisions) to English in the 1950s as the *New Critique of Theoretical Thought* [21]– may well be said to engage with almost every major school of jurisprudence since the Reformation. That much, an American legal scholar of his thought would say.[22] On this score alone, a study of Dooyeweerd's thought as applied to international law should need no justification. Yet Dooyeweerd, in his works, does not treat international law in any comprehensive way as a distinct subject of study. And where he feels constrained to discuss international law he only does so as part of his over-arching project to develop a systematic philosophy.[23]

His discussions of various schools of jurisprudence and the works of their respective representative thinkers however, have an important bearing on a reformational account of international law; indeed, it is one that, as yet, is to be fully elaborated. In fact, many of the themes he treats in his work reassert themselves in contemporary discourse on international legal theory, as I will

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CONTOURS OF A CHRISTIAN PHILOSOPHY: AN INTRODUCTION TO HERMAN DOOYEWEERD'S THOUGHT 10 (Bernard & J. Zylstra, eds. 2002 ed.). Langemeijer's appreciative essay was originally published as a tribute to the philosopher on the occasion of his 70th birthday in the 6 Oct. 1964 issue of the Dutch newspaper *Trouw*. Writing on the occasion of the 50th anniversary of the publication of Dooyeweed's WdW, the historian C.T. McIntire, a follower as well as a critic of his work, would say of him that he is "one of that small number of thinkers so far in the twentieth century who produced a comprehensive theory capable of inspiring thought in virtually any field of learning," putting him in a class with his contemporaries, Roman Catholic philosophers Jacques Maritain and Bernard Lonergan, the Protestant theologian Paul Tillich, the historian Arnold Toynbee and the social theorists Talcott Parsons and Pitrikim Sorokin. LEGACY, *supra* note 12 at xi.

[19] A selected and comprehensive bibliography of English, French and German titles written by Dooyeweerd and his students, sympathizers and critics is found in L. KALSBEEK, CONTOURS OF A CHRISTIAN PHILOSOPHY: AN INTRODUCTION TO HERMAN DOOYEWEERD'S THOUGHT 307-345 (Bernard & J. Zylstra, eds. 2002 ed.) [hereinafter, KALSBEEK] . This bibliography also makes references to earlier existing bibliographies. The *Introduction* to Kalsbeek's book, written by Dooyeweerd's student, the late Bernard Zylstra, although dated, still provides a helpful biographical note to the philosopher's philosophical program. *Id.* at 14-33.

[20] II HERMAN DOOYEWEERD, DE WIJSBEGEERTE DER WETSIDEE, VOL. I-III (H.J. Paris, 1935-1936) [hereinafter, II DOOYEWEERD,WdW]. The term "Philosophy of the Cosmonomic -Idea" is the literal English translation of the WdW. It was also rendered as "Philosophy of the Law-Idea" but to many English-speaking admirers, the former became the term of choice to describe Dooyeweerd's philosophical project.

[21] III HERMAN DOOYEWEERD, THE COLLECTED WORKS: THE NEW CRITIQUE OF THEORETICAL THOUGHT SERIES A, VOLS. I-IV, (David H. Freeman & H. De Jongste trans. & D.F.M. Strauss, gen. ed., The Edwin Mellen Press, 1997) (1953-1958)[hereinafter, III DOOYEWEERD, NEW CRITIQUE].

[22] DAVID S. CAUDILL, DISCLOSING TILT: LAW, BELIEF AND CRITICISM (1989). A most cursory look at the pages of the fourth volume of the *New Critique* – the subject and author index to the three volumes – will confirm Caudill's observation. Caudill's work cited above is his doctoral dissertation at the Free University of Amsterdam comparing Dooyeweerd's project to uncover the "ground-motives" that underlie all philosophical systems/theoretical projects claiming to be objective and neutral and that of the then emergent school of American jurisprudence, the Critical Legal Studies Movement. A shorter introductory version of this work may be found in David S. Caudill, *Law and Belief: Critical Legal Studies and the Philosophy of the Law-Idea, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 109-129 (McConnell, Cochran & Carmella, eds. 2001) published by the Yale University Press.

[23] In the related field of international relations, James Skillen has made significant works applying Dooyewerd's thought, first in INTERNATIONAL POLITICS AND THE DEMAND FOR GLOBAL JUSTICE (1981) and most recently, WITH OR AGAINST THE WORLD? AMERICA'S ROLE AMONG THE NATIONS (2005).

demonstrate in the following sections. Dooyeweerd emphatically allies himself with the Calvinist tradition in his elaboration of his theory of law (although in later years, he would hesitate to label his philosophy "Calvinist" to stress its ecumenical or at least, dialogical project).[24] This is clear in his appropriation of the Geneva Reformer's ideas on law as early as in his 1925 essay *Calvinism and Natural Law*.[25] A discussion of some detail of this essay is essential to understanding the outworking of his philosophical system as it applies to law. In this essay, he summarizes Calvin's general theory of law (or the "law-idea") in these words:

> 1. *[F]ormally* it posits a universal boundary between the being of God and the being of creation.
>
> 2. *[M]aterially* its content is that of ordering, the product of God's wisdom in his providential cosmic plan, in which it also finds that unity which reason cannot comprehend.
>
> 3. *[M]aterially* it also posits in Augustinian fashion a continuous dependence between Creator and creature.

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[24] In one essay he follows on Kuyper's realization that the term "Calvinist" did not quite represent the latter's own ecumenical intellectual effort. *See* IV HERMAN DOOYEWEERD, *Christian Philosophy: An Exploration*, in THE COLLECTED WORKS: PHILOSOPHY AND THE MEANING OF HISTORY, SERIES B, VOL. 1 1-35 (John Vriend trans. & T. Grady Spires & Natexa Verbrugge eds., The Edward Mellen Press, 1996)(1962) [hereinafter, IV DOOYEWEERD, CHRISTIAN PHILOSOPHY]. Dooyeweerd was a Calvinist in the broadest sense of one who developed systematically Calvin's insight into the divinely-instituted order in reality, following the lead of Kuyper, who sought to distance himself from the stereotypical image of Calvinism as a religion with a theological obsession with predestination and instead portray Calvinism, or at least, its Dutch version, as a world-and-life view encompassing all spheres of life, whether it be art, culture, philosophy, politics or the natural sciences - hence the term "Neo-Calvinist" has also been applied to the philosophical movement he started. Contemporary scholars working in the tradition however now generally refer to the movement as "reformational." Dooyeweerd himself explains how his philosophy first came to be referred as Calvinistic:

> THE TERM "Calvinistic Philosophy" used to describe the philosophical movement which has been developing around "The Philosophy of the Cosmonomic Idea" since the nineteen thirties, may in many respects cause misunderstanding. The term can only be explained historically by the fact that this movement originated in the calvinistic revival which toward the end of the previous century, led to renewed reflection on the relation of the Christian religion to science, culture, and society. Abraham Kuyper, under whose inspiring leadership this new reflection took place, pointed out that the great movement of the Reformation could not continue to be restricted to the reformation of the church and theology. Its biblical point of departure touched the religious root of the whole of temporal life and had to assert its validity in all of its sectors. Kuyper found that insight into these implications had been best expressed by Calvin, and so for lack of a better term began to speak of "Calvinism" as an all-embracing world view which was clearly distinguishable from both Roman Catholicism and Humanism. *Id.* at 24[capitalization in the original].

[25] Originally published as *Calvinisme en Natuurrecht* in 1925. HERMAN DOOYEWEERD, *Calvinism and Natural Law, in* THE COLLECTED WORKS: ESSSAYS IN LEGAL, SOCIAL AND POLITICAL PHILOSOPHY, SERIES B, VOL. 2 3-68 (A. Wolters trans. & John Witte Jr. & Alan M. Cameron eds. The Edward Mellen Press, 1997)(1925) [hereinafter, V DOOYEWEERD, CALVINISM].

(God's upholding of creation is a continuous creation).[26]

Here, as Alan Cameron notes,[27] Dooyeweerd attempts to make a clean break from the dominant rationalistic natural law tradition (of both the religious and the secular variants)[28] as well as the positivistic account of law.[29] And in this essay we see the basic features of a systematic account of his general philosophy as he developed it in *WdW* and much later, in its revised, English version. Though in this essay, we do not yet see the key concepts that his mature philosophical system would eventually develop, he already attempts to provide a systematic account of Kuyper's notion of sphere sovereignty, basing it on Calvin's notion of a pluralistic ordering of the cosmos according to the edict of divine sovereignty. Dooyeweerd writes:

> Calvin's law-idea, consequently, is pluralistic. It must be because it is transcendental-realistic, and by virtue of its non-rational character it cannot reduce the given multiplicity in God's inscrutable providence to a unity for the sake of human reason... .Under the boundary-concept of the law, the cosmos unfolds into a multiplicity of sovereign spheres. Separate ordinances, founded only and exclusively in divine sovereignty, hold for each of these spheres.[30]

The theme of a pluralism of societal spheres – each of which is endowed with its own fundamental competence – would prove to be an important element of his theory of law, especially with regard to the question of sources or the material principles of law, as well as of the state as a public legal community. Jonathan Chaplin would say that Dooyeweerd belongs to a tradition of Althusian qualitative pluralism, one that grants different types of groups and associations in society "free spheres of operation."[31] In Skillen's words: "[d]ifferent social relationships have different characters, different kinds of law-making requirements, different foundations."[32] This, I will attempt to apply to international law in the subsequent sections of the thesis.

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[26] V DOOYEWEERD, CALVINISM, *supra* note 25 at 17.[italics in the original].

[27] I Alan M. Cameron, *Foreword, in* THE COLLECTED WORKS: ESSSAYS IN LEGAL, SOCIAL AND POLITICAL PHILOSOPHY, SERIES B, VOL. 2 vii (A. Wolters trans. & John Witte Jr. & Alan M. Cameron eds. The Edward Mellen Press, 1997) [hereinafter, I Cameron, *Foreword*].

[28] Hence he rejects what he calls the "older theories of natural law, from Grotius to Kant." V DOOYEWEERD, CALVINISM, *supra* note 25 at 20.

[29] Just as he opposes the Kelsenian rationalistic/formalistic account of law. *Id.* at 21.

[30] *Id.* at 18. For a detailed account of the development of his idea of law, *see* I Skillen, *Calvinistic Political Theory, supra* note 15, at 378-400.

[31] I Jonathan P. Chaplin, Dooyeweerd's Theory of Public Justice (June 1983) 34 (unpublished M.A. thesis, Institute of Christian Studies on file with the VU-University Amsterdam Library) [hereinafter, I Chaplin, Public Justice]. Chaplin says Althusius, for Dooyeweerd , "was the first to formulate the central principle of societal sphere sovereignty." *Id.* at 35.

[32] I Skillen, Calvinistic Political Theory, *supra* note 15 at 388.

1. Topic and research questions

Thus the primary objective of this study is to draw out some important implications of Dooyeweerd's notion of societal sphere sovereignty for international law. Yet the present work is but a modest attempt to elaborate further on some key themes in contemporary international law from a Dooyeweerdian perspective. Indeed, I can only hope in this present work to deal with what my imagined readers may treat as a preliminary inquiry into the implications of his social ontology – in other words, his theory of societal sphere sovereignty – on such issues as sovereignty (the individuality of states), the United Nations (as an embodiment of notions of community in the international plane) and international justice (the notion of collective/communal concern in the context of an international *ordre public*). As can be seen below, I will attempt as well to engage with some contemporary approaches to international law to illuminate, clarify or otherwise reformulate Dooyeweerdian thought in relation to international law.

In Chapter 2, I will elaborate on the basic outlines of Dooyeweerd's social and political philosophy, including his social ontology, notably expressed in the idea of sphere sovereignty. Here I will unpack the general contours of his theoretical thought, his theory of the state in relation to various other societal structures, relationships and institutions and its implications for the development of his own theory of the sources of law.

In Chapter 3, I will discuss the traditional notion of sovereignty and contrast this with that of Dooyeweerd's and attempt to outline some implications of his idea of sphere sovereignty for contemporary debates on the bounds and limits of the consent-based system of sovereign states in the international legal order. Indeed, the dawn of the so-called Post-Wesphalian era in international law and international relations, one marked by differentiation and fragmentation, has put to question the integrity of the state as a community. Here I will also address recent proposals within reformational philosophy itself to revise Dooyeweerd's own conception of sphere sovereignty as it applies to the state – in particular, that raised by Chaplin – and relate this to contemporary international law on the state. I will thus attempt to answer the following questions here: *How is societal sphere sovereignty to be compared with the traditional notion of state sovereignty in relation to the contemporary debates about the supposed end of the state in a Post-Wesphalian order? What is the status of the state in contemporary international law? How may Dooyeweerd's theory of societal sphere sovereignty critique or interact with contemporary international law of the state?*

In Chapter 4, we explore further the traditional opposition between individualism and universalism (or collectivism) as expressed in international legal theory. The critique of state-dominated international relations is that it cannot anymore account for the transformations in human life brought about by globalization. A crucial consideration here is the notion of international legal

personality in relation to the rise of non-state actors in international affairs. The idea of "community" in the international sphere – comes into a sharper focus viewed through the lens of Dooyeweerd's social ontology. I will attempt to extend the notion of sphere sovereignty to an enlarged sphere where other actors find a place, contrasting this with current thinking on the idea of an "international community." Dooyeweerd spurns such an idea as a case of sociological infelicity instead proposing to describe relations in the international plane as an "inter-communal legal order." Dooyeweerd's limited discussions of an "inter-communal legal order" seem to touch mainly on states in international relations but it can be argued that a necessary implication of his horizontal conception of sphere sovereignty is that in international relations, states can no longer have a monopoly on the discourse as various non-state actors now enter the picture. I will then discuss the Dooyeweerdian inter-communal legal order and the role of states and associational spheres in this task at the level of the inter-communal legal order.

Here, the following questions are relevant: *What are the implications of Dooyeweerd's social ontology for resolving the clash between individuality and community? How may his social ontology account for the rise of non-actors in international law? What are its implications for the debates on international legal personality? What is Dooyeweerd's notion of an inter-communal legal order? What is the place of societal sphere sovereignty in such an order? How is such a notion different from contemporary notions of an "international community"? What are implications of Dooyeweerd's inter-communal legal order for our understanding of the UN system? What is the place of non-state actors in the inter-communal legal order?*

The last section presents a summary of the findings of the study and its conclusions.

II. A REFORMATIONAL PHILOSOPHICAL FRAMEWORK: SOCIETAL SPHERE SOVEREIGNTY

A. TRANSCENDENTAL THEORETICAL CRITIQUE

Dooyeweerd's philosophical system is known for its development of the "transcendental theoretical critique"[33], which is a critical inquiry into the "universally valid conditions which alone make theoretical thought possible, and which are required by the immanent structure of this thought itself".[34]

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[33] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 6. This book I refer to is what many consider as the text written in English by Dooyeweerd himself as a standard introduction to his complex philosophical system. This was originally presented as a series of eight lectures he delivered during a tour of North America in the 1950s. The book referred to here is an edition published by the Dooyeweerd Center, with annotations, footnotes and a new introduction provided by a new editor, James K.A. Smith, professor of philosophy of Calvin College, Michigan (formerly of Villanova University).

[34] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 5-6. I will not discuss here the deeper nuances and controversies that surround Dooyeweerd's own account of this critique but present only its main contours. For a detailed account on this point, *see* Lambert Zuidervaart, *infra* note 38.

According to Dooyeweerd, human beings experience the world as a coherent whole in the temporal horizon.[35] The immediate and the everyday, in the pre-scientific outlook or our "naïve experience"[36], are grasped as an undifferentiated reality. Theoretical thought arises when humans break up the coherence of reality into its different "modal aspects"[37] in a systematic and abstract manner, through the opposition of the logical against the non-logical aspects of thought (what he calls the *Gegenstand-relation*[38]).

What makes this synthesis between the two opposed aspects possible is that innate impulse of human selfhood to direct itself toward the true or toward the pretended absolute origin or starting point of all the diversity of meaning in the temporal horizon. [39] This innate impulse is what he refers to as the "religious nature"[40] of human beings; that is, of religion as a matter of the heart (ego) and its direction. The heart occupies a central significance[41] in his discovery of the religious root of theoretical thought, because the heart (ego) is the center of human selfhood – of the *imago dei*.[42] The moment we deny the absolute origin of meaning – God – we succumb to the pretense of an autonomous reason.[43] In other words, human beings, even those who consider themselves totally secular, are in truth, religious, inasmuch as "religion" for Dooyeweerd refers to whatever one views as ultimate reality. For what is ultimate is implied in and required by both ordinary experience and scientific accounts of the world.[44] Thus, depending on the direction the heart takes, philosophy is directed by particular religious commitments expressed in certain "ground-motives". In Dooyeweerd's

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[35] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 7.

[36] *Id.*

[37] *Id.*

[38] *See* Lambert Zuidervaart, *The Great Turning Point: Religion and Rationality in Dooyeweerd's Transcendental Critique*, 21 FAITH & PHIL. 65-89 (2004) for an elaboration of this relation.

[39] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 7.

[40] *Id.* at 23-24.

[41] *Id.* at 24.

[42] Zuidervaart notes that in Dooyeweerd, "the 'ego' or 'heart' or 'religious root of human existence' is not the existing individual as such. Neither is it a Kantian transcendental subject, in the strict sense. It is the central, dynamic and directed relationship that human beings sustain, in their entirety, both individually and corporately, toward God, toward fellow humans, and toward the rest of creation." Zuidervaart, *supra* note 38 at 75.

[43] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 29-36.

[44] Anyone familiar with postmodern accounts of the world knows the standard broadside against absolutizing claims, against the "grand narratives" of progress and modernity and notions of objectivity, and against the putative supremacy of unbridled reason and the scientific method as complimentary ways of knowing the world. Yet in this day and age of postmodern, revisionist, sensibilities, Dooyeweerd's philosophical system uncannily and presciently presents itself as non-foundationalist, or even "deconstructive", in its relentless attack on any philosophy claiming to be an autonomous, objective or neutral theoretical thought system. It is in fact, one that also mercilessly cuts even against supposedly "Christian" philosophical systems, notably the scholastic movements in both the Roman Catholic and Protestant traditions, which he considers as failed attempts to synthesize essentially a pagan ground-motive with a Christian one – ground-motives which are in fact, irreconcilable antinomies. *See* also J.K.A. Smith, *Introduction: Dooyeweerd's Critique of "Pure Reason"*, *in* I DOOYEWEERD, TWILIGHT, *supra* note 17, at v-xii for an interesting discussion locating a pride of place for Dooyeweerd in the contemporary debates spawned by various postmodern movements [hereinafter, I Smith].

formulation, throughout the history of at least the Western world, four such ground motives have surfaced: the motive of "creation, fall and redemption" in Jesus Christ, the form-and-matter motive of classical Greek culture and philosophy, the nature-and-freedom motive of modern humanist culture and philosophy, and the nature-and-grace motive of the scholastic movements in both Roman Catholic and Protestant systems of thought.[45]

B. LAW-SUBJECT RELATION

For Dooyeweerd then, any theoretical thought is necessarily rooted in some ground-motive or other. In his Christian account of societal spheres the fundamental idea is that the Christian ground-motive acknowledges a genuine diversity in the world, for God created everything after its own kind. Inseparably linked to this idea of diversity in creation is the idea of order and law. That is, God created each kind of thing according to its own kind of law by which He continues to sustain and govern them. Only God, being transcendent, is above law and not bound by it; everything else is subject to this law order He has set in place. This law order is expressed in reality by two indissolubly interconnected horizons: the "modal" and the "entitary", with the latter encompassing both the factual subject side and the factual object side in Dooyeweerd's mature philosophy (the subject-object relation). How then, must we account for reality, including its obvious diversity, and our experience of it? Dooyeweerd's philosophical thought, as a massive intellectual project that seeks to account for the unity in diversity of reality, exposes the reductionism theoretical thought often falls into when it attempts to explain the complexity of reality from the point of view of only one of its many aspects - a word, that, as we shall see presently, has a technical meaning in Dooyeweerd's formidable philosophical system.

1. First horizon: theory of modalities

For Dooyeweerd, the fundamental unity of reality expresses itself in a splendid diversity of aspects in the temporal order, just as light refracts into a many-hued arch of the rainbow as it beams through a prism.[46] Dooyeweerd accounts for unity-in-diversity by taking these characteristics of reality - the diversity of "seeing" and "experiencing" - as creational givens in a theory of modalities[47] (or in Van Woudenberg's terms, "Theories of Modes of Being"[48]).

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[45] I DOOYEWEERD, TWILIGHT, *supra* note 17 at 29-36.

[46] VI HERMAN DOOYEWEERD, THE COLLECTED WORKS: ROOTS OF WESTERN CULTURE: PAGAN, SECULAR, AND CHRISTIAN OPTIONS, SERIES B, VOL. 3 41 (John Kraay trans. Mark Vander Vennen & Bernard Zylstra eds., & D.F.M Strauss new. ed., The Edward Mellen Press, 2003) (1959) [hereinafter, VI DOOYEWEERD, ROOTS].

[47] I Rene Van Woudenberg, *Theories of Modes of Being (Modalities)* in PHILOSOPHICAL FOUNDATIONS I READER, INTERNATIONAL MASTERS IN CHRISTIAN STUDIES OF SCIENCE AND SOCIETY PROGRAM , VU-UNIVERSITY AMSTERDAM 3 (2006 ed.) [hereinafter, I Van Woudenberg, *Modes of Being*]. Note that articles compiled in the Reader are not numbered sequentially.

This theory of modality involves a radical critique of reductions made throughout intellectual history of the diversity and complexity of reality into certain modalities or group of modalities, and deals with the different ways or modes in which we can see or experience things. "[]t is at the same time a theory about the ways in which things exist... about the mode of *being* of things, or... a theory about the aspects *or facets* of things."[49]

In his explication of Dooyeweerd's theory, Van Woundenbeg says that naive experience encounters reality in wholes, that is, "it grasps temporal reality in the concrete plastic thing-structure without theoretically analyzing this structure itself;"[50] it experiences reality "systatically" and not "theoretically-synthetically;"[51]the modal aspects in their different manifestations only appear on the horizon of thought once the structure is subjected to theoretical thought, in other words, to the corresponding scientific studies (Dooyeweerd's *Gegen-stand* relation). Different sciences constantly use similar basic concepts or categories. Biology may talk of life (the biological) but so may psychology (emotional life) or economics (economical life), or even law (legal life). These indicate certain connections or analogies.[52]

But are these analogies only incidental or accidental? Or do they point us to a certain deeper understanding of reality as studied by a science? Reductionist approaches, says Van Woudenberg, often abstract one aspect of reality and turns it into a final explanation. While indeed they do assign a meaning to the phenomenon of the existence of analogical concepts as they are used in the various fields of science, (and hence, ascribe a continuity between these various sciences), they do so only by regarding one science as the most fundamental, to which all the others are reduced. [53] Reformational philosophy as Dooyeweerd develops it rejects this notion of continuity that highlights the supposed fundamental importance of one science over the others. For Dooyeweerd, many different and mutually irreducible sciences stand on the same level with one another, as much as each approaches reality systematically from the lens of the particular science in question.[54]

Yet he also argues that there is an organic connection and deeper unity between the various aspects of reality and this indeed, is the very source of the intriguing analogies in the various sciences.[55] For Dooyeweerd, such a deeper

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[48] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 3.

[49] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 3.

[50] II Rene Van Woudenberg, *Theories of Thing-Structures* in PHILOSOPHICAL FOUNDATIONS I READER, INTERNATIONAL MASTERS' IN CHRISTIAN STUDIES OF SCIENCE AND SOCIETY PROGRAM, VU-UNIVERSITY AMSTERDAM 3 (2006 ed.) [hereinafter, II Van Woudenberg, *Thing-Structures*]. Note that articles compiled in the Reader are not numbered sequentially.

[51] *Id.*

[52] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 4.

[53] *Id.* at 5.

[54] *Id.*

[55] *Id.*

connection in regard to the analogical problem in the sciences is anchored on the fact that the *various viewpoints from which reality can be studied correspond with as many sides, aspects, or modalities of reality.*[56] Hence one discipline may use a similar concept from another discipline, albeit in a qualified way, that is, subject to first discipline's core characteristic. *In the example given above, from the perspective of Dooyeweerd's philosophy, the meaning of life is "original" in the biotic or biological sphere of inquiry whereas in all others, "life' is a merely analogical meaning; those latter are all different analogical concepts – ultimately different from the original concept found in the "modal seat" of the biotic aspect.* "The picture that emerges here is... that the various sciences are not reducible to one another because the aspects of reality to which they relate cannot be reduced to each other,"[57] explains Van Woudenberg. "Each aspect is governed by a sphere of specific laws."[58]

This is expressed by Dooyeweerd in the principle that each modality is sovereign in its own sphere or sovereign in its own orbit[59] - one which we will discuss in more detail below. Van Woudenberg explains that the failure to understand this "is the common basic error of all reductionist interpretations of analogies."[60] In the Dooyeweerdian account, there are at least 15 or aspects of things: arithmetic, spatial, kinematic, physical, biotic, psychical, analytical, historical, lingual, social, economic, aesthetic, jural, and ethical and faith (or pistical). I will now discuss the principal features of Dooyeweerd's modal theory of aspects, which has a systematic and complete (though not necessarily exhaustive) list, with a definite order to it.

First, in this theory, modalities do not deal with concrete things, but with aspects or modalities of concrete things. Hence, aspects do not exist by themselves but are functions of things; that is, things function in the aspects and not aspects in things.[61]

Second, all things have aspects; that is, they are universal in character so that everything displays all of these aspects.[62] This is called the principle of sphere universality, where everything functions in all the aspects; the corollary is that each aspect is expressed within the internal structure of all the others in an unbreakable coherence in time, or in an inter-modal (sphere) coherence. Hence, the seemingly convincing case made by all philosophical *isms* can be explained by sphere universality and sphere coherence, i.e., every law-sphere exhibits the entire spectrum of meaning of temporal reality – in other words, the other aspects, qualified only by the meaning-kernel of the particular aspect in question.

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[56] *Id.*
[57] I Van Woudenberg, *Modes of Being, supra* note 47 at 6
[58] *Id.*
[59] VI DOOYEWEERD, ROOTS, *supra* note 46 at 44.
[60] I Van Woudenberg, *Modes of Being, supra* note 47 at 6.
[61] *Id.*
[62] *Id; See* also VI DOOYEWEERD, ROOTS, *supra* note 46 at 47.

Third, they do not violate one another (the principle of the excluded antinomy or the law of non-contradiction of spheres). In other words, these aspects are irreducible to one another; they are sovereign in their own law-spheres, [63] their material competence defined by their respective meaning-kernels.

Fourth, these aspects, as already noted, have a definite order of "earlier" (ascending) and "later" (descending) aspects. The ascending order is composed of "anticipations"[64], the descending order, "retrocipations."[65] Analogy in the theory of modalities has an **anticipatory** character in respect of "proleptic references" to later aspects.[66] They are considered aspects on two criteria: 1) anticipations and analogies; and 2) the principle of antinomy, or the law of non-contradiction of spheres. [67]

Fifth, some spheres are normative, while the others are not; in other words, some of them can be broken by human beings, particularly in regard to the post-psychical law-spheres where it is only the human beings who act as subjects in them.(Human beings also have subject-functions in the pre-logical law-spheres). [68] These normative laws require human recognition; that is, human positivation.

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[63] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 9.

[64] *Id.* at 8.

[65] *Id.*

[66] *Id.*

[67] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 9. Van Woudenberg says the first criterion deals with the particular progression of the order of aspects and the ways in which aspects refer to all the others. Here analogy has a retrocipative character in the sense that retrocipations are not simple repetitions but they are "qualified resumptions." *Id.* at 8

[68] *Id.* at 14. Hence Van Woudenberg says: "[t]he laws in force here, unlike the pre-logical laws, can be broken. They appeal to man in his freedom, but he may be deaf to the appeal. For instance, man may respect the laws of thought but may also contravene them. In other words, the normative laws require human *recognition*" [italics in the original]. *Id.* Spijker puts the modal aspects, with their respective meaning-kernel, in this way:

> Natural side of reality
> Numerical: discrete quantity
> Spatial: (dimensional) continuous extension
> Kinematic: movement
> Physical: energy
> Biotic: life
> Psychical: feeling, emotion
>
> Cultural side of reality
> Logical: analytical distinction
> Historical: mastery, control
> Lingual: meaning, symbolic signification
> Social: interaction
> Economic: frugality
> Aesthetic: harmony
> Jural: retribution
> Ethical: (moral) love
> Pistical: certitude

In this two-part list, the first (natural) corresponds to the non-normative spheres and the second, the normative (cultural) spheres. Spijker, *infra* note 172 at 3. [citations omitted].

They must be applied and tailored to concrete things (the pathos of freedom in reformational philosophy as always present and insistent).[69] Van Woudenberg's explanation is very helpful:

> The sphere of normativity is a sphere outside of which it is impossible to act at all. In technical terms: the entire normative sphere forms the *transcendental precondition* for human action. Norms are not applied to it afterwards, in retrospect, or at a later stage, no action *presupposes* this sphere because it makes this action possible... .the law-side and subject-side of reality do not and cannot exist separately from each other but depend on each other, correlate with each other.[70]

It should also be stressed that all things have functions in all the aspects, either as subject or object.[71] A subject-object relation is a relation in which something that is qualified by a certain aspect becomes an object of something that is qualified by another aspect.[72] There are no things which exclusively have subject-functions in the first three law-spheres and hence there are no things that are qualified by one of these three aspects.[73]

The first law sphere in which some things have a subject-function is the physical law-sphere.[74] And all things that have a subject-function in the physical law-sphere and are qualified by the same law-sphere form a kingdom together.[75] Only the human person has a subject-function in the post-psychical aspects (in other words, the normative spheres or aspects). The heart of this theory is summarized in the following insight by Van Woudenberg: "Our 'seeing' and 'experiencing' differs, not because we human beings impose our own (collective or individual) schemes on reality, but because reality itself is multicoloured, many-sided. What we see and experience is like a cut diamond, which has many facets: it can be approached from different sides so that different facets sparkle; but the facets are truly facets of the diamond of experience."[76]

2. Second horizon: theory of entities.

Dooyeweerd's modal theory (of modes of being) is interlocked with his theory of individuality-structures (things-structures, theory of entities). The theory of entities deals with how things, events and relationships display typical functions within the modal aspects; that is the typical structures that set them apart as things, events and relationships. To explain: all 15 modal aspects belong to one dimension of reality – the dimension of modal aspects. Things, events and

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[69] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 15.
[70] *Id.* at 28 [italics in the original].
[71] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 12.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 13.
[76] *Id.* at 3.

relationships have both an individual and a universal side.The universal side of, for example, an atom (the atom-*ness* of an atom) displays its conformity to the structural law that makes an atom an atom. Hence entities are subject to modal laws and to type laws; the effect of the latter is that entities have typical functions within the modal aspects – through this typicality the modal universality of an aspect is specified and not individualized. These typical laws form the second horizon in the dual structure of reality. They set in place the structures of individuality or things-structures of concrete things, events and relationships and direct how they are to function. In Chaplin's words, they are "the basis for the distinct identity of concrete phenomena; and they form the ontic conditions for their continuing factual existence."[77] The second axis answers to the question: how do we account for identity of concrete things and entities and their changes through time?[78] (Identity, here, refers to "specific identity" not to "unique identity.")[79]

A different approach in Reformational philosophy posits that "naive experience" or pre-scientific experience "should not be forcibly theorized or draped on top of a theory, but should be *accounted* for"[80]; at the same time, it also recognizes that naive experience should not be taken as determinative, because it is indeed fallible, although irreplaceable as primary datum for scientific knowledge.[81] "It is the first medium by which reality reveals itself to us."[82] Reformational philosophy resists the dualism in Plato and Aristotle – the tug-of war between unity-in-diversity and constancy-in-changeability – and advances the idea of the "integral unity of things."[83] The difference between a modal and entitary way of looking is that the latter remains focused on the qualifying function of things; the former does not.[84] The qualifying function is a thing's intrinsic purpose.[85] The

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[77] I Chaplin, Public Justice, *supra* note 31 at 16.

[78] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 1.

[79] *Id.* at 4-5.

[80] II Van Woudenberg, *Thing-Structures* ,*supra* note 50 at 2 [italics in the original].

[81] *Id.* at 3.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 6. Aware that his use of the word "intrinsic" may prove controversial to students of Dooyeweerd's philosophy, Van Woudenberg qualifies what he means by this:

> At first sight, this term may have somewhat misleading connotations, because "purpose" can be easily interpreted as 'external end', as in the following statements: 'The purpose of a harvester is to thresh,' 'A thermometer serves the purpose of measuring temperature.' And it is indisputable that the linden, too, [the tree he earlier cites as an example] may serve such external ends, for instance when it provides shade in summer, so that we can spend a pleasant hour under it. But the giving of a shade is not the tree's exclusive or distinctive characteristic; a tower, a house, or a human being may also, under certain conditions, provide shade. By "intrinsic purpose" Dooyeweerd does not in fact mean the external end which a thing may serve but the *internal* end of the thing. The intrinsic purpose qualifies the thing's *internal* structure. The linden displays an internal structure that is unmistakably its own and is marked by the biotic function. This structure is geared to serve an end internal to the tree, namely to lie and to grow in conjunction with its environment. The purpose of the tree is to be a tree. II Van Woudenberg, *Things-Structures* ,*supra* note 50 at 6 [italics in the original].

[85] *Id.*

intrinsic purpose qualifies the thing's internal structure.[86] The qualifying function is also the "individual leading function" which plays a role in the thing's internal unfolding process, by which is meant that such process "gives the function an internal structural coherence."[87] The qualifying function of a thing shows that the identity of a thing cannot be understood through the theory of modalities, but that nevertheless, the structural unity of a thing expresses itself in all modal functions.[88] For Dooyeweerd, the relation between functions and wholes is an expressive relation: the individuality structure expresses itself in all the thing's functions.[89] "The internal structural principle, though it has supra-modal character, groups and unfolds the functions under the direction of the intrinsic purpose."[90] Stated in another way, each thing, event or relationship displays all aspects at the same time but there will always be two aspects which will display its particular identity. These are the founding and the qualifying functions. In this way, Dooyeweerd's theory of individuality structures or thing-structures accounts for their distinctiveness.

We can apply this to the state in a preliminary way. Dooyeweerd identifies "power" and "justice" as embodying the two principal components of the state's structural principle, corresponding to the state's founding (historical) and qualifying (jural) functions. The state is established by the exercise of power, but it is established to pursue justice, according to its qualifying function. State power is directed by deepened principles of justice. It is the jural mode that places the limits on what a state can do. Thus in this relation, the qualifying function has a central role. *First*, because the individual unity is more than the sum of its parts, it does not have a modal character, yet such unity does not hamper the characteristic modal principle – the structural sphere sovereignty of the various aspects of being; *Second*, the thing as constancy-in-changeability does not contain a supra-temporal or eternal component, *contra* Plato and Aristotle, but is entirely embedded in time; *Third*, theoretical analysis of the thing does not lead to understanding its concrete unity; it can only talk about the concrete unity by means of ideas (or "transcendental borderline concepts).[91] Which is why Van Woudenberg says that

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[86] *Id.*

[87] *Id.*

[88] II Van Woudenberg, *Things-Structures*, *supra* note 50 at 7.

[89] *Id.*

[90] *Id.*

[91] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 7. An explanation is in order here. At the beginning of the article, Van Woudenberg notes that in Dooyeweerd, theoretical thought is directed not at wholes but at aspects of wholes. Entitary structures are experienced as individual wholes in pre-theoretical experience, and not as abstracted entities. This would imply the impossibility of a theory of things. *Id.* at 4. Hence Dooyeweerd proposes a theory of entities expressed in an idea of what these entities are; that is, what their structures are, which are governed by structural laws; it is a theory focused on the qualifying function of things as a method of distinguishing one from the other. *Id.* at 6. So in regard to the state, Skillen notes that while according to Dooyeweerd it has an internal structural principle that is supra-modal, "we never seem to get beyond the modal, structural functions of this unique community." Instead, we only see him proceed right away to an analysis of its founding and qualifying functions. This, notes Skillen, is consistent with Dooyeweerd's argument that philosophic thought cannot transcend the *Gegenstand*-relation; theoretical thought must always presuppose but can never exhaust the real communal whole it is analyzing; it can only have an idea of that whole, which is why an idea of that whole is a prerequisite for philosophic analysis. I

the theory of entities or things-structures is a theory that investigates the structures of things, where structural principles that apply to things have the character of law; as a theory it never reaches the concrete and individual things as they exist in reality.[92]

A key idea relating to thing-structures is that of enkaptic binding (enkapsis) – the binding of a certain individuality structure with another, without canceling the peculiar character of the former (In contrast to a part-whole relation, where the whole encompasses the parts).[93] There are different types of enkapsis.[94] We can speak of the correlative and the unilateral. In a correlative

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Skillen, *Calvinistic Political Theory*, *supra* note 15 at 405-406. Such ideas are expressed in certain basic concepts. In distinguishing concept and idea in Dooyeweerd's thought, Clouser explains it thus:

> When we form a concept we combine in thought a number of properties of whatever it is we're conceiving. This is why the contents of a concept can be parsed, analyzed, and made specific. A concept, of course, also includes the relation(s) in which its content (properties) are taken to stand to one another, which is why a definition is the linguistic statement of the contents of a concept. By contrast, a limiting idea of something is not a combination of its properties, but is our awareness of something that comes about via the relations in which it stands to other things. For example, the property red is not able to be analyzed into any constituent elements into a concept. The meta-properties that qualify the various aspects (spatial, physical, sensory, biotic, etc) are similar in this regard to colors. We have limiting ideas of them, not concepts of them. We come to know them by encountering specific properties of things as further qualified by such meta-properties... .And we distinguish the meta-properties by comparing them to one another, unable as we are of forming even a limiting idea of them in isolation from all the others. We also need to keep in mind that limiting ideas can have more or less content; some can be formed by stripping away part of the contents and relations found in concepts. When we form an idea in that way we often use the same term for both the concept and for the idea derived from it, so it becomes important not to shift back and forth between the two sorts of knowledge without realizing it. I Clouser, *infra* note 94 at 225.

[92] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 14.

[93] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at at 9.

[94] Roy C. Clouser proposes some revisions on Dooyeweerd's description of his social ontology. A durable social unit (an institution or organization) is "a subwhole encapsulated within another when: (1) it functions in the internal organization of the other, and (2) has a different leading function which is overridden by the other's, even though (3) it could exist apart from the other." ROY C. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEFS IN THEORIES 289 (Rev. ed. 2006) [hereinafter, I CLOUSER]. The army is a part of the state, whereas a business or a family can never be a part of a state. *Id.* Major types of social institutions and organizations are never parts of a whole. They always stand in a whole-whole relation to one another. Clouser gives the following taxonomy of relationships:

> 1. part – whole: there is one social entity which, according to its inner nature as a whole, determines the inner nature of its parts. An example is the relation between a province (part) and the state (whole). Both state and province have the same leading function and the province cannot exist without the state .
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> 2. subwhole – whole: this is the encaptic relation. An example is the relation between a jural department of a hospital and the hospital itself. Both keep their leading function, but the jural department is functionally subservient to the hospital.
>
> 3. whole – whole: the relation between two major institutions, like state and business enterprise. *Id.* at 285-290.

enkapsis both structures presuppose each other, as in the case of the interlacement between communal and coordinational relationships. A variation of correlative enkapsis is territorial enkapsis, where all differentiated societal structures are territorially bound to the state in whole or in part. [95] In this way, Dooyeweerd can account for the Roman Catholic Church, which transcends the territorial boundaries of the state - an example that clearly shows that other societal structures cannot be a part of the state. He explains this reality by another example:

> [T]he relations between the state and its citizens may cut straight across the other societal structures... The members of the same family or kinship may belong to different political nationalities; and all international organizations and inter-individual societal relations overarch the territorial boundaries of the individual states. As far as the internal structures of the other societal relationships are concerned, the enkaptic territorial connection with the state remains of an external nature.[96]

Meanwhile a unilateral enkapsis is illustrated by the interlacement between marriage and family: For Dooyeweerd, no family can exist without a marriage, but a marriage can exist without a family.[97] Van Woudenberg says that the objective intrinsic purpose of things can change in time, sometimes under pressure of necessity.[98] Others are lost; some are newly born. But one must undergo inculturation about the historical founding function of things to recognize that a particular thing is intended for a particular purpose.[99]

Concrete individual things with their unique identity all possess a characteristic individuality structure. As Chaplin explains, these are classified into certain ontic "types," or typical structural principles that are invariant and universal for all members of that type. Each type is further classified into an "inner articulation" of radical types and genotypes that embrace further subtypes. The former are determined according to the qualifying function of a structure, which may be categorized within any of the normative modal aspects.[100]

An important consideration with respect to societal structures is how to distinguish various genotypes within radical types; here, the determining factor is the relation between the qualifying function and the founding function.[101] The *radical-type* embraces all societal structures that have the same qualifying and

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[95] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 662.

[96] *Id.*

[97] VII HERMAN DOOYEWEERD, A CHRISTIAN THEORY OF SOCIAL INSTITUTIONS 67-68 (1986) [hereinafter, VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS].

[98] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 11.

[99] *Id.* at 12.

[100] II Jonathan C. Chaplin, *Dooyeweerd's Notions of Societal Structural Principles*, 60 PHIL. REFORMATA 16,17 (1995) [hereinafter, II Chaplin, *Structural Principles*]. *See* also III DOOYEWEERD, NEW CRITIQUE, III *supra* note 21 at 80, 94.

[101] II Chaplin, *Structural Principles*, *supra* note 100 at 17. *See* also III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 56-60.

founding function[102]. The state and the United Nations for example belong to the same radical type.[103] To another radical-type belong marriage and family, both founded by the biotic function and led by the moral function.[104] Meanwhile, *genotypes* are subtypes within the radical types.[105]

The founding function determines the genotypical character of the qualifying function or its "type of individuality"; that is, the role played by the founding function in a societal structure is expressed in the specific character of the qualifying function. How? Chaplin explains: "For example, the state's pursuit of justice is different [from] that of a church, family, business, etc. because it is, uniquely, backed up by a *coercive* power (as opposed to faith power, moral power, economic power etc.)."[106] A third type is the variability type or the phenotypical variation that arises from the enkaptic interlacements with other differently qualified structures.[107] The phenotypes, though essential to the factual existence of a societal structure, do not change its structural principle. Those that cannot be accounted for by these classifications are to be considered as an expression of the subjective individuality of each one, says Chaplin.[108]

For Dooyeweerd, the cosmos is not a thing, nor a comprehensive whole of which everything that exists forms a part, but a universal interwoven coherence, an interlacement of vast quantities of enkaptic interlacements, according to Van Woudenberg.[109] But it is not an enkaptic structural whole. Such structural whole occurs only where we find an irreversible relation in the three kingdoms and in the human bodily structure where things are interpreted in a scheme of supra and sub organization, of a whole that encompasses parts and subdivisions (part-whole relation).[110] Such does not obtain in the case of the cosmos. It is clearly a "coherence of enkaptic interlacement-coherences,"[111] where "things functioning in

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[102] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 83, 88-90.

[103] *Id.* at 600.

[104] *Id.* at 307-308.

[105] *Id.* at 92-94.

[106] II Chaplin, *Structural Principles*, *supra* note 100 at 17.

[107] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21 at 127. In Van Woudenberg's terms, structural diversity can also be brought about by external factors. II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 13. They are also called social forms. An example of which is the state church (or established church) as phenotype of the radical type church, originated by the intertwinement of state and church. There is also a distinction that is made within the phenotypical type: the one between genetic and existential forms. An example of the former is the modern form of marriage, in which marriage is interlaced with the state at its solemnization. An example of the existential form is the family business. Here the question is how it is functioning and how the characteristics of the family community concretely influence the business enterprise.

[108] II Chaplin, *Structural Principles*, *supra* note 100 at 18. Hence, love in marriage is different from love in family for example, although the same aspect leads both communities. Although the radical function is the same, the structure has different characteristics. The reason for this difference is the specific relation within the societal structure between its leading and founding function. *Id. See* also III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 90.

[109] II Van Woudenberg, *Thing-Structures*, *supra* note 50 at 15.

[110] *Id.* at 17.

[111] *Id.*

the interlacement preserve their independent internal purpose and that the bound things are not parts of the larger whole."[112]

C. A REFORMATIONAL PHILOSOPHY OF SOCIETAL STRUCTURES

1. The Problem of the Theory of the State without a State-Idea

"Perhaps, there is no other organized human community whose character has given rise to such chaotic diversity of opinions in modern social philosophy and social science as the State," notes Dooyeweerd.[113] He argues that humanistic views have been unable to address this crisis because of their denial of the notion of an enduring structural principle of the state. Yet he says that this problem is not really new. "Already in ancient philosophical political theories the conceptions of the State appeared to be so vague and undefined as to the inner nature of this institution that they were bound to vitiate the entire view of human society."[114] Still, in Plato and Aristotle Dooyeweerd sees a basic though unrefined intuition about the normative inner structural principle of the state, despite their having made the universalistic identification of the ideal of the *polis* with the whole of societal life.[115]

Both based their concept of the state on a "supra-temporal"and "metaphysical essence" – an indication of their recognition of the normative nature of the state. For the ancients however, the *polis* was conceived as a whole with its parts, the all-encompassing totality of human society.[116] Moreover in the Platonic conception, we find two "genuinely political classes", one the philosophers, and two, the warriors, in which the state's monopoly of the sword is embodied. For Dooyeweerd this is recognition of the structural functions that will prove to be pivotal to the formation of the state, even if the ancients may not have properly understood the constitutive elements of the state's inner structural principle. This is an important development that runs counter to modern historicistic and positivistic approaches that reject the normative character of the state's structural principle. Historicism, in Dooyeweerd's terms, is the "fatal illness of our 'dynamic' times,"[117] inasmuch as it

> views culture in terms of unending historical development, rejecting all the constant creational structures that make this development possible....As a result it has no reliable standard for distinguishing reactionary and progressive tendencies in historical development. It faces the problems of the "new age" without principles, without criteria.[118]

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[112] *Id.* at 16.
[113] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 380
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 63.
[118] VI DOOYEWEERD, ROOTS, *supra* note 46 at 67.

Positivism, meanwhile, sought to apply the scientific method of the natural sciences to societal phenomena, formulating causal laws that could purportedly explain such phenomena. Hence according to Dooyeweerd, St. Simon and Comte, the acknowledged founders of modern sociology, treated the body politic as nothing more than a secondary product of civil society in its economically qualified relationships. In their system,

> [t]he "leading ideas" of societal life are by no means the law-ideas of the classical and modern political theories, which had no inner coherence with the factual condition of society. The latter does not exhibit that natural freedom and equality of all men which the speculative jurists supposed to lie at the foundation of the civil legal order. Nor can there be ay truth in the classical conception of the State, with its military foundation, as an institution of public interest. The truth is that [for St. Simon and Comte] civil property gives rise to class differences and class contrasts and that political authority always belongs to the ruling class.[119]

For Dooyeweerd, this signified a fundamental break with both the classical liberal and the natural law distinctions of state and society as well as the earlier identifications of the two. The new sociology now made a revolutionary discovery which fundamentally undermined both the idea of the state as a *res publica*, or an institution of public interest, and the idea of civil law with its principles of freedom and equality. Sociology paid no heed to these but instead focused on the class oppositions as the driving forces of history – that is, the new social facts.[120] With these developments, the idea of an immutable structural principle was no longer accepted: "[t]he shibboleth of a scientific political theory was declared to be the elimination of all normative evaluations. Thus the attempt was made to form an a-normative notion of the State on a merely historical and positivist sociological basis.[121]

Dooyeweerd says that a rejection of the normative character of the state's structural principle leads to a crisis, although he does allow that a crisis may still be a useful one, if it results from the withering away of the traditional political theories which insist on existing historical forms as the ultimate measure of political life.[122] It may yet prove to be a necessary transitory phase in the theoretical reflection on the problem of the State. For the decline that leads to a crisis may simply be a symptom of decadence but it may also lead to a new stage in public life.[123] In the case of the Greek view of the state, the first theoretical crisis was ushered in by the radical left-wing sophists who arose in the wake of a decay of the foundations of Athenian democracy following the death of Pericles. Machiavelli too, says Dooyeweerd, is to be cited for at least heralding the transition from the decaying idea of the Holy Roman Empire to a modern bureaucratic and

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[119] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 453.
[120] VI DOOYEWEERD, ROOTS, *supra* note 46 at 198.
[121] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 384.
[122] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 380.
[123] *Id.*

centralized national State.[124] After all, it was under Machiavelli that the name *stato* was first used to describe the body politic as a whole.

Yet, what results from side-stepping the normative structural principles of the state is a crisis in the theory of the state that, in the words of Dooyeweerd, has culminated in a "political theory without a State-idea"[125]. In his own time, Dooyeweerd connects this with the crisis in western political life and the economic crisis between the two world wars, the dissolution of parliamentary democracies resulting from the corruption and subjection of politics to interest groups and classes.

He cites as the most recent crisis in political theory (in his time, that is), the disintegration of the normative Humanist idea of the civic law-State, thanks in no small way to relativism and historicism. "Western man had become aware of a fundamental historical relativity of the supposed self-subsisting ideas of natural and rational law,"[126] he says of this process. "In the crisis of a regular *Götterdämmerung*, of all absolute standards, the world of ideas of post-Kantian freedom idealism had also been unmasked as historically conditioned."[127] Thus political theory has come to reject any notion of an invariable normative structural principle of the state. This is captured in Richard Schmidt's *Allgemeine Staatslehre*, where he wrote that modern political theory, emancipating itself from the speculative view, dispenses with metaphysics and instead restricts itself to an empirical investigation of the state.[128] Relativism also makes its work felt in Carl Schmitt's rejection of the state founded on the humanistic faith in reason. Writing about the formalism of his day, Schmitt would say:

> [a]ll other properties of the statute law as a substantial-rational, just and reasonable arrangement have become relativized and problematical. The faith in natural law, implying the belief in the law of reason and in the reason in the law, has disappeared to a considerable degree. The civic law-State is only saved from completely merging into the absolutism of changing Parliamentary majorities by the still factually existing respect for this universal character of the statute law.[129]

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[124] *Id.* at 381-382.

[125] *Id.* at 397.

[126] *Id* at 382.

[127] *Id.*

[128] *Id., citing* RICHARD SCHMIDT, ALLGEMEINE STAATSLEHRE 117 (1901)

[129] *Id., quoting* CARL SCHMITT, VERFASSUNGSLEHERE 156 (1928). An excellent account of Schmitt's battle with formalism, written from the perspective of critical theory, is found in Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations, in* THE ROLE OF LAW IN INTERNATIONAL RELATIONS 17-34 (Michel Byers ed. 2000). An extended and substantially revised version is found in chapter 6 of MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW (1870-1960) 413-509 (2002). In recent years, there has been an tremendous rise in interest in the ideas of Carl Schmitt, leading a contemporary Marxist scholar like Miéville – adamantly against the rehabilitation of a known apologist for Nazism like Schmitt – to remark that his ideas must be viewed with caution; Miéville also warns that any lip-service to the shocking character of Schmitt's avowed racism and anti-Semitism cannot hide the political ramifications of the latter's theoretical project, which in the end, recognizes only the language of power and who has control or monopoly of it. The Marxist

Indeed, Dooyeweerd's theory of the state is incomprehensible apart from its specifically Western trajectory of development. The legal philosopher H. J. Van Eikema Hommes, closely following Dooyeweerd, broadly traces the dynamics of the elaboration of what he prefers to call the "law-state" in three stages.[130] By dynamics, he refers to a two-fold sense; the external one, insofar as it only asserts itself and can only be realized in a particular level of cultural and historical development, and the internal one, to the extent that its structural principle unfolds its normative-meaning-content in the progressive cultural development of human society in an ever richer and deeper way, led by the norm of public justice (and about which norm more will be said here later).[131] The first stage has two sub-phases. The first sub-phase, from the 15th to the second half of the 17th century, is characterized by the one-sided orientation of the monopolization of coercion over the state's territory, and dominated by the absolutists' concept of sovereignty identified with Bodin, Machiavelli's *raison d'etat* and Hobbes' *Leviathan* state.[132] It was the era of civil and religious wars so that little if any regard was given to personal and non-political spheres of life.[133]

The consolidation of states in the 17th century gave rise to the idea of the law-state, albeit also one-sidedly skewed towards civil law, in which the fundamental rights of civil freedom and equality, as well as civil property, were extended to all within the territory of the state as inalienable human rights.[134] This second sub-phase was the era of such representative thinkers as Locke, Montesquieu, Kant, Humboldt. Here, the state is no longer the all-inclusive frame of ordered human society but an organization according to the principle of the *trias politica*, aimed at protecting innate human rights and property, and providing legal certainty unavailable in the state of nature, through independent courts, general legislature and executive power.[135] This saw full expression in the American and French constitutions as well as the Declaration of Human and Civil Rights. [136]

The second stage came in the wake of the French Revolution, where the early liberal idea of the law-state could no longer account for the tremendous societal transformations that the revolution ushered into, as well as for the rise of the modern industrial age. Traditional political protections and civil-legal freedoms could not address the socio-economic tempests that broke out in the second half

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scholar's target of criticism was the leftist journal *Telos*, which has published a number of studies on Schmitt, all of which he claims, have forsaken the journal's original perspective rooted in the tradition of Critical Theory for, among many other things, one that is avowedly right-wing as well as an apology for open libertarianism. MIÉVILLE, *supra* note 1, at 23, 27 (fn. 96).

[130] I H.J. Van Eikema Hommes, *The Material Idea of the Law-State*, PHIL. REFORMATA 49, 51 (1974) [hereinafter,I Hommes, *Law-State*]. Van Eikema Hommes succeeded Dooyeweerd as holder of the professorial chair of jurisprudence at the Free University.

[131] *Id.* at 51.

[132] I Hommes, *Law State*, *supra* note 130 at 52.

[133] *Id.*

[134] *Id.*

[135] *Id.*.

[136] *Id.* at 53.

of the previous century. G.F. Stahl then conceived of the state as a "moral kingdom" to address these problems of child labor, security in factories, unemployment and the like.[137] Thus his well-known words: "[t]his is the concept of the law-state, not in the sense that the state should only maintain the legal order within administrative purposes, or should just protect the rights of the individuals; it does not at all refer to purpose and content of the state, but only to the manner and character in which they are to be realized."[138] Here, the administrative state displays a formal-jural feature, with administrative legislation as a formal external boundary for the state.[139]

Van Eikema Hommes traces the rise of this formal-jural conception of the state to the positivistic concept of state legislation that has since dominated the western legal tradition since the second half of the 19th century.[140] Yet this positivistic outlook treats its doctrine of constitutional freedoms, parliamentary democracy, administrative legislation and independent judiciary as variable, technical-organizational self-limitations of state power, which is the exclusive source of all positive law.[141] This formalistic view of the state – often identified with the failed Weimar constitutionalism – could not effectively oppose the rise of Nazism in Germany in 1933. Nazism, while showing the formal framework of the state, turned against the traditional humanitarian values of western civilization. [142]

The third phase is really Van Eikema Hommes' plea for the idea of the state that breaks through the formal-jural frame of the state-constitution and founds itself in the fundamental material principles of public and civil law, which, in his Dooyeweerdian view, determine the limits of the state-power over against non-state social spheres and control the inner structure of public and civil law from top to bottom.[143] This calls for a normative theory of the state, not in the sense of a theory that subjects the supposedly "value-free" results of positivistic sociology and political theory to social and political postulates (as in the ideal of social emancipation and the like) but in the sense of a doctrine which considers the state – its proper object –according to its inner nature as a normative structural principle.

He argues that the normative theory of the state is premised on a structural principle that is generally valid and necessary (in the sense of the transcendental) condition and limitation of all factual state institutions which consider themselves a law-state.[144] Furthermore, it is not a metaphysical conception that is ready-made for all times and places but one that requires

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[137] I Hommes, *Law State*, *supra* note 130 at 53 [citations omitted].
[138] *Id.*
[139] *Id.*
[140] *Id.* at 54.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*

expression or positivation in the actual historical process of human society. And to surface this inner nature of the state, Van Eikema Hommes requires the transcendental-empirical method.[145] We now turn to Dooyeweerd's conception of it.

2. The Transcendental-Empirical Method

For Dooyeweerd, the task of the political philosopher is that of bringing to light the structural principles that govern various societal structures. This s/he must do by employing the "transcendental-empirical" method, which seeks to distinguish between these invariant structural principles (structure) and their variable factual expressions (direction). As already noted, the Neo-Calvinist philosopher believes that all reality in its full diversity is an ordered reality. Human beings are called to develop this ordered reality to its fullest expression. This order, consisting of invariant structural principles, urges or presses itself upon us in our ordinary experience. These invariant principles are ontic and must be traced in continuous confrontation with empirical social reality.[146] Political theory, for Dooyeweerd, is a philosophical examination of the structural principles of the state; Political theory is impossible without its foundation in a philosophy of human society. This extended explanation by Dooyeweerd of the implications of his view of the diversity of social structures for the relationship between sociology and the philosophy of human society is most relevant:

> It is the task of our philosophic examinations to lay the necessary foundation for a scientific sociology which no longer neglects the basic principles mentioned. Our social philosophy does so by engaging in a critical analysis of the structures of individuality of the different societal relationships and the different types of mutual interlacements. Its task is not to examine the variable social phenomena, presenting themselves within these foundational structures, in the changing societal forms in which the latter are realized. Such investigations must be reserved to a sociological science which we would prefer to call "positive sociology", since the term "empirical" is inadequate to distinguish it from a social philosophy. So we must conclude that, as a science of human society in its total structures, positive sociology has no specific scientific but only a social philosophic viewpoint. But, although determined by the latter, its field of research is different from that of social philosophy. The structures of individuality and the different types of their mutual intertwinements, which are the proper subject of philosophical inquiry, have only the character of necessary *presuppositions*, as far as positive sociology is concerned.
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> One should, however, guard against the conclusion that positive sociology may leave alone the difficult philosophic problems concerning the social structures of individuality and their interrelation, and follow its own course....

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[145] *Id.*

[146] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 264. It was Hommes who first called Dooyeweerd's approach a "transcendental-empirical method."

> A historicist or a pseudo-natural scientific view of this social reality is not independent of philosophic presuppositions. Such a view leads positive sociology astray all the more since it pretends to be philosophically unprejudiced...
>
> On the other hand our philosophic examinations cannot be independent of a positive sociology guided by our basic cosmonomic Idea. The reason is that the social structures of individuality and the types of their intertwinements cannot be detected in an *a priori* way. Rather they must be traced in a continuous confrontation with empirical social reality. However much the structural principles are the *a priori* cadre of the latter, our *knowledge* of these principles is always implied in our experience of concrete variable social phenomena[147] [italics in the original].

Human beings have a responsibility to bring from possibility to reality these societal structural principles, which are not all positivized at all times and in all places,[148] inasmuch as they are inseparable from historical development. Yet the inner nature of these societal structures as they emerge in history is not dependent on variable conditions of human society; "that is to say as soon as they are realized in a factual human society, they appear to be bound to their structural principles without which we could not have any social experience of them."[149] Dooyeweerd argues that societal relationships always presuppose norms by which we recognize them:

> If someone seeks to study the state from a sociological point of view, the question of what the state is cannot be eluded. Can one already call the primitive communities of sib, clan or family "states"? Were the feudal realms and demesnes in fact states... .Anyone who discusses monarchy, parliament, ministers etc. is concerned with social realities which cannot be experienced as such unless one takes into account their authority or legal competence. However, authority and competence are normative states of affairs, which presupposes the validity of norms[150]

3. The State's Inner Structural Principle

I will now discuss the main features of the state's inner structural principle. This is only a general discussion of inner structural principle as an opportunity to extend it will present itself in the next chapter, where I engage Chaplin's critique of Dooyeweerd's conception of the state's inner structural principle.

We have earlier discussed how Dooyeweerd identifies the two correlative functions that make up the state's inner structural principle: the historical founding function (expressed in the meaning-kernel of "power") and the qualifying function of the jural aspect of reality, expressed through the deepened principles of jural

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[147] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 263-264.
[148] *Id.* at 170.
[149] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21at 171.
[150] VI DOOYEWEERD, ROOTS, *supra* note 46 at 207.

morality (the so-called legal-ethical principles), which are collectively designated as principles of *justice*. In regard to the public character of the integrating task of the state within its territory, the qualifying function is expressed as the norm of public justice. Here "might" (the state's monopoly of sword-power) and "right" (the norm of public justice) are intrinsic to the nature of the state. "The one without the other," says Kalsbeek, "will not do. Might must be guided by right, and right needs might for its realization, for its positivation."[151] Power acquires a historical sense here for Dooyeweerd, by which we mean a cultural way of being, or the deliberate human shaping or forming. The meaning kernel of power, says Dooyeweerd, is "command", "control", "mastery" or "free formative power."[152] He explains that power

> implies a historical calling and task of formation for which the bearer of power is responsible and of which he must give an account. Power may never be used for personal advantage as if it were a private possession. Power is the great motor of cultural development. The decisive question concerns the direction in which power is applied.[153]

Dooyeweerd therefore rejects Christian theologians who label power as intrinsically evil or those who say that it was introduced to the world only on account of sin. [154] Dooyeweerd is emphatic that from the Biblical point of view, the power of the sword inherent in the office of government in its structural coherence with the leading function of the state has been incorporated into the world order because of sin. Moreover, for Dooyeweerd, the church and the state are two institutions which have been ordained after the fall. The state, in his view, is not the direct product of the original order of creation but, as an institution of common grace, came into being as a result of sin. In its typical structure, he says, the body politic has a general soteriological vocation to preserve temporal life in its differentiated condition.[155]

He also faults Barth for teaching that sin has so marred creation its original principles are no longer detectable. For Dooyeweerd, sin did not and could not have changed the creational decrees, only the direction of the human heart.[156] He argues that even institutions of general and special grace like the state and the church, which came to existence after the Fall are based upon ordinances set by God in creation.[157]

Power is the state's founding function, that "monopolistic organization of the power of the sword over a particular cultural area within territorial

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[151] KALSBEEK, *supra* note 19 at 216.

[152] III DOOYEWEERD, NEW CRITIQUE II, *supra* note 21 at 198.

[153] VI DOOYEWEERD, ROOTS, *supra* note 46 at 67.

[154] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21at 423. *See* also I CLOUSER, *supra* note 94 at 307-308 on this point.

[155] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 506.

[156] VI DOOYEWEERD, ROOTS, *supra* note 34 at 59.

[157] VI DOOYEWEERD, ROOTS, *supra* note 34 at 40.

boundaries."[158] This is what distinguishes the state from other societal structures. It has a monopoly of coercion over its defined territory. Such a monopoly is central to the state's task of establishing a public legal community. Without it, there can be no public legal community. That the community it organizes is public points to the state's qualifying function: power is never an end in itself, for it must be correlated with the task of the state to pursue public justice. In the case of the state, that direction in which power is applied is provided by the second pole, which is public justice.

The state organizes within its territory a typical, legally qualified, public community – in fact, a public legal community of government *and* subjects, according to Dooyeweerd's social philosophy. What results, in other words, is a *res publica*. As such, according to him, wherever a real state arose, its first aim was to destroy tribal and gentilial political power, or otherwise erase the undifferentiated political power formations in which private interests prevailed. Whatever form it took, a *res publica* projected itself as an institution of public interest, in which political authority is a public office, and not a private property.[159] No real state can exist without this founding function of power over a territory that broke down any armed resistance on the part of any private group. This, according to Dooyeweerd, is an historical truth that cannot be denied.[160]

This is the state's normative historical task, which it can realize in a better or worse way.[161] The better way is the pursuit of the state's intrinsic purpose, which is to provide justice in a public way. The historical founding function is never an end in itself. It is necessary to the formation of a genuine *res publica* but it is never sufficient: "the military organization of the State displays an opened anticipatory structure that cannot be explained in terms *merely* of armed control."[162]

The second function that makes up the state's inner structural principle is the jural aspect expressed in deepened way as principles of justice. But first a preliminary remark about the jural aspect in general. Dooyeweerd warns against conflating it with ethics as some are wont to do, that is, derive the former from ethical principles. Dooyeweerd considers this to be reductionist, in as much as the aspects of reality are irreducible to one another.[163] Ethics has its own realm, as much as the jural aspect. Each is sovereign in its own sphere. While it is true that all function in the jural aspect on account of sphere universality, not all of them are qualified by the jural aspect.

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[158] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 414.

[159] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 412.

[160] *Id.* at 414. We can refer to Fiji as a current example. Many Pacific countries do not recognize the *de jure* legitimacy of Bainimarama's government but they also cannot treat his deposed predecessor Qarase as having de facto power within the government of the state – the coup Bainarama mounted now has the de facto power in a politico-jural sense even though it was illegitimately acquired – because it has a monopoly of coercive power over the territory and is using it to carry out the public jural functions of the state.

[161] *Id.*

[162] *Id.* at 422.

[163] *Id.* at 141-150.

The state is. The state is that institution governed by the norms of the jural aspect, which norms cannot be made subject to other norms governed by other aspects. For Dooyeweerd, the meaning-kernel or core of the jural aspect cannot be defined but is only known through "immediate intuition and never apart from its structural context of analogies".[164] For him, such meaning-kernel is embodied in the concept of "retribution", which designates the irreducible meaning-kernel of what is signified by the same word in various languages – *dikē, jus, justice, recht, diritto, droit*, and so on. Too, the classical rendition of justice as *suum cuique tribuere* expresses the same thought, based upon an older cosmological conception of justice whose retributive meaning cannot be doubted,[165] he says, which meaning refers to an irreducible mode of balancing and harmonizing individual and social interests with the end of view of maintaining a just balance by just reaction.[166] Retributive justice reacts against *ultra vires* acts and binds both legal power and subjective right to their limits.[167]

We can see that Dooyeweerd here employs retrocipative analogies: to the aesthetic mode ("harmonizing"), to the numerical ("proportionality"), to the economic ("balance"). Moreover, the economic and the aesthetic analogies are tied to the social as it is expressed in a strict correlation between communal interests and inter-individual relationships in jural relations.[168] Dooyeweerd explains that at the core of the jural mode, its retributive meaning is expressed on the law-side in a well-balanced harmony of a multiplicity of interests, resisting any excessive actualizing of special concerns that harm the interest of others. The plurality of interests should be subjected to a balanced harmonizing process.[169] This again, reflects Dooyeweerd's concern for the various communal, societal and individual relationships. Contrary to individualistic theories of society, Dooyeweerd advances a social pluralist view which, as it were, grants "being" to various associations and communities that, in ways that accord with their internal spheres, take precedence over that of the individual[170] (and at the same time accords the individual her own sphere of integrity). Chaplin summarizes Dooyeweerd's understanding of justice as applied now to the various spheres inhabited by different societal structures and relationships in this way:

> [J]ustice consists in effecting a harmoniously balanced complex of jural relationships among a multiplicity of particular interests, whether individual or societal (communal or inter-individual or inter-communal). It calls for an integrating activity of a specific variety, one in which such special interest realise their own jural claims, but always without "excess".[171]

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[164] *Id.* at 129.
[165] *Id.* at 132.
[166] *Id.* at 129.
[167] *Id.* at 134.
[168] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at at 135.
[169] *Id.*
[170] *Id.* at 135-136.
[171] I Chaplin, Public Justice, *supra* note 31 at 100.

How then do we apply this core meaning of the jural aspect as retribution in the public task of the state? Before answering that question we must first tackle the public nature of the task of the state. We have seen that Dooyeweerd recognizes the existence and sovereignty of many different spheres within society, which is an expression of the modal universality of the jural aspect in every sphere distinct from the state. Therefore, on account of this modal universality of the jural aspect, every such sphere also has a function within the jural aspect, constituting the internal (non-state) societal freedoms within a differentiated society. Citizenship within the state disregards all non-state ties (such as gender, race, ethical affiliation, economic status, social rank, religious membership, marital status and so on). Yet this does not mean that these ties are erased. Instead, these ties are disregarded by the nature of citizenship in order to fulfil the calling of the government of a just state, namely to *integrate* the **legal interests** entailed in these non-political societal collectivities into one public legal order. In other words, what is at stake is binding together a multiplicity of legal interests, in order to harmonize and balance such legal interests in one public legal order and whenever an infringement of rights takes place to restore (re-tribute) what was taken away illegally (unlawfully).The political integration of these different spheres is achieved in a primarily legal way. Spijker writes on this integrative function of the state:

> In most societal relations, the internal legal function is qualified by a non-legal leading function. [It is only] in the state [where] the public legal function itself is the leading one. As such, (the leading jural aspect of) the state lacks a typical non-jural qualification. In principle this implies the unique *universality* and *totality* of the internal legal community of the state, which is not found in any other societal structure.[172](citations omitted).

The people in a state are the totality of all the citizens *irrespective* of all their relations, memberships, convictions, professions, etc, hence transcending the differences between the citizens. It is strictly public legal community – the enkaptic relation that ties all the citizens and communities and institutions and relations – with the state. Such legal relation is public in nature, because as Kalsbeek explains:

> The state is public in the sense that every person living within its territory and every community and association having its domicile therein is subject to the state's legal jurisdiction and has a right to its legal protection.[173]

As intimated earlier, all structures have a jural aspect but only the state is qualified as a public legal community. With public justice as the norm, the integration becomes a process of "*harmonizing the various interests which arise from the legal sphere sovereignty of various social structures*... justly interrelating... all legal interests

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[172] Jan Geert Spijker, State, Nation and Integration. An Analysis of Dooyeweerd's Concept of Public Legal Integration (Aug. 2005) (unpublished MA Thesis, Faculty of Philosophy, VU-University Amsterdam) (on file with author) [hereinafter, Spijker].

[173] KALSBEEK, *supra* note 19 at 238.

within the territory of the state."[174] It as an "external" integrating function viewed from the standpoint of the state. It must be stressed that this is an external integrating function viewed from the standpoint of the state – hence it concerns legal interests within its territory, but not within the public legal community itself. The internal legal spheres themselves of the non-state communities are left intact but the state integrates them in the civil law by holding those "private" legal spheres to observe "public legal" (state norms) of coordinational or private justice.

4. Theory of Societal Structures: the Transcendental Societal Categories

Dooyeweerd distinguishes himself from other thinkers for his elaboration of a general theory of social structures and relationships that circumvents the perennial tug-of-war between individualism and universalism. [175] He insists on the reality of real communities governed by their own internal structural principles, yet he also argues for a social pluralism based on the sphere sovereignty of various societal structures, and whose competences must be respected by the state.[176] He thus outlines what he terms as "transcendental societal categories"[177] There are four pairs of such categories, to which we now turn.

The first pair consists of communal (intra-communal) and social relationships (inter-individual or inter-communal); the second, of organized (historically-founded) and natural communities; the third, of different and undifferentiated communities, and the fourth, institutional and non-institutional (or voluntary) communities.

a) Communal and social relationships

Communities are made up of people bound together into a social unity, regardless of the degree of intensity of the communal bond.[178] Communities – examples of which are family, state and voluntary associations – are characterized by continuity, authority, a certain structure and sphere sovereignty.[179] There is

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[174] III Jonathan P. Chaplin, *"Public Justice" As a Critical Political Norm* 7 (2005) Workshop Paper, International Symposium, Association of Reformational Philosophy (August 15-19, 2005), Hoeven, the Netherlands, available at http://www.aspecten.org/teksten/IS2005/Chaplin_Workshop.pdf [italics in the original] [hereinafter, III Chaplin, *Critical Norm*].

[175] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 222-237.

[176] *Id.* at 198-261.

[177] *Id.* at 176.

[178] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at at 177.

[179] D.F.M Strauss posits a refinement to Dooyeweerd's original conception, based on his understanding that these societal structures and relationships being described are complex basic concepts built up out of the foundational or constitutive modal analogies of the social aspect. In his opinion, Dooyeweerd looks at these structures and relationships not from the point of view of sociology, to which they properly belong, but from biology as the foundational function of certain societal forms. Hence he suggests three finer categories: social collectivities, communities and coordinational relationships. Social collectives refer to those forms of interaction which have (i) a solidary unitary character and (ii) a permanent authority structure. Communities are those forms of interaction which only have one of the two characteristics. Coordinational relations neither have a permanent authority structure nor a solidary unitary character but concern social interaction normally related to the phenomena of friendship, partnership,

continuity because a community continues despite the change in membership. Each community has a typical authority structure. Authority is always normative, according to the character of the community. It is always connected with the notion of responsibility; it must serve the community. Moreover, authority is limited to a specific community.

Communal relationships have sphere sovereignty, their own irreducible nature. Hence in contrast to the Roman Catholic notion, for Dooyeweerd, no single community – not even the state or the church – occupies an exalted place. No community embraces everything else into an all-encompassing whole where the other societal relationships and structures are the parts, as in the Aristotelian *polis*. With respect to each other, the various communities stand shoulder-to-shoulder, each with their own kind of authority typical or specific to its nature. This is what Dooyeweerd calls "sovereignty in its own orbit."

Social relationships allow people to coexist either in cooperation with or in opposition to each other[180]. Social relationships, founded in the creational order like communities,[181] are interlinkages between individuals, communities, or communities and individuals. Hence they are either inter-communal or inter-individual. These are relationships where "individual persons or communities function in coordination without being united into a solidary whole"[182] and which exhibit internal structural types of an invariant, supra-arbitrary character, just like the communities. The market is a combination of economically qualified and historically founded social relationships.[183] Other relationships are jurally qualified,

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fellowship mate, pal, peer and the freedom we have to associate with an accountable freedom of choice. In other words, they are inter-relations of equal footing between communities and social collectivities, or analogous to Dooyeweerd's conception of the inter-individual and the inter-communal. So in Strauss' scheme, the state, the church, the firm, the school, the university, the nuclear family, even the art, sports, language and cultural associations are not communities but social collectivities. Referring to the state, he says that the state possesses a durable sub-and-super-ordination of authority and subjects, or a permanent authority structure; it also has unity and identity even when citizens change places (as when one becomes a citizen while the other takes her place as a civil servant). A nation (*volk*/people), he says, is a community as much as the extended family is; both posses a solidary unitary character but no permanent authority structure. Strauss explains how his approach is different from Dooyeweerd's:

> Having linked the nature of communities directly to their (natural-biotic) foundational function, Dooyeweerd proceeds by claiming that historically founded (i.e. *organized*) communities can be re ferred to as 'verbanden' (i.e. in terms of our proposed nomencla ture: societal collectivities). *Natural communities*, on the other hand, are unorganized (cf. Dooyeweerd, 1997-III: 178ff.). The result of this approach is that Dooyeweerd cannot meaningfully distinguish between a *marriage* and the *nuclear family*. According to him they are both natural (i.e. *biotically* founded) and *ethically* qualified **communities**. In terms of our distinctions a marriage is a *community* whereas the family represents a *collective social bond*. I D.F.M. STRAUSS, REINTEGRATING SOCIAL THEORY 260-262 (2005) [italics and emphasis in the original] [hereinafter, I STRAUSS, SOCIAL THEORY].

[180] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97at 74.
[181] *Id.* at 107.
[182] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 177.
[183] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97at 103.

as can be seen in the inter-relation between the parties in a civil or international lawsuit. Still others display a typical pistical qualification, as in the example of a religious dialogue between people with different beliefs and worldviews. [184] As can be seen, these relationships are intertwined in a variety of ways with other social relationships.

Communities and interlinkages presuppose each other, by which Dooyeweerd means that wherever such communal wholes exist, there also exist relationships between such communities (inter-communal relations) and between members of such communities (inter-individual relationships). [185] Yet the two distinct communal wholes are not united into a single whole; neither do the inter-individual relationships merge into one. Dooyeweerd shows an important implication from these coordinational relations: human beings can never be fully held or defined by either his position as a member of the community or his status as an individual person. For this reason he rejects both individualism and universalism.[186] The latter means an absolutization of the communal bond and of the inter-individual relations. The latter's nominalistic bent aims to

> construe society from its supposed "elements", i.e. from elementary interrelations between human individuals. From this standpoint the reality of communities... as societal unities is generally denied. The latter are considered only as fictitious entities resulting from subjective relations in human consciousness.[187]

It is erroneous for individualistic perspectives to construct communal relationships out of atomisticically conceived autonomous individuals, forgetting that "the civil legal personality is only a specific component of the full legal subjectivity. This latter is equally constituted by various internal legal relationships implied in the membership of various communities."[188] The universalistic approach, meanwhile, conceives of society as different societal relationships bound into one all-embracing whole. Dooyeweerd considers it more dangerous than individualistic theories because "it is in principle a totalitarian ideology which implies a constant threat to human personality."[189] The organic metaphors resorted to by universalistic thinkers are highly appealing but Dooyeweerd reminds us that the "human I-ness" goes beyond every temporal societal relationships so that it is totally wrong to think of human beings as an organic member or part of any temporal social whole.[190] Skillen explains thus:

> Dooyeweerd's entire theory of modal sphere sovereignty, societal sphere sovereignty, and enkapsis... .presupposes his fundamental conviction that man in

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[184] *Id.* at 103-104.

[185] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 178.

[186] *Id.* at 183. Reformational scholars after him, like Clouser and Griffioen, for instance, prefer to use the word "collectivism" in lieu of Dooyeweerd's "universalism." For purposes of this study, we use the terms inter-changeably.

[187] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 182.

[188] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 280.

[189] *Id.* at 196.

[190] *Id.*

> his deepest selfhood transcends the temporal order of which all communal, inter-communal, and enkaptic relationships are a part. Man himself, Dooyeweerd argues, cannot be qualified according to any single "radical type" of individuality structure as can plants and animals. The different types of societal relationships, therefore, are temporal structural types which can never be enkaptically or otherwise united into a single temporal whole or classified under a single radical type. They always point beyond themselves toward the deeper, supra-temporal religious community of mankind in Christ[191] [underlining in the original].

b) Natural and historically founded communities

Simply put, natural communities are those which have a foundational function in the biotic aspect (that is, "founded in nature")[192] while historically founded communities are those which have a foundational function in the historical aspect. Natural communities include marriage, the nuclear and the (cognate) extended families while the latter embraces a wide variety of organized communities, such as states, churches, businesses and voluntary associations of many kinds. In other words, they depend upon historical conditions for their existence; Dooyeweerd insists that many thinkers erroneously hold that all human communities are historically founded. In saying this he rejects the organicist view that the state arises from a natural foundation and then develops as a supra-individual being in a pattern of organic growth (the blood and soil ideology of the Nazis, for example). Dooyeweerd holds that this view overlooks the necessity of formative human shaping that makes it possible for communities such as the state, the church and voluntary organizations like football clubs to persist as communities.[193]

c) Institutional and non-institutional communities

Where individuals are members for life of a community, to which they are bound into a whole, whether or not they consent to it, such a community is institutional in nature. They are characteristic of the state and of church (as far as those which require baptism for membership is concerned). [194] The opposite case – the non-institutional – refers to a community where individuals freely choose to be part of it.[195] The latter kind of community falls into two types: (1) free associations (like political parties and youth organizations), where the highest authority rests on the general membership and (2) other voluntary organizations, which, though having members in their internal community sphere, are not bound in a jural sense by a law of association. Within this category of organizations, Dooyeweerd identifies s (a) labor organizations of the marketplace, which are

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[191] I Skillen, *Calvinistic Political Theory*, *supra* note 15 at 395.

[192] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 405; VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 75.

[193] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 406. VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 75.

[194] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 74-77.

[195] *Id.* at 76, 95.

qualified by the economic function of the enterprise; (b) various organizations for scientific education; (c) enkaptically related administrative organizations, academic hospitals etc; (d) schools of non-scientific education created by (i) the state or its subdivisions, or (ii) the organization of the United Nations, which is qualified by international law, or (iii) the churches; or (iv) enterprises; or (v) trade unions or lastly, (vi) political parties. Free associations are unilaterally founded, for a purpose and with a means to accomplish it. To qualify as free social organizations, adds Dooyeweerd, organizational forms must be instituted by public law and function only in an enkaptic manner, by virtue of a special structural interlacement with the state as an institutional community. The free associations are characterized as democratic while the latter voluntary organizations are authoritarian, inasmuch as in the case of the latter, the authority exercised within them is imposed from above by an external institution. Dooyeweerd says it makes no difference that such organizations can also be created by free association, or are democractically organized inside their own sphere, sine the external institutions are not part of the free associations but only have a close enkaptic intertwining with the, in their social genetic and existential forms. [196]

The distinction between institutional and non-institutional is important to Dooyeweerd's notion of political sphere sovereignty. For him, societies rest upon relative stability, and only institutional communities can provide that kind of stability, not voluntary associations. For this reason, the state, family and church play an important role in societal stability; if they are undermined, it will have negative consequences for society in general.[197]

d) Differentiated and undifferentiated relationships.

Dooyeweerd's notion of differentiation in society is rooted in the historical process of modernity. In differentiation – the unfettered unfolding of the structures of individuality in society[198] - we see the structural development of the various societal structures with their respective material competencies and inner structural principles. *Indeed, a genuine public legal community can only take shape in the process of differentiation.*

Thus, social and communal relationships can display differentiated and undifferentiated characteristics. Undifferentiated communities are totalitarian in nature inasmuch as they absorb the individual.[199] In such communities "divergent structural principles are intertwined in one form of communal bond and are realized inside one and the same communal bond."[200] Examples of such communities are sibs, clans and guilds, which possessed an exclusive and absolute

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[196] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 75-76, 95-96.
[197] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 568-569.
[198] VI DOOYEWEERD, ROOTS , *supra* note 46 at 74.
[199] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 76
[200] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 76.

religious sphere of power[201] so that the structural principles of various societal relationships could not yet freely unfold according to their particular material competencies.[202]

In Dooyeweerd's scheme, certain norms govern historical development; this is seen in the place God assigned the historical aspect in the creation order: "The contrast between historical and unhistorical action refers back to the opposition found in the logical aspect of reality between what agrees with the norm for thought and what conflicts with this norm."[203] Norms are ontic (cosmic) standards of evaluation and only humans are endowed with a logical function capable of rational distinction; only humans are responsible for their own behavior and who are accountable for conduct that violates these norms.[204] Dooyeweerd cites three such norms, which require formation by competent human authorities, a process determined by the historical development itself of a people, directed by the principle of cultural economy – our **first norm** – which is sphere sovereignty applied to the process of historical development. This principle requires that each differentiated cultural sphere should remain limited to the boundaries set by the true nature specific to each life sphere.[205]

This process is a gradual unfolding of culture into intrinsically different spheres of science, art, state, church, industry, school, voluntary organizations, etc.[206] Only when a culture follows this principle does harmonious cultural development ensue.[207] But every transgression of this historical norm leads to disharmonious cultural unfolding. In this development, the **second norm**, that of historical continuity, which connects the past with the present (tradition), must be respected. Any notion of vitality in the unfolding of the cultural way of being must point "to that part of tradition which is capable of further development in conformity with the norm for opening or disclosure of culture."[208] This **third norm** of opening and disclosing culture requires the differentiation of culture into spheres that have their own unique nature.[209]

The corollary of this *differentiation* is the idea of *individualization*, which refers to the development of genuinely individual national characteristics, which are an expression of its common historical experiences and of its disclosure as a cultural community – individualization, first developed in the cultural interaction

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[201] VI DOOYEWEERD, ROOTS, *supra* note 46 at 74.

[202] According to Griffioen, however, Dooyeweerd's idea of the primitive society had already been outdated by the time his *New Critique* was published. Griffioen says that new anthropological studies have shown that tribal societies were much more complex than held by scholars in the 19th and the early 20th century, who considered these societies as a universalistic primitive stage of civilization Sander Griffioen, *Dooyeweerd's Idea of Development* 7-12 (1986) (unpublished manuscript, on file with author)

[203] VI DOOYEWEERD, ROOTS , *supra* note 46 at 70.

[204] *Id.*

[205] *Id.* at 82.

[206] Id. at 74.

[207] *Id.* at 72.

[208] *Id.* at 76.

[209] *Id.* at 80-81.

of civilized peoples.[210] It can be seen then, that "the national character of a people is not a product of nature but the result of culturally formative activity"[211] in line with a "type of cultural individuality which ought to be realized with increasing purity as the *special calling* of a people."[212] Once differentiation begins, "the connections between the historical aspect and the later aspects of reality disclose themselves."[213]

Now Dooyeweerd posits a link between faith and history in the process of historical development: "the faith of the leading cultural powers"[214] – those called to form history – "determines the entire direction of the opening process of culture."[215] This connection therefore, "requires special attention because of the exceptional place the aspect of faith occupies in the temporal world order"[216]: "the last in temporal reality" that is not to be confused with the "religious root-unity of the heart"[217], which in turn is the base of the "departure points of our temporal life"[218], including our "temporal faith life."[219] This is where the direction of cultural unfolding may acquire an apostate character, although he allows that sometimes, such a turn, even if apostate, as in the case of the Enlightenment, "must be properly acknowledged for its historical merit to the extent that it has indeed contributed to historical disclosure."[220]

In terms of these four categories, Dooyeweerd describes the state as a differentiated, organized, institutional community. This does not refer to its inner structural principles but only places it in the context of Dooyeweerd's transcendental societal categories. The state has a special task of protecting both individual and communal rights as an institution that convenes a public legal community. I will discuss in detail the state's structural principles in the next chapter, following an exploration into his theory of the sources of law, which closes the discussion in this chapter.

D. A Theory of the Sources of Law

The societal structural principles from which differentiated societal spheres arise open our understanding of Dooyeweerd's theory of the sources of law. Skillen outlines for us four guidelines or summary principles that direct Dooyeweerd's own formulation of the sources of law.

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[210] VI DOOYEWEERD, ROOTS , *supra* note 46 at at 83.
[211] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 83.
[212] *Id.* at 84.
[213] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 84.
[214] *Id.* at 91.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 91.
[219] *Id.*
[220] *Id.* at 108.

First, the universal legal sphere of meaning itself must be observed and not reduced to, nor explained away by, some non-legal sphere. The organic social communities as well as the social individuality structures in which law is actually presented to us must recognized and accounted for. This therefore breaks off from all formalistic conceptions which explains law as a logical abstraction and insists on a material theory of sources, since it alone can guarantee sphere sovereignty.[221]

Second, every societal community has its own end-function, thus fulfilling its legal function in a way unique to its very nature. This means that each community has its own internal sphere of law which cannot be derived from that of another differently-qualified community. This would prove crucial to the issue of competence for making formal law.[222]

Third, since the structures of different spheres are grounded in divine sovereignty, legal norms cannot be subject to human arbitrariness. Positive laws are understood as human positivations of divine jural principles. This has particular implications for our understanding of the limits of the state's own law-making powers. Since in Dooyeweerd's thought, all positive law is traced to the proper authorities of structurally distinct communities, positive state law cannot be the basis of the existence of a distinct non-political community or social relationship.[223]

Fourth, there is a mutual interrelationship of different sources of law requiring an investigation of the external relationship and connection of the sources of law which in their internal spheres are sovereign. This guideline springs from his theory of enkapsis, or the mutual intertwinement of differently-qualified societal spheres and relationships.[224] Dooyeweerd thus defines a source of law as "any jural form in which material, divine, jural principles are positivized by the competent lawmaking organs of a jural community or a sphere of legal relationship into binding positive law within that community or relationship."[225]

For Dooyeweerd, then, the societal structural principles rooted in the creational order – norms that delimit the bounds of the differentiated spheres – "lie at the basis of every formation of positive law and [it is only these principles that make the latter] possible."[226] Moreover, positivized laws found in the various spheres of competence, are interlinked with one another in complex ways by way of enkapsis. According to Dooyeweerd, insight into the nature of enkapsis,

> ... appears to be of fundamental importance for the theory of

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[221] I Skillen, *Calvinistic Political Theory*, *supra* note 15 at 418.
[222] *Id.*
[223] *Id.* at 419-420
[224] *Id.* at 420.
[225] *Id.* at 421.
[226] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 669.

> human society because, in current conceptions, the difference in principle between sphere sovereignty and autonomy is consistently misunderstood... [227]

Dooyeweerd says that implicitly, this insight has a fundamental bearing on any theory of the sources of law "because it is only by making a sharp distinction between the internal sphere sovereignty of radically different societal structures (such as for example, state, church, and business organization) and the autonomy of parts of one and the same societal whole (such as, for example, municipality and province within the state) can proper jural insight be obtained into the mutual relationship of the original material spheres of competence with respect to *the* area of law formation."[228]

1. Between Formal Source of Law and Material Sources of Law.

Here, we have to make a distinction between the formal source of law and material competence. The formal source of law is determined by the different enkaptic relations that happen in the interlacement of different societal structures and relationships. Material competence meanwhile refers to the invariant structural principles of the various societal relationships that are sovereign in their own spheres – in other words, the material sources of law.[229] Recall that in his social ontology, societal relationships possess a multiplicity of irreducible spheres of jural competence that are internal to their own structurally defined domain of justice.[230] "Sovereignty in its proper orbit," says Dooyeweerd elsewhere, "is a universal ontological principle, which gets its special legal expression only in the jural aspect of reality."[231] It displays two different gives in the structure of reality: (1) the mutual irreducibility of the different aspects of reality; (2), their indissoluble intertwinement and connection in the temporal order of reality.[232]

Yet, this interlacement of various societal relationships could only happen in a differentiated context. It could only happen in the trajectory of historical development, as human societies develop into differentiated orders of varying complexities interlaced with one another in various ways. Crucial in this development is Dooyeweerd's notion of both the internal opening process of each sphere, as well as the disclosure of the various modal aspects, both of which are inextricably linked.[233]

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[227] VIII HERMAN DOOYEWEERD, THE COLLECTED WORKS: ENCYCLOPEDIA OF THE SCIENCE OF LAW SERIES A, VOL 8 310 (2002). [hereinafter, VIII DOOYEWEERD, ENCYLOPEDIA].

[228] VIII DOOYEWEERD, ENCYLOPEDIA, *supra* note 21 at 310.

[229] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 665.

[230] *Id.* at 667-558.

[231] IX HERMAN DOOYEWEERD, *The Contest Over the Concept of Sovereignty, in* THE COLLECTED WORKS: POLITICAL PHILOSOPHY, SERIES D VOL. 1 70 (1950) [hereinafter, IX DOOYEWEERD, *Sovereignty*]. This was originally delivered as Dooyeweerd's rectorial address on the occasion of the 70th anniversary of the founding of the Free University on Oct. 20, 1950.

[232] *Id.*

[233] For a discussion of this process, *see* KALBSBEEK, *supra* note 19 at 126-131.

Again, as Skillen says, different social relationships have different characters, different kinds of law-making requirements, different foundations. [234] Thus, one and the same genetic form (that is, a formal source of law) posivitizing jural principles, says Dooyeweerd, may be an original source of law in one sphere of competence but may be a derived source of law in another sphere. Indeed, inasmuch as such spheres are inter-twined in various structural interlacements, their original spheres of competence bind and limit one another.[235] While a formal source of law is inextricably bound with a law-forming organ (say, a criminal statute emanating from the legislature), such an organ is interwoven with various material spheres of competence, so that it can never be the source of validity of all positive law.[236] Hence:

> An internal ecclesiastical legal relation, e.g. does not exist "in itself", i.e., in isolation, but only in an enkaptic interlacement with constitutional State-law, civil law, inter-individual law, internal law, and family relations law, and so on. Therefore every internal jural relation within a particular sphere of competence has its counterpart in jural relations within other spheres of competence. Such a jural relation has inter-structural aspects that are interwoven with each other.[237]

Dooyeweerd summarizes his theory of the sources of law in these words:

> All law displaying the typical individuality structure of a particular community of inter-individual or inter-communal relationship, in principle falls within the material-jural sphere of competence of such a societal orbit, and is only formally connected (in its genetic form) with spheres of competence of other societal orbits.[238]

2. A Formal Classification of Law

With this in mind we can then proceed to a discussion of Dooyeweerd's formal classification of law, which springs from a distinction he makes between *jus commune* and *jus specificum*. The former, in its proper public legal sense, is attached to the public law of the state while the latter refers to the specific, non-public jural qualification, and is further divided into two sub-types: the private civil law proper and the private non-civil law. [239] On this basis, we make the following taxonomy:[240]

a) Public Legal Sphere

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[234] I Skillen, *Calvinistic Political Theory*, *supra* note 15 at 388.

[235] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 669.

[236] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 669.

[237] *Id.*

[238] *Id.*

[239] D.F.M. Strauss notes that there is only one place where Dooyeweerd makes this distinction, in Volume III of the *New Critique*, so that it is not widely known. It is found in III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 690, where he negatively refers to a view according to which "private law is only of one kind: it is identical with civil law" (which therefore implies that there is a non-civil private law distinct from civil law proper).

[240] *Adapted* from I STRAUSS, SOCIAL THEORY, *supra* note 170 at 270-271.

It encompasses the relations within the state between government and subjects, as well as the legal order among the nations, or international law. It includes international public law, constitutional law, penal law, penal procedural law and administrative law. This sphere embraces the political rights of citizens, such as the rights to assembly and to free speech, as well as electoral rights.

b) Civil Private Law

Here, all state relationships in which a subject may take part are ignored. In this sphere, citizens stand in their position as free individuals within the differentiated legal interaction; it guarantees for the individual personal vindication in legal life. In distinction from constitutional law in which there is a superior-inferior relation between government and subject, civil private law maintains co-equal legal relations among individuals and institutions. Both public coordinational law and civil private law have a jural qualification.

c) Non-Civil Private Law

This concerns the internal law of the various non-state life forms, where in every instance such law is differently qualified. Internal business law is qualified by the economic function of business; international church law is qualified by the faith function of the church as a collective faith bond. It delimits the legal competence of the state externally – that is, apart from the internal limitation of government action by the jural qualification of such action.

E. CONCLUSION

In Dooyeweerd's philosophy, we see divine sovereignty as the origin of order, diversity and unity in the cosmos. His Christian philosophy of societal spheres accounts for a genuine diversity in the world, where an indissoluble link exists between the diversity in creation and order and law, inasmuch as God created each kind of thing according to its own kind of law, through which He continues to sustain and govern them.

These two horizons of experience – the modal and the entitary – unveil the workings of invariant structural laws for human experience in both the natural and the cultural spheres. *Modal laws explain the diverse aspects of reality.*

The modal theory breaks through reductionistic theories that attempt to explain complex reality through only one aspect. The modal theory is interlocked with the theory of individuality-structures dealing with how things, events and relationships display typical functions within the modal aspects. *Their typical structures set them apart as things, events and relationships.*

Humans are called to responsibility: to unfold or positivize the structural principles that govern the working of entities, communities, institutions and relationships.

A key feature in Dooyeweerd's social and political philosophy is his normative theory of the state, explained through its founding and qualifying functions. The state is an organized community of government and subjects and founded on the monopolistic organization of the power of the sword that extends over a cultural area within defined territorial boundaries. But what distinguishes the state from these institutions and communities is that it is historically-founded and jurally-qualified, with the task of providing public justice. The state is guided by the norm of public justice. The state is a public legal community that creates a sphere of freedom and equality for individuals. Individual rights as we know them are only possible through the formation of the state as a public legal community.

Yet the state is not an all-encompassing reality for Dooyeweerd inasmuch as his social and political philosophy deals with the diversity of social and communal relationships that enriches and mark human existence, and each of which has its own sovereign sphere. The state in Dooyeweerd's systematic philosophy is but one of different institutions and communities with their respective spheres of competence.

This pluralism of societal spheres – each of which is endowed with its own fundamental competence – is a keystone of his theory of law, especially with regard to the question of sources or the material principles of law. At the heart of this theory of law is the concept of enkapsis, or the mutual intertwinement of differently-qualified societal spheres and relationships.

III. CHRONICLE OF A DEATH FORETOLD:

THE END OF THE STATE AS WE KNEW IT?

The Future of the Dooyeweerdian State in a Globalized World

L'etat est mort.[241]

The two concepts of Sovereignty and Absolutism have been forged together on the same anvil. They must be scrapped together.[242]

Sovereignty has historically been a factor greatly overrated in international relations. Among the overraters have been prominent practicioners of international law, dazzled by their status, as or aspirations to be, high officials of

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[241] *Quoted* in III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 465. Dooyeweerd attributes the quip to the French syndicalist Eduoard Berth, with a cross-reference to the French constitutional law theorist Leon Duguit's book LE DROIT, LE DROIT INDIVIDUALE ET LE TRANSFORMATION DE L'ETAT 38-39 (1908).

[242] Jacques Mauritain, *quoted* in IX DOOYEWEERD, *Sovereignty*, *supra* note 214 at 101-102.

their national foreign offices. Never, however, have notions of sovereignty demanded as much cautious rethinking as now.[243]

For [Western political institutions] do not carry the good society with themselves. The same types of government create different consequences in different contexts; there is nothing predetermined about the State form. It can be used for freedom and for constraint, and history is full of examples of both.[244]

A. THE DEMISE OF THE SOVEREIGN STATE?

James Crawford, in his now standard work on statehood, records a particularly telling debate among illustrious legal scholars tapped by the International Law Commission (ILC) to draft a proposed *Declaration on the Rights and Duties of States*. In one such session in the late 1940s, the French scholar Georges Scelle (1878-1971) is said to have emphatically stated that he "had been active in international law for more than fifty years and still did not know what a State was and he felt sure that he would not find out before he died. He was convinced that the Commission could not tell him."[245] If anything, Scelle's revealing comment underscores the recurring crisis in political theory that according to Dooyeweerd arises from a theory of the state without a state-idea. For today, we seem to be no better at pinning down just what a state is, even as we hear the strains of the funereal music being played at its seemingly eternal wake.[246] Indeed, in this era of globalization, calls for the dismantling of the state (with its claim to sovereignty) are once again rife.

I will thus present first of all a broad and abbreviated philosophical history of state sovereignty as a backdrop to the contemporary discussions in international legal theory.

In the context of these broad debates about the nature of the state in the globalized world, I will then tackle the discussions right within the very philosophical tradition spawned by Dooyeweerd about just what constitutes the state's inner nature. At its center are proposals raised by Jonathan P. Chaplin. While he does not reject the normative nature of the state's structural principle, Chaplin raises serious and compelling objections to Dooyeweerd's own conception of it; his revisionist proposal proves highly relevant to contemporary discussions in international law about the notion of democratic entitlement, which in relation to statehood itself, embraces a host of concerns, foremost of which are state

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[243] I THOMAS M. FRANCK , FAIRNESS IN INTERNATIONAL LAW 3 (1995) [hereinafter, I FRANCK , FAIRNESS].

[244] I MARTTI KOSKENNIEMI, THE GENTLER CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960 177 (2002)[hereinafter, I KOSKENNIEMI, GENTLER CIVILIZER].

[245] I JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 38 (2nd ed. 2005) [hereinafter, I CRAWFORD, STATES].

[246] In fact, Crawford notes that since it began its work of codification of the international law on the state and recognition in 1949, the ILC has not progressed at all on that score. CRAWFORD, *supra* note 244 at 40.

legitimacy and participative democracy. These in fact, are matters which have a direct bearing on Chaplin's own project.

Hopefully, this will clear the way for a discussion of Dooyeweerd's theory of the state anchored on societal sphere sovereignty and its implications for contemporary debates on the bounds and limits of the nominalistic consent-based system of sovereign states in the international legal order. As a point of discussion, I will present the ideas of a contemporary international legal theorist, Anna Marie Slaughter and her theory of the disaggregated state to further highlight the significance of Dooyeweerd's critique of the theory of the state without a state-idea.

B. AN ABBREVIATED PHILOSOPHICAL HISTORY: NOMINALISM AND THE CONCEPT OF STATE SOVEREIGNTY

Any discussion about the state in international legal theory is inseparable from its supposed attribute of sovereignty. In particular, the issue of statehood, or of the criteria possession of the status of a state under international law, traditionally defined as "effectiveness", is closely linked to the concept of sovereignty, although is not itself a criterion for statehood but is, in international law, the "totality of international rights and duties recognized by international law"[247] as embodied in an independent territorial unit that is the State.[248] In other words, an entity endowed with statehood has sovereignty, but sovereignty itself is not a precondition but only an attribute, or "an incident or consequence of statehood, namely the plenary competence that States prima facie possess."[249]Like many contemporary writers, Crawford cautions against its political connotations, which point to untrammeled authority and power; yet at the same time he is at loss what to do with it.[250] It seems to be ineradicable, he says, but on the other hand, its elimination might only make matters worse. "Better, one might think, 192 sovereigns than one or few."[251]

Peter Malanczuk, in his reworking of Professor Michael Akehurt's classic textbook on international law, traces the theory of state sovereignty back to political philosophers who problematized the question of supreme political power within the state: Machiavelli (1469-1527), Jean Bodin (1530-1596) and Thomas Hobbes (1588-1679).[252] Although it can be said that there are important

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[247] Reparations Case, Advisory Opinion, [1949] ICJ 174, 180.

[248] The best known formulation of the basic criteria for statehood is enshrined in Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States: "[t]he State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c), government; and capacity to enter into relations with other States." Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19.

[249] I CRAWFORD, STATES, *supra* note 244 at 89

[250] *Id.* at 33.

[251] *Id.* at 32.

[252] PETER MALANCZUK, AKEHURT'S MODERN INTRODUCTION TO INTERNATIONAL LAW 17 (7th rev. ed. 1997) [hereinafter, MALANCZUK]. But as far as lawyers are considered, he says that its best-known

differences in their respective intellectual projects, all three thinkers stand in the tradition of nominalism developed by the two Franciscan philosophers Duns Scotus (1265/66-1308)[253] and William of Ockham (c.1287-1347)[254] in the late Middle Ages. They may well be considered representative (but do not exhaust the list) of a host of thinkers who belong to or have been influenced by the same philosophical line.

Yet the standard textbooks hardly pay attention to the implications of this philosophical tradition on how international law and its elements are in the end conceived. Malanczuk himself disparages the concept of sovereignty, remarking that "it is doubtful whether any single word has ever caused so much intellectual confusion and international lawlessness."[255] He thus says:

> When international lawyers say that a state is sovereign, all that they really mean is that it is independent, that is, that it is not a dependency of some state. They do not mean that is in any way above the law. It would be far better if the word 'sovereignty' were replaced by the word 'independence'. In so far as 'sovereignty' means anything in addition to 'independence', it is not a legal term with any fixed meaning, but a wholly emotive term. Everyone knows that states are powerful, but the emphasis on sovereignty exaggerates their power and encourages them to abuse it; above all, it preserves the superstition that there is something in international cooperation as such which comes near to violating the intrinsic nature of a 'sovereign' state.[256]

But more than a "wholly emotive term," its philosophical history in fact shows that the concept of sovereignty as embodied in standard interpretations of the term is founded on a nominalistic view of states as monadic entities that are the ultimate reality in international relations.[257] Even Marti Koskenniemi, the leading figure in the so-called New Stream scholarship in international legal theory,[258]in his critical history of the liberal doctrine of politics in international law, while deeply suspicious of it, nevertheless appears to have uncritically accepted the underlying individualistic presupposition of such a doctrine.

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exponent was the positivist John Austin (1970-1859), who defined law as the general commands of the sovereign, backed up with the threat of sanctions. For which reason, so notes Malanczuk, Austin did not consider international law as law proper, in the absence of a single sovereign in the international sphere. *Id.*

[253]The biographical entries here are from the on-line Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/entries/duns-scotus/ and http://plato.stanford.edu/entries/ockham/.

[254] John Milbank lays the blame squarely on Scotus, *see infra* note 248 at 10. Dooyeweerd identifies nominalism with William of Occam, known for his principle Ockham's razor. *See* II DOOYEWEERD, NEW CRITIQUE I, *supra* note 21 at 186. I will take up Dooyeweerd's critique of nominalism in relation to sovereignty in more detail below.

[255] MALANCZUK, *supra* note 251 at 17.

[256]*Id.*

[257]In the next chapter, I will show the implications of this philosophical history to the idea of an "international community".

[258]II MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 52-130 (1989) [hereinafter, II KOSKENNIEMI, APOLOGY]. Miéville describes the book – a "monumental and brilliant work" – as having justly come "to be the centre of gravity for critical studies in international law. MIÉVILLE, *supra* note 1 at 48. Of Koskenniemi's theoretical approach, we will see more in the next chapter.

By individualistic, I mean the idea of society as constituted supposedly by its basic elements: the individuals, yes, even if such society is conceived in different ways -whether as an all-encompassing collective of individuals forming the state as the only political reality or simply as a social contract of individuals that nevertheless maintains the distinction between state and society. In the case of Koskenniemi, while he aims to show the contradictory nature of the liberal doctrine of politics, that is, of how such doctrine is "forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice versa* without ever being able to emphasize itself permanently in either position",[259] he does not question the ontology behind much of international law; in other words, why in the first instance, thinkers from the absolutist ones such as Hobbes and Bodin to the liberal ones such as Locke to the naturalist ones such as Grotius and Vattel conceived of the state in individualistic or monadic terms, so that other spheres of life are excluded from the discourse of international law and international relations. Similar to the thinkers he criticizes, he seems to take this conception of the state for granted (or at least, does not present an alternative to it). As an anti-metaphysical postmodernist, Koskenniemi does not seem bothered by this lack of a clear alternative ontology, nor does he sense a need for it. Instead, he makes an appeal for a critical legal practice that undermines the liberal idea of the rule of law,[260] a "practice of attempting to reach the most acceptable solution, a conversation about what to do, here and now."[261] Miéville complains that these days, international legal theory has largely been reduced to a concern for the doctrinal or the technical (the "vanishing point of jurisprudence"),[262] eschewing any discussion of the legal form itself, that is, about why international law assumes its present form. This is highly ironic, considering that international law is now a global system.[263]

John Milbank's attack on modern and postmodern accounts of secularization is instructive here, especially his pioneering work *Theology and Social Theory*.[264] Milbank unravels the history of modern social and political theory, in particular, of the creation of a supposedly autonomous human agency driven by a seemingly insatiable quest for power. In this deconstruction and reconstruction of the history of modernity, Milbank argues that crucial shifts in theological thought – that is, how the leading thinkers of the day conceived of God in relation to the world and to humanity – led to profound transformations in much all else, and in the end paving the way for the birth of other disciplines that effectively secularized

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[259] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 46.

[260] *Id.* at 501.

[261] *Id.* at 486.

[262] MIÉVILLE, *supra* note 1 at 9,10. He has of course, his distinctively Marxist account of the legal form of international law claiming to be able to explain what makes international law, law. Here he refers to the remark by T.E. Holland about international law as the "vanishing point of jurisprudence", famously quoted as an epigraph by the American legal theorist Myres S. McDougal, founder of the legal realist New Haven school of jurisprudence in his landmark 1968 book.

[263] *Id.* at 10, 13.

[264] J. MILBANK, THEOLOGY & SOCIAL THEORY: BEYOND SECULAR REASON (1990) [hereinafter, MILBANK].

life. In particular, Milbank makes two core arguments about social theory as espoused by modernity, according to Smith. First, modernity, while claiming to be secular and therefore religiously neutral, is in fact governed by ultimately religious assumptions that are no more rationally justifiable than the Christian position themselves. Second, these assumptions indicate a certain "perverse debt" to Christianity, so that modernity and social theory in particular is rooted in heterodox theology.[265]

Milbank's central thesis is that modernity (read: secularization) is social theory's invention,[266] with the latter instituting "an entirely different economy of power and knowledge" and inventing "the political" and the "state" just as it had to invent a notion of "private religion." This thesis goes against what he says is "received sociology's"[267] account of modernity as something that was itself hatched inevitably by Judeo-Christianity, from its very inception removing "sacral allure from the cosmos, and then, inevitably, from the political, the social, the economic, the artistic – the human 'itself'." [268] This societal transformation ("desacralization,"[269] as social theory would put it) came about with the development of irreligious and distinctly new ideas about human nature and society, corresponding with the rise of political science, anthropology and political economy, disciplines that eventually replaced theology as social theory.

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[265] SMITH, *infra* note 281 at 127.

[266] The now famous opening salvo of Milbank's book goes:

> Once there was no 'secular'. And the secular was not latent, waiting to fill more space with the steam of the 'purely human', when the pressure of the sacred was relaxed. Instead there was the single community of Christendom, with its dual aspects of sacerdotium and regnum. The saeculum, in the medieval era, was not a space, a domain, but a time – the interval between the fall and eschaton where coercive justice, private property and unimpaired natural reason must make shift to cope with the unredeemed effects of sinful humanity. MILBANK, *supra* note 264 at 9.

[267] *Id.* On this point, Milbank says in particular that social theory:

> interprets the theological transformation of the inception of modernity as a genuine "reformation" which fulfils the destiny of Christianity to let the spiritual be spiritual, without public interference, and the public be secular, without private prejudice. Yet this interpretation preposterously supposes that the new theology simply brought Christianity into its true essence by lifting some irksome and misplaced sacred ecclesial restrictions on the free market of the secular; whereas, in fact, it instituted an entirely different economy of power and knowledge. *Id.* at 10.

[268] We can see, notes Smith, that Dooyeweerd anticipates Milbank's critique, especially in his narrative of the emergence of the humanistic ground-motive. Dooyeweerd, says Smith, argues that the freedom-motive of humanism is rooted in a religion of humanity into which the biblical motive had been transformed. This Copernican revolution with respect to the biblical motive meant that the biblical revelation of the creation of man in the image of God was implicitly subverted into the idealized image of man. The biblical conception of the rebirth of man and his radical freedom in Jesus Christ was replaced by the idea of a regeneration of man by his own autonomous will. SMITH, *infra* note 281 at 128.

[269] MILBANK, *supra* note 264 at 10.

First, the construction of the autonomous object as "natural", that is, the political, in a new social science (built on the ideals of Grotius, Hobbes and Spinoza), a new social theory independent of theology, in particular, political science, which conceived of society as a "a human product, and therefore, 'historical' "[270]. Second, there came the idea of private property as a personal, individual, right, (divorced from the notion of the communal) and a political sovereignty independent of ecclessiastical power and control (resulting in the idea of *dominium*, the "sphere of the arbitrary")[271]. The secular *factum*, "[b]ecause it is rooted in an individualistic account of the will, oblivious to questions of its providential purpose in the hands of God, it has difficulty understanding any 'collective making', or genuinely social process. To keep notions of the state free from any suggestions of a collective essence or generally recognized *telos*, it must be constructed on the individualist model of *dominium*."[272] This also inaugurated a new anthropology based on the assumption that humans exist as individuals defined largely by the impulse for self-preservation[273], ultimately, the only basis for why they ever agree to enter into a social contract with the state[274] (the rise of the idea of the social contract).

What results is a new understanding of power in politics as something humanly "made"[275] (*factum*), which dovetails with the proposition that the world or reality is "natural"[276]; that is, as something that is there, but is no longer to be explained by reference to divinity, but by an emergent scientific knowledge. The instrumentalist methods and assumptions of the natural sciences, as they came to be known, will be copied by the social sciences in their study of human *factum* – "the new space of secularity." [277]The sad thing is that theology, in keeping in step with the march of the times, would also provide justification for this new political science and new anthropology (of the "self-preserving *conatus*"[278]) in two ways: "First of all, it ensured that men, when enjoying unrestricted, unimpeded property rights and even more when exercising the rights of a sovereignty that 'cannot bind itself', came close to the *imago dei*. Secondly, by abandoning participation in Being and Unity for a [nominalistic] 'covenantal bond' between God and men, it provided a model for human interrelationships as 'contractual' ones."[279] Alas, the "secular", says Milbank, is related to shifts within theology and not an emancipation from it.[280] Here Milbank's guns are expressly trained on Duns Scotus (and by implication, on William of Ockham), whom he faults for deviating from Aquinas' conception of the entire created order hanging on and participating

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[270]MILBANK, *supra* note 264 at at 10-11.
[271]*Id.* at 11-17.
[272]*Id.* at 13.
[273]*Id.* at 14.
[274] *Id.* at 15..
[275] *Id.* at 11.
[276] *Id.* at 10.
[277] *Id.*
[278] *Id.* at 15.
[279] *Id.*.
[280] *Id.* at 29.

in the nature of the Divine.[281] Scotus is criticized by Milbank and his followers for developing a "univocal ontology"[282] that in the end would unintentionally and paradoxically erase the divine when it blurred the distinctions between Creator and created. The Scottish Franciscan friar trashed Aquinas's ontological contention that finite being only subsists because of a divine grant and instead argued that finite things are identifiable with the infinite and the infinite can only be known with reference to the finite, inasmuch as they exist in the same sense.[283] "Duns Scotus and his successors... opened a space for univocal treatment of finite being without any regard to any theology, rational or revealed. Although this space was not immediately exploited in a secularizing fashion, in the long run this came to be the case."[284]

Dooyeweerd's own critique of Ockham is very telling on the path nominalism took in departing from Thomistic approaches. Thomistic approaches, with which Dooyeweerd also disagrees, forged a dualistic view of nature and grace based on Aristotelian philosophy, through which reason in the realm of nature was absolutized and deified. Dooyeweerd says that Ockham and his followers tried to reassert God's sovereignty as Creator over against such deification but erred when they reduced God's sovereign will to what Dooyeweerd called a "despotic voluntarism." If in Aquinas, the good is good not because God commands it but because he had to command the good, since it was good (in other words, it was grounded in the general concept of the good as it agrees with the rational-moral nature of a person, so that God himself is subject to law),[285] in the nominalists, says Dooyeweerd, "God could just as well have willed an egotistical moral law instead of the Ten Commandments."[286]

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[281]For a detailed discussion of Milbank's critique of nominalism, *see* JAMES K.A. SMITH, INTRODUCING RADICAL ORTHODOXY: MAPPING A POST-SECULAR THEOLOGY 87-103 (2005) [hereinafter, II SMITH]. I agree with the broader turns – especially his attack on claims to neutrality and objectivity of secular disciplines – taken by Milbank's project, now known in theological and philosophical circles as *Radical Orthodoxy*, but reject his other argument – clearly implied in the book – that we should all now return the place of the *Queen of the Sciences* to theology, as it was in the time of Thomas Aquinas. His social ontology is also quite limited so that there is little that can be glimpsed in his theoretical project for instance, as an explication of the other societal spheres outside the church and the state. Indeed it can be said that Milbank, at least, in his early writings, is anti-thetical to the state (thereby making himself an ally to the Anabaptist Christian tradition).

[282]SMITH, *supra* note 281 at 98.

[283] *Id.*

[284] C. Pickstock, *Reply to David Ford and Guy Collins*, in 46 SCOT. J. THEO. 415 (1993), *quoted* in *id.* at 99.

[285] X H. DOOYEWEERD, *The Christian Idea of the State*, *in* THE COLLECTED WORKS: POLITICAL PHILOSOPHY, SERIES D VOL. 1 25 (John Kraay, trans. & D.F.M. Strauss ed., 2004) (1936) [hereinafter, X DOOYEWEERD, *Christian State*]. This was originally delivered as an address on Oct. 3, 1936 entitled *Christlikje Staatsidee* for the Anti-Revolutionary Youth Day.

[286]*Id.*at 26. We can discern here then a difference in stress: Milbank and the radical orthodoxy movement take up Scotus as the person who opened the floodgates of nominalism while Dooyeweerd looks at Ockham as the one who further radicalized Scotus' nominalism. Read for example this passage in the *New Critique*:

> In DUNS SCOTUS the *potestatas Dei absoluta*, as distinguished from the *potestas Dei ordinata*, was bound by the unity of God's holy and good Being (essence). According to him, the *lex aeterna*

Returning to Milbank's account, as the stress on the scientific enterprise grew, the new space-time created for it would encroach upon ecclesiastical space-time.[287] Even Sacred Scripture will not be spared from this revolutionary movement, and the Reformation's battle cry of *sola scriptura* would in the end, be subsumed to a scientific hermeneutical project in which the text is made to support the idea of the sovereign (a rejection of the allegorical for the scientific, literalistic and the historicist);[288] that is, it must be believed because it is "politically authorized."[289]

With the reimagination of politics as power came the deconstruction of history – previously seen as the abode where civic, participatory virtue could best flourish[290] – into a "Machiavellian Moment"[291], a "pagan political and philosophical time"[292] where history is "no longer as a makeshift, nor a Thomist preparation for grace, but rather as something with its own integrity, its own goals and values, which might even contradict those of Christianity"[293](in other words, Machiavelli's "political *prudentia* as instrumental manipulation"[294]).

Third, after the undoing of history, the rise of the market came next, with a corresponding political economy. Here a three-pronged account of political economy arises. The first prong is a heretical theodicy about "how bad or self-interested actions can have good long term outcomes,"[295] which is different from traditional ethical discourse. The second prong is an "agonistics", a "Homeric agon, of a 'playful' warfare, within limits, according to rules and permitting the

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> also originates in the essence of God. And absolute goodness and truth are grounded in the divine Being. Consequently, the Scotist conception of the *potestas absoluta* cannot have any nominalistic purport. It had no further intention than to account for the fact that sometimes in the Old Testament God seems to give "dispensation" of some commands of the second table of the Decalogue. However, in DUNS, the *potestas Dei absoluta* too, is always the expression of God's holy and good Being. [capitals and italics in the original]. III DOOYEWEERD, NEW CRITIQUE I, *supra* note 21 at 186

Dooyeweerd then notes that William of Ockham, radically departed from Duns Scotus's conception of a *lex aeterna* and a *potestas absoluta* as being bound to God's being, following instead a totally irrationalistic line. In Thomistic thought, God's essence was conceived as pure form. Ockham developed it along the unpredictable *Ananke* of Greek matter-motive, thus separating it from divine revelation in Scriptures, more than what Thomistic realism had done through natural theology. Ockham abstracted the will of God from the fullness of divine holy being, instead conceiving divine sovereign power as an orderless tyranny, says Dooyeweerd. In the former conception, at least, God's will was still placed under the lex. And so in Ockham it became possible to say that God could just as well have imposed with his will a totally selfish ethics inasmuch as such will is now characterized as arbitrary. III DOOYEWEERD, NEW CRITIQUE I, *supra* note 21 at 186-187.

[287] MILBANK, *supra* note 264 at 17.

[288] *Id.* at 19-20.

[289] *Id.* at 19.

[290] *Id.* at 20-21.

[291] *Id.* at 21.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 21-22.

[295] *Id.* at 29.

testing and exercise of a constant ingenuity"[296] built on the exercise of violence by a military power. Political economy takes a turn for the worse in the third prong found in Malthus (and after), which required a redefinition of Christian virtue into something concerned only with an "evangelical" self-development rather than social concern.[297] "Political economy... imagined and helped to construct an amoral formal mechanism which allows not merely the institution but also the preservation and the regulation of the secular. This 'new science' can be unmasked as agonistics, as theodicy, and as a redefinition of Christian virtue."[298]

In an insightful and important piece exploring the theological roots of the concept of sovereignty, Govert Buijs outlines – implicitly following Milbank's own intellectual trajectory [299] - how as a concept it was deployed to carry out the secularization of the political sphere.[300] Here, again, nominalism identified with the theological thought of Scotus and Ockham has had three important implications on the spread of secularization in Western society.[301] The first is that nominalism

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[296] *Id.* at 34.

[297] *Id.* at 42.

[298] *Id.* at 45.

[299] Carl Schmitt, in his 1922 work *Politische Theologie*, suggests that "all key concepts of modern political theory are secularised theological concepts." Buijs revises Schmitt's original secularization thesis, saying that while indeed, the justification used for the political order shifted from the theological to the secular, sovereignty itself was not a "secularised" theological concept or rather "there seems to be a kind of back and forth between theological and political experiences." The over-all result may well be a secularized political order, but while this secularization is in some respects theologically grounded, in other respects it is an unintended consequence of certain theological insights, and in still other respects a result of a quite purposive process of secularization. Govert Buijs, "Que les Latin appellen maiestatem": *An Exploration into the Theological Background of the Concept of Sovereignty" in* SOVEREIGNTY IN TRANSITION 235 (Neil Walker, ed. 2003) [hereinafter, I Buijs, *Concept of Sovereignty*]. But Derrida follows Schmitt's formulation. He says:

> It was in the beginning, a religious concept, that is, God, the Almighty, is sovereign... So here you have a concept which is in principle secularized, but for which the secularization means the inheritance of theological memory. It is a theological phantasm or concept. When for instance Carl Schmitt says that all the political concepts, all the concepts of the political, in the Western society are theological concepts secularized, that is what he means: that our culture lives on secularized sacred concepts, secularized theological concepts. Jacques Derrida, *A Discussion with Jacques Derrida*, 5 *Theory and Event* 49, (2001), *quoted* in Peter Fitzpatrick, *"Gods Would Be Needed... ": American Empire and the Rule of (International) Law*, 16 *LJIL* 434-435, (2003)

[300] Buijs "archeology of sovereignty" uncovers the following layers of meaning":

> The *first* element concerns unifying a realm and organising it into one political entity.
>
> The *second* element is the presence of one subject, one representative centre of power, one agent, who has his/her place vis-à-vis this entity, for example to issue laws.
>
> The *third* element of the concept of sovereignty concerns its voluntaristic overtones. Sovereignty is mostly couched in terms of a will, of an almost personal character.
>
> The *fourth* element is the territorial limitation. Compared to older symbolisms like the Sumerian King List... the modern notion of sovereignty seems rather awkward: the highest power, but only in a limited territory. It is somewhat like calling a person "world famous" in his own village. I Buijs, *Concept of Sovereignty, supra* note 299 at 236-237.

[301] *Id.* at 235.

led to a voluntarist conception of law and government, where both, formerly regarded as a reflection of divine reason, now came to be considered as matters based solely on an essentially arbitrary decision (*quia voluntas est voluntas*).[302] This voluntarist element is fully present in the systems of Bodin and Hobbes, says Buijs. The consequences of the nominalistic outlook is especially "weighty"[303] in the author of the *Leviathan*, whose universe seems to be characterized entirely as a clash of wills now given absolute freedom. This freedom expressed in unfettered will, Buijs notes, was previously unthinkable, inasmuch as the universe before them was conceived of as a closed rational order.[304]

Second, there is now no avenue for appeal beyond the lawgiver. In Bodin,[305] this is especially prominent. While the human law-giver is still bound by the laws of nature and divine law, he has become the only available standard, inasmuch as God has been turned into an inscrutable higher being to whom there can be no access. While nominalism made possible the criticism of the established order, it can only do so without an available higher standard to measure the existing order.[306] Hence:

> The *potentia absoluta* does not provide for a standard to measure the actual order. He who has the power at the same time has the *ius non appelandi*. Hobbes, a self-proclaimed nominalist, articulated this in the very concise formula *auctoritas, non veritas facit legem*. So doubt about the existing order is the only thing left without there being a basis for this doubt in the (inner) experience of a superior order.[307]

The third consequence of nominalism is the rise of contractualism. While the theological version of nominalism still held to the covenant as an all-encompassing ontological category, its appropriation by Hobbes *et al.*, involving the contract as a substitute.[308] While in the Judeo-Christian covenant, trust is the basis, in contract, fear of the consequences is the primary motivation. "So the contract symbol is the nominalist covenant washed in late-medieval and early modern fear. It is the mutually agreed ceasefire between otherwise inscrutable wills."[309] Buijs quotes Hobbes thus: "Fear and I were twins."[310]

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[302] *Id.* at 251.

[303] *Id.*

[304] *Id.* at 248, citing LOUIS DUPRE, PASSAGE TO MODERNITY: AN ESSAY IN THE HERMENEUTICS OF NATURE AND CULTURE (1993).

[305] As Van Creveld says of Bodin's intellectual project: "In a world where God is no longer capable of providing a consensual basis for political life, Bodin wanted to endow the sovereign with His qualities and put him in His place, at any rate on earth and as pertained to a certain well-defined territory." MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE 177 (1999), *quoted* in I Buijs, *Concept of Sovereignty, supra* note 299 at 232.

[306] I Buijs, *Concept of Sovereignty, supra* note 299 at 252.

[307] *Id.*

[308] *Id.*

[309] Hence, the international legal order of states could then be described in nominalistic terms as the state of nature characterized by a certain agonistics – or struggle – between and among the wills of monadic individual states. This is a constant theme in realist accounts of international relations.

> The sovereign exercises his rule "in the name of...(something higher)..." However, the distance between the sovereign and this higher authority is virtually abandoned, for no one else has access to this higher authority in order to "check" the claims of the lawgiver. God has become inscrutable, *legibus solutus*, He hides in the darkness of his *potentia absoluta*. He cannot be appealed to – and the same applies to the sovereign.[311]

Dooyeweerd for his part identifies three main currents in Bodin's thinking[312] on sovereignty. The first is that it drew the boundary lines between the state and all other political and non-political spheres of life. Secondly, it defined the concept of positive law as the certified will of the law-giver (the sovereign, through its various instrumentalities) and thirdly, it defined the relation between the different orbits of competence in the creation of law, all of which are dependent on the only source of original competence, which is the sovereign state through its legislative power. He explains that Hugo Grotius – in both Christian and secular quarters much revered as a founding figure of modern international law – followed Bodin's concept of sovereignty.

As already discussed, nominalism, with its a mathematical view of society, that is, the *more geometrico*, paved the way for an understanding of society solely in terms of its supposedly basic elements, the individuals. Hence, the rise of the concept of the social contract as elaborated for example in the *Leviathan*, in Rousseau's absolutist concept of the *volonté générale* [313]as well as in Grotius own conception of international law. Of the latter, Dooyeweerd says: "Even in HUGO GROTIUS, who externally follows the Aristotelian-Thomistic doctrine of the *appetitus socialis*, authority and obedience have no natural foundation. Both must be construed *'more geometrico'* out of the simplest elements, the free and autonomous individuals."[314]

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[310] *Id.*

[311] *Id.*

[312] Dooyeweerd however says Bodin differed from Machiavelli in that while the latter held that the sovereign was not bound to anything or anyone but his own will, the former still taught that the sovereign was bound by natural and divine law. Yet Bodin also argued that in his realm, the sovereign cannot be subject to any other higher power, such that his sovereignty also implied the absolute and only original competence for the creation of law within the territory of the state. This, in Dooyeweerd's view, was "epoch-making.". Dooyeweerd too, traces the idea of the *raison d état* to Machiavaelli. III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 399.

[313] *Id.* at 313-17

[314]III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21at 311. [capitals and italics in the original]. Dooyeweerd says more of this in the second volume of the *New Critique*, in the part where he explains the analysis of social reality by way of a modal analysis:

> The mathematical science-ideal of Humanistic philosophy, as manifested in the nominalistic-individualistic doctrine of natural law from GROTIUS to ROUSSEAU, KANT and the young FICHTE explained these complicated jural analogies of number by imputing a mathematical meaning to them (the 'mos geometricus' in the humanistic doctrine of natural law!) In this way it tried to eliminate the complication of meaning in the jural arithmetical analogy and to construe the *state*, the *jural person* and the *legal order* out of their 'mathematical elements': the free and equal individuals (the construction of the social contract!). [capitals and italics in the original]. III DOOYEWEERD NEW CRITIQUE II, *supra* note 21 at 167.

Dooyeweerd says on account of this nominalistic attitude, Grotius could not comprehend the distinction between inter-individual and communal law.[315] Moreover, Grotius' natural law doctrine appropriated the Stoic idea of humanity as a temporal community of all-inclusive character[316] for his foundation of international law. While this broke through the classical Greek absolutization of the *polis*, it could not allow for a theoretical examination of the basic structures of individuality in society that determines the inner nature of the different types of relationships[317] (precisely because in the end, it cannot go beyond the individualistic perspective). Dooyeweerd shows that this individualistic perspective permeates so much of Grotius' system that the four main principles in which he summarizes natural law in its strictly jural sense are conceived as legal principles that only apply to inter-individual relationships.[318]

With this philosophical backdrop, the German scholar Wilhelm G. Grewe's observations about the development of the concept of sovereignty in his magisterial (if also deeply flawed[319]) history of international law comes into sharper focus. He ascribes to the modern state the concept of sovereignty as its first "characteristic quality"[320] and attributes to Bodin's work the source of an essential element of the modern theory of sovereignty, that is; the "absolute and perpetual power of the Republic."[321] So he says:

> Sovereignty is, in the external relations of States, their independence from all foreign powers and the impermeability of the body of the State against all outside interference. Individual States emancipated themselves from traditional community ties rooted in the Holy Roman Empire and Church stood beside each other as subjects of equal rank and dignity within the international legal order.

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[315]III DOOYEWEERD, NEW CRITIQUE II, *supra* note 21 at 359.

[316]That is, the Stoic theory of the social instinct in human nature. III DOOYEWEERD, NEW CRITIQUE III , *supra* note 21 at 232. *See* also an extended discussion of the school of natural law theory founded by Grotius in VI DOOYEWEERD, ROOTS, *supra* note 46 at 106.

[317] III DOOYEWEERD, NEW CRITIQUE II, *supra* note 21 at 169. I will explore this theme further in the fourth chapter of the thesis.

[318]III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 212, referring to the prolegomena in Grotius' *De Jure Belli ac Pacis*. Justice, in Grotius understanding, cannot be understood in the jural sense, but only in the moral sense, so that for him, the distribution of benefits, in the sense of distributive justice, is not a jural obligation but only a moral obligation. *Id.* Elsewhere, Dooyeweerd notes how Grotius, based on this individualistic and humanistic doctrine of natural law, conceived of marriage as nothing more than a contractual relationship giving rise to mutual *iura in re*, that is, the right to use each other's bodies. *See* III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 316 (fn. 3).

[319] Miéville, citing Koskenniemi , excoriates Grewe for writing virtually nothing about the Holocaust in his history and refusing to acknowledge German responsibility, the result of which is a "perverse exculpation of the German atrocities" in the last world war that casts a long shadow over the otherwise brilliant work. *See* MIÉVILLE, *supra* note 1 at (fn. 5), citing Martti Koskenniemi, *Book Review: The Epochs of International Law*, 51 INT'L & COMP. L Q. 747-748 (2002)

[320]W. GREWE, THE EPOCHS OF INTERNATIONAL LAW 166 (Michael Byers trans., 2000)[hereinafter, GREWE].

[321]GREWE, *supra* note 320 at 166.

> Direct interference of foreign powers directed at subordinated parts of the State, whether individuals or corporations, was excluded. In respect of the internal organisation of the State, sovereignty implied the exclusivity of political power. The State held the monopoly on legitimate applications of force; every other use of force was precluded; private warfare and any other form of self-help were prohibited. The State took over the supreme legal protection of its subjects; it was the court of last instance. It acquired a decision-making monopoly on all questions of political existence.[322]

Grewe goes on to cite three other characteristics of the modern state: the second, he says, is its secular rationality expressed in the guiding principle for political action, *raison d'etat*;[323] the third, the individualism of the state's basic structure, meaning to say that all the other communities before the creation of the state were either "dissolved or frozen into empty forms[324]" so that there is nothing but the direct opposition between the individual and the state, with the individual becoming the locus of all discourse on legal relations within the state[325]; this also meant the development of a concept of individual property as well as free contractual relations , with the later taking over relations based on status. Lastly, the inseparability of the development of States with a capitalist economic system based on profit-seeking and the individual pursuit of profit over the satisfaction of needs[326].

C. CLASSICAL INTERNATIONAL LAW: THE *LOTUS PRINCIPLE*

Indeed, this nominalistic turn in political philosophy would have an enormous influence on the conception of international law as predominantly state-centered. This is clearly seen in the classic doctrine of state sovereignty in international law as embodied in what is known as the *Lotus Principle*; this principle was expressed in a famous statement in a 1927 case bearing that name by the Permanent Court of International Justice (PCIJ), the predecessor of today's International Court of Justice (ICJ):

> International law governs relations between independent States. The rule of law binding upon States therefore emanates from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[327]

The principle, says Koskenniemi, "expresses the assumption that State sovereignty is the starting point of international law in the same way as individual

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[322] *Id.* at 166-167.

[323] *Id.* at 167.

[324] *Id.*

[325] GREWE, *supra* note 320 at 167.

[326] *Id.* at 167-168.

[327] S.S. Lotus (France v. Turkey) 1927 P.C.I.J (ser. A) no. 10, at 18, says: ... "Restrictions upon the independence of States cannot be presumed... "and that that therefore, States "... have a wide measure to act... " under international law, subject only to express prohibitions.

liberty is the basis of the municipal order."[328] In other words, States are treated as individuals – individuals who are the principal determining actors (or *subjects*, in the traditional way of putting it) of what constitutes international law, and against whose exercise of free will no restraints may be made, in the absence of express legal prohibitions.

D. THE CHAPLIN *PROBLEMATIQUE*: COERCION, (JUSTICE), AND DEMOCRACY

We can now turn our attention to an important project within reformational philosophy itself to revise Dooyeweerd's motion of the inner structural principle of the state. Dooyeweerd stands within a Reformed tradition that rejected the Roman Catholic-Thomistic view that the state as such is not instituted or required because of sin, but only the power of the sword is. In Dooyeweerd's view, Thomas Aquinas conceived of the state as grounded in the nature of the human being and is the totality-bond of natural society.[329] "In other words," he says, "the power of the sword is, in the Roman Catholic view, not an essential structure of the state."[330] For Dooyeweerd, this is a "falling away" from the biblical view of the state identified in particular with Augustine. He explains further what the Thomistic view entails:

> This falling away is explicable in terms of the synthesis mentioned earlier – a synthesis of Christian doctrine and pagan Aristotlean theory. For, as we saw, the latter taught that the state is grounded in the "rational-moral nature," and as such is the total bond on which all "lower" relationships are never more than dependant parts.[331]

We have already introduced the key elements of the state's normative inner structural principle: for him, the state's typical founding function is given in the historical aspect of reality; that is, in an historical power formation, the monopolistic organization of the power of the sword over a given territory. Without this founding function, we cannot speak of the state, according to Dooyeweerd.

This discussion provides an important backdrop to Chaplin's revisionist project, first elaborated in his critical exposition of Dooyeweerd's theory of public justice.[332] In particular, I will discuss his two-pronged critique of Dooyeweerd's conception of the state based on two "illuminating difficulties"[333] he finds in such conception: *first*, the coercive character of the state's founding function and *second*,

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[328] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 221.

[329] X DOOYEWEERD, *Christian State*, *supra* note 284 at 44.

[330] *Id.*

[331] X DOOYEWEERD, *Christian State*, *supra* note 284 at 44.

[332] I Chaplin, Public Justice, *supra* note 31. His critique he first elaborated in great detail in his master's thesis at ICS. There is in fact a basic continuity between his earlier and later expressions of the critique. However, Chaplin adds an important element to his earlier critique, a point that we will discuss presently. Where necessary, I will refer to his critique as published in his master's thesis.

[333] II Chaplin, *Structural Principles*, *supra* note 100 at 25.

the status of democracy in relation to the structural principle.[334] There is a third critique that he does not mention in his later work referred to here but that was broached in his earlier work. Chaplin's third critique is closely related to his first critique: the apparent inconsistency between the meaning-kernel of justice as Dooyeweerd conceives it ("retribution") and a good creation. It will be necessary to discuss as well this third critique, building on my arguments against Chaplin's first critique.

1. First Critique

We have already noted how a societal structure's founding function determines the specific individuality type of its qualifying function. This, Chaplin says, is pivotal for Dooyeweerd's conception of the state based on the special link between the jural function and its foundation in formative historical power. *The particular characteristic seen in the state's historical foundation is the monopolistic organization of the power of the sword over a particular cultural area within territorial boundaries.*[335] This distinguishes the state from other societal structures that are non-political since authority in the state is *governmental authority over subjects enforced by the strong arm.*[336] It is this authority that gives the state's internal public legal order that typical jural character that distinguishes it from all kinds of private law.

A true *res publica* cannot develop unless control over the power of the sword rests in one governmental authority with a distinctly public character. Dooyeweerd rests his argument on an appeal to history: "there never has existed a state whose internal structure was not, in the last analysis, based on an organized armed power, at least claiming the ability to break any armed resistance on the part of private organizations within its territory."[337] There cannot be a state without a founding function based on monopoly of coercion. This is an invariant structural principle that is expressed as an essential element of state founding in history. It is here where Chaplin raises his first volley: if coercion is written into the structural principle, how can it be consistent with its supposed basis in creation? Dooyeweerd, he notes, holds that such coercive power has been incorporated into the world order on account of sin; the state thus is an institution of "common" or "preserving grace" established with a soteriological aim of preserving temporal society in its differentiated condition. Thus the seeming inconsistency:

What can Dooyeweerd mean by claiming that the state has been "incorporated into the world-order" after the fall? Given his general view that "sin changed not the original creational decrees but only the direction of the human heart, what he now seems to be saying is that although sin has not changed the original creational decrees, God has as sovereign added further decrees in response to sin. Yet he also sees further that the state (and the church), though occasioned

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[334] *Id.*
[335] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 414.
[336] *Id.* at 435.
[337] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 414.

by the fall are nevertheless grounded in the original creation order. This appears to mean that the post-fall decrees for state and church must, like every feature of cosmic order, be "indissolubly coherent" with the pre-fall decrees. A new, post-fall, structural principle has appeared, sliding without friction into the original order.

The problem here is that, if the state as such is necessary only on account of sin, then all its activities must be explicable essentially as ways of dealing, jurally, with the consequences of sin. However, by no means all these activities, as he at some length describes them, can be explained in this way. This is especially the case with those which fall within the requirements of "public interest" (such as transport, infrastructure, financial coordination etc.) Many seem to be attributable to situations arising not from "directional" distortion (justice as "retribution"), but from "structural" features arising from the cultural unfolding of original creation givens (justice as "tribution"). If this is the case, the idea of a special post-fall institution of a new, invariant, structural principle seems implausible.

To recap, Chaplin suggests that there is an incoherence between Dooyeweerd's notion that *pre-fall*, the state's sword function has been incorporated into creational norms from the very beginning and the latter's contention that the state was instituted *post-fall*, on account of sin. Chaplin thinks coercion cannot be consistently built into structural principles since structural principles are conceived as grounded in the original order of creation that was yet unmarred by sin.[338] This inconsistency could only arise from Dooyeweerd's misreading of the state's positive form (the territorial monopoly of coercive power) into its invariant structural principle.

In his earlier work, Chaplin argues that "[i]t is clearly not the case that all states do in fact need to coerce most people physically in order to enforce them to obey its laws. In many states, most people obey the laws of the state for reasons other than physical compulsion."[339] Endorsing one part of Brunner's view, he says that it is oftentimes the case that power is a moral rather than a physical force (in contrast to what he says, is Dooyeweerd's understanding of the founding power of the state). But he departs from Brunner's concession that ultimately, the state is founded on the same monopoly of coercion.[340] In Chaplin's view, in certain situations moral power could be the decisive factor instead of the threat of coercion, as shown by this example he provides:

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[338] II Chaplin, *Structural Principles*, *supra* note 100 at 27.

[339] I Chaplin, Public Justice, *supra* note 31 at 89, citing EMIL BRUNNER, JUSTICE AND SOCIAL ORDER 188 (1945).

[340] *Id.* Which is why Brunner, according to Dooyeweerd, could not accept the idea of a Christian state. Dooyeweerd roots this view in Brunner's well known work *Das Gebot und die Ordnungen*, where the German theologian wrote of the autonomy of the whole natural realm of ordinances (area of the law) over against the realm of grace of the Christian faith. This dualistic view, says Dooyeweerd, is a continuation of Luther and Melanchton's inability to part ways with the nature-grace dualism of the late Middle Ages. X DOOYEWEERD, *Christian State*, *supra* note 284 at 27.

> Clearly the means of physical coercion are far more significant for the state of Lebanon than for the state of Holland. Indeed it is precisely the Lebanese government's current lack of monopoly of coercion which is undermining its very ability to function as a state at all. If it would achieve such a monopoly, then the coercive sanction would indeed be a highly significant factor in popular obedience to the state. It would take a considerable length of time before the Lebanese state began to be able to depend more on its "moral power". By contrast, while the Dutch government does have a monopoly of coercive power, this is clearly a minor factor for most Dutch citizens in obeying the laws of the state.[341]

He now asserts that in conceiving of an original creational ordinance for the state, its essential foundation should be characterized not as physical power but as moral power rooted in "public trust"[342]. By this he means "the acceptance of the state as a legitimate state worthy of obedience,"[343] in other words, a version of the theory of popular sovereignty. He explains further:

> We are not arguing that the legitimacy of the state per se is the state's own foundation. Legitimacy as such is not a form of power. Rather we are proposing that it is the popular conviction that the state is a just and therefore legitimate state which is a genuine form of power and which is the state's essential foundation[344][underlining in the original].

While in Dooyeweerd, it is the monopoly of the sword that ultimately sets the state apart from other societal structures, in Chaplin, it is the public trust of the citizens that the state will dispense public justice that sets it apart from the other societal structures.[345] So public trust becomes the basis for the state's formative physical power. In its original creational structure, the state is able to engage the task of public justice on the basis of public trust. While the state's power is, as Dooyeweerd would have it, multi-faceted, it is only able to utilize this upon the willingness of citizens to recognize the state as the legitimate holder of power.[346] And it is not that the legitimacy of the state springs from popular recognition; rather, its legitimacy is conditioned on the state's pursuit of justice, because a just state is a legitimate state, with the power of the state derivative of popular recognition of its legitimacy.[347]

> We are not arguing that states can relax their commitment to maintain a monopoly of physical coercion within their territory. But by conceiving of the state as grounded in the original creation order, and being founded on the power of public trust, then the deliberate search to win such trust by doing justice becomes the most foundational imperative for a state, whereas for Dooyeweerd

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[341] I Chaplin, Public Justice, *supra* note 31 at 89-90.
[342] *Id.* at 90.
[343] *Id.*
[344] *Id.* at 90-91.
[345] I Chaplin, Public Justice, *supra* note 31 at at 93.
[346] *Id.* at 91.
[347] *Id.* at 92.

> the most foundational imperative is the maintenance of a monopoly of coercion.[348]

Following this reformulation, there is a need therefore to transfer the coercive element into the variable side of human positivation. The better account, Chaplin says, is that the state's coercive power is an historical development developed or positivized in response to sin, but is not part of its typical structure or its inner structural principle. In this way then, he says, we can look at the state and the UN, or all bodies organized as public legal communities, as having the same typical structure, but with variegated positive forms.[349]

From there it now becomes easy for Chaplin to suggest that based on Dooyeweerd's notion of the "internal opening process" of societal structures, the UN can perhaps be identified as an "international 'state' at the very early stage" that is analogous to emerging nation-states prior to their development as an authority over a defined territory enforced by coercion, or an " 'immature' international state" that needs further positivation so as to help realize the "pressing normative historical mission facing humankind in the sphere of public justice."[350] This is an advantageous approach, he says, because it is more sensitive to the dynamics of the evolution of structures whose task is to establish public justice and avoids the danger of regarding the nation-state as sacrosanct, historically finalized structure.

Correlative to this, he argues for the necessity of showing that in particular historical periods, certain kinds of societal structure form the necessary contexts for each of the capacities of a fully developed human person to be adequately performed, and that apart from these structures, humans will remain unfulfilled or even at risk. Corollary to this is the need to show what specific design of societal structure best serves this sort of human flourishing.[351] Of course, Chaplin is not the first to raise this suggestion, although he is perhaps, the first to take the discussion as far as suggesting a modification of Dooyeweerd's idea of invariant structural principles. Kalsbeek himself was not averse to the idea of an organization of states with a supranational police force to maintain order among states which have the relinquished the right to wage war on their own account.[352] "Such a development," according to Kalsbeek, "is not in contradiction... .with the manner in which the state must be positivized in Dooyeweerd's conception."[353]

But he did not come close to suggesting, as Chaplin did, that the UN may well be treated as an "immature state" that needs further positivation through the

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[348] *Id.*

[349] *Id.* at 28. Hence, Chaplin brings the reformational account of the state back, or at least closer, to Thomist thinking.

[350] *Id.* at 28.

[351] II Chaplin, *Structural Principles*, *supra* note 100 at 29-30..

[352] KALSBEEK, *supra* note 19 at 220

[353] *Id.* at 19.

internal opening process of individual states. In a footnote, Chaplin says we need to question the idea that the territorial boundaries of "nation-states" are permanently normative. He however allows that to the best of his knowledge, Dooyeweerd "nowhere lends any support" to aspiration of a "world government" although his own reformulation of Dooyeweerd's view, considering the present universal nature of the UN, would seem to amount to a *civitas maxima* that Dooyeweerd rejects.[354]

2. Second Critique

Chaplin's second critique rests on what he perceives to be the indifference of Dooyeweerd's account of how political power comes to be organized - that is, "either from below or from above""; he says Dooyeweerd simply does not indicate for us which might be the better way, only saying that the establishment of a territorial monopoly of coercion is an indispensable normative historical task which every state must complete, but not that the establishment of democratic structures is. The core of his second critique is this:

> A case could be made, however, that the participation of citizens in the process of governing is indeed a structural norm implied in the very idea of the state as public-legal community. If the political community is indeed a *community* of government and citizens, established to secure public justice, then arguably this implies that citizens are *co-responsible* with government in this enterprise.[355]

If this is so, then, it could as well be argued that an institutional structure ought to be made available to allow citizens to participate in pursuing it as a part of the internal opening up process of the state. The particular strength of this approach, Chaplin argues, is that while it does not set a definite mode of citizen participation, yet as in the example of the UN above, it conceives of the state as a "dynamic historical task" which, in many cases, still requires completion. The presence or absence of participatory mechanisms may then serve as a benchmark for evaluating the historical development of the state. He adds this important remark:

> This is not to suggest that every case of imposed political authority is wrong; in a fallen world, there surely have been cases where such an imposition was the only way to secure a needed public-legal authority. But it does allow us to mount a critique of the legitimacy of many such impositions (colonialism) for example).[356]

In a footnote, Chaplin makes a pivotal contrast between his proposal and that made by Koekkoek, who *pace* Van Eikema Hommes, suggests that democracy

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[354]II Chaplin, *Structural Principles*, *supra* note 100 at 28 (fn.11).

[355]*Id.* at 30.

[356]II Chaplin, *Structural Principles*, *supra* note 100 at 30 (fn. 12), citing A. KOEKKOEK, BIJDRAGE TOT EEN CHRISTEN-DEMOCRATISCHE STAATSLEER (1982).

can be viewed as a "regulative principle, a principle of legal morality." In particular, it is an example of the anticipatory deepening of the jural principle of the equal possession of legal personality, under the leading of the ethical principle of human dignity. It can be shown by history that the recognition of this legal-ethical principle led to gradual expansion of the franchise to include wider categories of citizens - a formulation that appeals to Dooyeweerd's distinction between "concept" and "idea." Chaplin explains Koekkoek's argument in this way:

> The legal-ethical principle of human dignity is an example of "legal morality", the whole of which is governed by the "idea" of justice. Such (regulative) legal "ideas" disclose certain possibilities of a legal order only gradually and may not be operative in every legal order. They are to be distinguished from legal "concepts" which capture essential "constitutive" features of all legal orders, including "primitive" ones.[357]

This however implies that states may be excused for having put democratization on hold for a later time because they were not under an immediate historical task, deriving from their structural principle, to work towards democratization, says Chaplin. He holds that any undemocratic unfolding of states is not inherent in normative historical structural unfolding, but only indicates the evident "glaring *directional* deviation from earlier, more democratic forms."[358] In this scheme, an autocratic state may then be viewed as a "retarded"state.[359]

3. Third Critique

In the previous chapter, I have outlined Dooyeweerd's conception of the jural aspect's meaning kernel as retribution. Firstly, Chaplin says that here, Dooyeweerd "faces an inconsistency similar to that we found in his notion of the coercive power of the state"[360] - that is, it seems that the notion of retribution is an essentially negative notion, implying the correction of an abuse or the restoration of a violated order.[361] We quote him at length thus:

> In the case of all the other modal cores, Dooyeweerd has posited an essentially positive prescriptive notion, rather than a negative, proscriptive one. While he does not want to include cases of punishment, in the scope of retribution, both of these are primarily corrective responses to unjust state of affairs. Both are intended to "maintain the jural balance by a just reaction." It seems then that, for Dooyeweerd, the jural mode embodies a norm calling for a certain kind of reaction rather than for a certain kind of action. This is no doubt why its core is denoted as retribution.[362]

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[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] I Chaplin, Public Justice, *supra* note 31 at 100.
[361] *Id.*
[362] I Chaplin, Public Justice, *supra* note 31 at 100-101.

Secondly, Dooyeweerd, according to Chaplin, has to contend with a more substantial problem, which concerns retribution's apparent lack of fit with the philosopher's belief in the original nature of the creation ordinances as intended for a sinless word. It certainly cannot be, says Chaplin, since injustice, and the need for retribution, can only be consistent with a fallen creation, and not a good creation. He thus says: "[t]he implication that, as an original creation, retribution must have been built into the very fabric of the creation order seems quite inconsistent with this radical distinction between creation and the fall."[363] In the case of the problem of coercion, Dooyeweerd was forced to resort to the traditional theological notion of the state as a special post-fall institution. Here however, he does not speak of retribution as a special modal retribution introduced on account of the fall, instead apparently assigning the "existential necessity" for retributive responses in human life into the original creation order.[364] This could raise special problems, considering the state's office as the pursuit of justice. It could be taken to mean that the state's primary aim is the pursuit of the corrective acts, to the detriment of its positive, constructive tasks.[365] Thus Chaplin proposes as an alternative the idea of "tribution," borrowed from the theological system of Paul Tillich:

> ....tributive or proportional justice....appears as distributive, attributive, retributive justice, giving to everything proportionally to what it deserves, positively or negatively. It is a calculating justice, measuring the power of being of all things in terms of what shall be given to them or what shall be withheld from them. I have called this form of justice tributive because it decides about the tribute a thing or person ought to reserve according to his special powers of being. Attributive justice attributes to beings what they are and can claim to be. Distributive justice gives to any being the proportion of the goods which is due to him; retributive justice does the same, but in negative terms, in terms of deprivation of goods or active punishment. The latter consideration makes it clear that there is no essential difference between distributive and retributive justice. Both of them are proportional and can be measured in quantitative terms.[366]

This conception of "special powers of being", says Chaplin, runs parallel to Dooyeweerd's conception of his theory of individuality structures based on divinely instituted orbits of justice.[367]

E. RE-IMAGINING DIVINE SOVEREIGNTY: CONTINGENCY AND RESPONSE

Without doubt, the apparent contradiction between a good creation and the state's monopoly of the sword written into its structural principle is Chaplin's strongest argument for revising Dooyeweerd's original conception. In this section, I will show that the challenge foisted by Chaplin to Dooyeweerd's original

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[363] *Id.* at 102.
[364] *Id.*
[365] *Id.* at 103.
[366] II Chaplin, *Structural Principles*, *supra* note 100 at 103-104.
[367] I Chaplin, Public Justice, *supra* note 31 at 104.

conception is not insurmountable. Here I will devise an alternative explanation founded upon an enlarged view of divine sovereignty, one that is able to reconcile Chaplin's proposed revision as well as Dooyeweerd's original conception into a coherent unity. I will also show that a consolidation of power in the hands of the state is necessary to the formation of a differentiated societal sphere.

Why should the state's founding function based on a monopoly of coercion be inconsistent with an originally good creation? My argument is that it is good because God has put in place every possible support for human flourishing, whether in their obedience or disobedience. This is a necessary implication of the gift of free will to humanity – the capacity to choose between good and evil. Such a capacity cannot but clearly imply a divine anticipation of negative and positive consequences. In Scripture, when God gave the first humans a choice between the Tree of Life and the Tree of the Knowledge of Good and Evil, God also laid down what the consequences were of opting for one or the other (Gen. 2:8; 3:1-4) . This also implies that God, at the very least, knew what the consequences were of human choosing between life and death. Certainly, God's sovereignty is severely limited by a view that He only conceived of the state after humanity sinned, as an *ex post facto* imposition. It can well be argued that God's sovereignty has seen it best to institute creational ordinances that would address any possible negative consequences of human choosing.[368]

Hence the state is not a divine afterthought; to say that it was instituted as a response to the fall is only to stress the historical nature of its establishment. This is the only way for Dooyeweerd's suggestion that the state has been incorporated into the world-order after the fall to make sense. A new, post-fall, structural principle did not appear and slide without friction into the original order, as Chaplin suggests. *Rather, as a principle set in place to respond to a contingency, it was activated when the condition for which it was devised arose.* From before human history, from creation itself, God had already set in place ordinances that would govern the unfolding of the state in whatever context there maybe, giving

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[368]My conception of divine sovereignty as specifically manifested in divine foreknowledge has been influenced in some way by Open Theism as espoused by the American theologian Gregory Boyd. *See* especially GREGORY BOYD, SATAN AND THE PROBLEM OF EVIL: A TRINITARIAN WARFARE THEODICY (2001). I am aware that within the framework of the classical (Augustinian) Reformed position, this view of foreknowledge as partial knowledge of the future may not quite cohere; however, in my view, it is able to effectively account for the problem posed by Chaplin. Yet it must also be said that even within what Boyd calls an Augustinian "blueprint" theodicy – or the exhaustive view of divine sovereignty – the challenge posed by Chaplin can also be explained: an all-knowing God knew (or, in Calvinist terms, determined) exactly how human beings would respond to the call to responsibility – disobedience – hence from eternities past, He devised creational ordinances that would govern the development of an institution to mitigate the human propensity to sin and to cause suffering on one another. The major difference in my conception and that of a blueprint approach is that in the former, there is – at least in my view – a genuine contingency while in the latter, there is a paradoxical yet definite divine determination of future events. Chaplin's proposal *seemingly paints divine sovereignty into a rather awkward picture where having been caught unprepared, God finds himself instituting after the fact of human sin the state to curtail human capacity for abuse.* In this way, Chaplin can argue that Dooyeweerd seems to have suggested a situation where new creational ordinances slide seamlessly into the created order *after the fact of the fall, despite his own contention that no new such ordinances can arise in history.*

allowance for the consequences of human freedom. This echoes in some way Dengerink's formulation,[369] also referred to by Chaplin, one in which structural principles are "given only when disclosed", that is, "new structural principles are already enclosed within the Creation-Word that is now conceived as embracing past, present and future."[370]

Chaplin's qualification of this formulation stems only from a distinction he makes between divine providence and divine creation. He says thus: "not every (providential) action of God in history is necessarily to be viewed as an act of creation" (although, he does also remark, after Dooyeweerd, that at this point he defers to theologians).

Yet the criticism that in Dengerink's formulation, divine providence is being absorbed into divine creation is clearly not persuasive at all. The distinction made between providence and creation is false, if we are to consider the idea that everything hangs on divine sustenance – a central tenet of Reformed thought. As Van Woudenberg would remark, reformational philosophy is in fact,

> a single burning protest against [the deist conception of divine aloofness]. For God is not only Creator but also Preserver of all things. Without God's *constant* provision for the cosmos, it would revert to nothing. Nothing can exist by 'itself', everything exists in dependence on and in reference to the divine bearer of all that is.[371] [italics supplied].

Or, as Dooyeweerd would put it in his essay on Calvinism's general theory of law, there is a continuous dependence of the created upon the Creator – that is the idea of God's upholding of creation as a "continuous creation".[372] In my view, Dooyeweerd's Augustinian understanding of the historical foundation of the state resonates with biblical wisdom. Sin brings pain into the world, as exemplified in the fact that Eve must now suffer the pain of childbirth on account of her disobedience (Gen. 3:16). The same human propensity for disobedience has fundamentally skewed human relationships so that making such relationships

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[369] In relation to Dengerink's point, the following remark by D.F.M. Strauss is interesting:

> ... .[I]t should be noted that in spite of [Dooyeweerd's] thorough rejection of the natural law and historicistic modes of thought he did not fully escape from the *terminology* of the natural law tradition, because he continued to speak about *universal validity* as a characteristic feature of underlying *principles* – without realizing that insofar as principles are *universal* and *constant* (i.e. insofar as they are *pre-positive*) they are *not yet valid* (i.e. not yet *enforced* or *positivized*), and insofar as principles are *given* a positive shape and form (i.e. are positivized) they have lost their *unspecified* (pre-positive) *universality*. [italics in the original]. D.F. M. Strauss, *Is the Idea of the Historical Aspect of Reality Tenable*? 2-3 (undated) (on file with the author) [hereinafter, II Strauss, *Historical Aspect*].

[370] II Chaplin, *Structural Principles*, *supra* note 100 at 34.

[371] I Van Woudenberg, *Modes of Being*, *supra* note 47 at 34.

[372] XI H. DOOYEWEERD, *Calvinism and Natural Law* in, THE COLLECTED WORKS: ESSAYS IN LEGAL, SOCIAL AND POLITICAL PHILOSOPHY SERIES B. VOL. 2 17 (A. Wolters trans., John Witte & Alan M. Cameron eds.,., The Edward Mellen Press, 1997) (1925) [italics in the original] [hereinafter. XI DOOYEWEERD, *Calvinism and Natural Law*].

work in many levels would now require the intervention of the state's coercive power.

The founding function of the state in the form that it has now is consistent with a good creation in the sense that even at the point of creation, a good Creator, knowing all the possible consequences of the gift of free will to humanity, has in his sovereign will, set in place creational ordinances adequate to address such consequences.

In the best possible world – a world without sin – we can perhaps say that all that the state needs is public trust to sustain itself. In this way we can hold Chaplin's revisionist project as workable as well, in the context of a "state of nature", to use the phrase; that is, the original pre-fall condition. This is just another way of saying that public trust is the structural principle God has designed for a state unveiled in a pre-fall context.[373] The other side of the coin is that the same divine providence has, at the point of creation, established an ordinance – a structural principle – that would apply in the event of human disobedience. Hence we have two sides of the same coin of creation that, in the beginning, was good.

1. The indispensability of the state's founding function

Now for our next point: one clear implication of Chaplin's proposal is that the state might after all not have a founding function. Public trust, as he understands it, cannot be found in the historical aspect but is rather, a moral or ethical phenomenon.[374] *It is here where, I believe, his proposal clearly runs into problems, if we are to pay close attention to Dooyeweerd's insistence on the transcendental-empirical method to bring to light divinely instituted societal structural principles.*

This is the core of the historical founding function of the state: *at some point in historical space-time, a state begins its life with the establishment of the monopoly of the sword.* This is not to say that Dooyeweerd is singularly obsessed with this historical requirement, to the detriment of the concerns of justice. He is only saying that historically, a state cannot be brought into existence without the establishment of the monopoly of the sword. And it has not yet been shown otherwise. Today's viable states were yesterday's emergent states struggling to establish within the

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[373] Clouser argues that even in a perfect world a state will still be needed, as honest differences in opinion could still arise, and this would require impartial judges. I CLOUSER, *supra* note 94 at 308. Of course the contrary position is that in the perfect world, the retributive function of the state is not at all necessary, or better yet, there will be no need for retributive justice as there will be harmony in all relations.

[374] I Chaplin, Public Justice, *supra* note 31 at 91. In II Chaplin, *Structural Principles*, *supra* note 100 at 28, we read Chaplin's awareness of the logical conclusion to his revisionist proposal:

> This hypothesis opens up and intriguing line of questions. If coercive monopoly is not the individuality type revealed in the state's founding function, then what is? Does the removal of coercion from this structural principle imply that the state has no founding function at all? If the latter, could this further imply that other historically founded (organised) communities do not have founding functions, i.e., that the very idea of 'founding functions' is misconceived?

bounds of their respective territories "effective government", to borrow the language of international law.

And I believe it can be shown, from Chaplin's own example, that Dooyeweerd is fundamentally correct in his view, and is closer to historical reality, than Chaplin is. Chaplin's Lebanon in fact, undermines his very case. His example of Lebanon vis-à-vis Holland fundamentally misses the empirico-historical reality that Dooyeweerd appeals to. For one, before Holland can be what it is now, it had to go through the birth pains of state formation. It first had to have a state with a monopoly of coercion. Even today's superpower, the United States, could not have achieved its present status without going through that requisite historical founding based on a monopoly of the sword.

Public trust is not enough; in the first place, before there can be a public legal community to speak of, the state must be established first. Without the consolidation of military and police power, no state can exist as such. Dooyeweerd runs a list of historical examples: the Greek polis and the Roman world-empire, the Carolingian State and the Italian city-states of Renaissance times, the absolute French monarchy of the *ancien regime*, the constitutional state after the French revolution.[375] *Of course, this is not just a matter of wielding unchallenged military power over a territory. Such monopoly enables the integration of a people into a body politic. Without such monopoly, there can be no real integration into a public legal community.*

In this connection, Koyzis, in his own reformulation of Dooyeweerd's theory of modal aspects, follows Chaplin's arguments closely. He argues that although the state certainly requires sword-power in a fallen world, most of its activities rest upon other types of power, such as implicit authority (which is obeyed because the citizens believe it is right to do so) and persuasion (such as advertising campaigns urging people to obey seat-belt laws which are otherwise difficult to enforce). He explains further:

> Moreover, I believe that justice itself has a certain power. This may be seen as the *jural* analogy within the *organizational* mode, or jural power. If people believe they are being treated justly by the state and its laws, they will tend to obey them. Where such a conviction is lacking, no amount of physical force will be able to maintain the body politic. Even Dooyeweerd would agree, I think, that sword-power is not a *sufficient* basis for the state's existence, however necessary it may be.[376][italics in the original].

Like Chaplin, Koyzis does not fully appreciate Dooyeweerd's argument about the state's founding function. Like Chaplin, he argues from a situation where the state has already established itself *so that what is needed is public justification for continued public support for its maintenance, or the opening up and completion of its normative*

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[375]III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 420.

[376]I David Koyzis, *Dooyeweerd Revised: A Proposed Modification of the Philosophy of Herman Dooyeweerd with Special Attention to the Modal Scale and Structure of Individuality* 10-11 (1993). (on file with the author). [hereinafter, I Koyzis, *Dooyeweerd Revised*].

task of pursuing public justice. Yet Dooyeweerd himself says that that the state cannot maintain itself if it is not rooted in the moral conviction of the people, or at least, the ruling groups of such a people.[377] "But all this only proves what we have pointed out from the beginning," he says, "that the typical foundational function in the state is not self-sufficient. It does not imply that the State is not typically founded in the monopolistic organization of the power of the sword over a territorial cultural sphere."[378]

A third point in respect of this issue is that in my view, it does not quite capture the nuances in Dooyeweerd's position to say that his most foundational imperative is the maintenance of a monopoly of coercion, as Chaplin says it is. We only have to refer again to Dooyeweerd's insistence that there is an unbreakable coherence between the state's historical function and its qualifying function to show this. Dooyeweerd himself alerts us to this "very complicated" relation between the foundational function and the qualifying function of the state. "From a structural viewpoint this historical aspect of the state territory can never be conceived apart from the leading jural function of this societal institution,[379]" he says. "But this necessary structural relation between the foundational and the leading functions is no reason to ignore the peculiar modal meaning of the foundational function."[380] He then argues that military power, which is not of jural character, cannot be grasped in a modal jural sense, precisely because it is not jural in character.[381]

What is the peculiar modal meaning of the foundational function? In my view, it is none other than that as a history-forming power it must express itself effectively in state formation. Without its effective expression, there can be no state. *It is the starting point of state creation, but again, only the starting point.* The completion cannot be accomplished in the absence of the typical qualifying function, public justice. This indissoluble link between the founding and the qualifying functions of the state is expressed in the structure of its authority, according to Dooyeweerd.[382] This is why for Dooyeweerd, the military organization of State power displays an opened, anticipatory structure that cannot be explained merely in terms of armed control.[383] And this unbreakable connection between the two poles is what sets the state apart from all non-political structures in society: governmental authority over subjects enforced by the strong arm. Dooyeweerd explains thus:

> All the pre-legal internal modal functions of the State should be guided by and directed to the territorial public legal community qualifying the body politic. A military usurper who does not perform the typical duties of the public

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[377] III DOOYEWEERD, NEW CRITIQUE III , *supra* note 21 at 416.
[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] *Id.* at 423.
[382] *Id.* at 435.
[383] *Id.* at 422.

> legal office of the government can never be an organ of the State, but remains the leader of an organized gang of robbers. But on the other hand, it must be emphatically repeated that the legal organization of the body politic, in its typical authoritative character, remains indissolubly founded in the historical organization of territorial military power. *Apart from the latter, the internal public legal order of the State cannot display that typical jural character which distinguishes it from all kinds of private law.*[384] [italics supplied].

In other words, there is no way a differentiated societal sphere where both the realms of public law and private law are respected and enforced can be organized without this monopoly of the sword. It is an essential requirement of the process of societal differentiation that Dooyeweerd has in mind. Clearly, public trust all by itself cannot put this differentiation into effect. This is also why this exertion of power has to have a physical manifestation in the form of an arrayed subjectively organized military force establishing the presence of the state over a particular territory.[385] To quote from Dooyeweerd:

> Wherever a real State arose, its first concern was the destruction of the tribal and gentilial political power or, if the latter had already disappeared, the struggle against undifferentiated power formations in which authoritative, and private proprietary relations were mixed with each other. Irrespective of its particular governmental form, the State-institution has always presented itself as a *res publica*, an institution of public interest, in which political authority is considered a public office, not a private property.[386]

The monopoly of the sword is necessary for the enforcement of public law. Without such power, enforcing even a modicum of public order is impossible. Public laws that lay down the rules of integration into a public legal community will remain laws on paper and civil law proper itself cannot be enforced. Civil courts that adjudicate the clash of private interests cannot call on the state to ensure the execution of its orders if the state has no monopoly of coercion. This is

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[384] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 436.

[385] *Id.* at 422. Here Dooyeweerd says:

> According to its individuality structure this monopolistic organization of the power of the sword is not merely *technical apparatus*. The foundational structural function of the State displays that typical subject-object relation which we already discovered when discussing the thing-structure of reality. It is true, the structural foundation of the State comprises an objective apparatus of military arms, buildings, aircrafts, airports, *etc.* But this military apparatus, an historical object, is only meaningful in connection with an organized army or police force. Only subjective military bearers of power can actualize this objective apparatus; without them it remains "dead material". As soon as we consider the organized military power of the State according to this subjective point of view, it is immediately evident how insufficient is a merely functionalistic technical conception. And also, how little this organized power can shut up in the historical law-sphere. Military rules of discipline, rigid military forms of organization appear to be powerless in an army or police-force in which a revolutionary mentality has undermined the sense that the authority of the present government is *legitimate*.
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> It is evident that the military organization of State power displays an opened, *anticipatory structure* that cannot be explained *merely* in terms of armed control [italics in the original].

[386] *Id.* at 412.

the significance of the historical function of the state. This is why it has to have an historical function. Otherwise the integrated public legal community in truth cannot exist. In sum, Chaplin's suggestion to replace physical power with moral power, thus eschewing the reality of the state's historical function cannot be sustained.

With this in mind, I can agree wholeheartedly with Koyzis' point, following Arendt[387] that we must distinguish between "power" and "violence" to avoid an excessive emphasis on physical force (which, I nevertheless argue, he mistakenly attributes to Dooyeweerd's own discussion of power[388]):

> [Power] in [Arendt's] conception always flows from the people. It "corresponds to the human ability not just to act but to act in concert." It is a group phenomenon and can never rest in a single individual. If the group dissolves or withholds its consent, then power disappears as well. Although Arendt's theory has its difficulties, I believe she has nevertheless discerned an important truth, viz.,that political authority depends to a large extent on its willing acceptance by those under it. To be sure, an overemphasis on popular consent can lead to the distortions of voluntarism, liberalism and radical democracy of the Rousseauan variety. For this reason, in undertaking an analysis of the state's internal structure along Dooyeweerdian lines, we must always bear in mind that its foundational organizing power needs to be completed in its qualifying *jural* function.[389]

As Dooyeweerd says above, the typical foundational function of the state is not self-sufficient; yet it does not mean that it is not founded on the monopoly of power of the sword over a given territory. Clearly, this is not merely a matter of academic discussion. The contemporary phenomenon of failed states or quasi-states that Wouter notes above underlines Dooyeweerd's point about the necessity of the state's historical foundation. The current situation in Lebanon, Iraq, Sudan, Afghanistan, among other places, point to the necessity of establishing first a public legal community, a *res publica*, with a monopoly of the power of the sword over a given territory. As Dooyeweerd says: "[a] State cannot serve any 'purposes' if it does not *exist* as such. And it can have no real existence except within the cadre of *its internal structural principle* determining its essential character."[390]

2. The State's Boundaries and the *uti possidetis* Principle in International Law

This is not yet the place to discuss the implications of Chaplin's revisionist project for Dooyeweerd's concept of the international legal order, which I will tackle in detail in the next chapter. But for now, as my last point to

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[387] I Koyzis, *Dooyeweerd Revised*, *supra* note 376, at 11, *citing* HANNA ARENDT, ON VIOLENCE 44 (1969)

[388] *See* III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 422 where Dooyeweerd stresses that the monopoly of power is never just technical apparatus; military power does not exist where those who hold it cease to believe in the legitimacy of government. *Cf. supra* note 380.

[389] I Koyzis, *Dooyeweerd Revised*, *supra* note 376, at 12-13.

[390] III DOOYEWEERD, NEW CRITIQUE III, *supra* note, 21 at 433.

Chaplin's first critique, suffice it to say that Dooyeweerd's theory of the state does not suggest, as Chaplin seems to imply, that the territorial boundaries of nation-states are normative. History has shown reconfigurations of state borders and boundaries, of states dissolving and transforming into one or more states (as in the case of the former USSR and more recently, Yugoslavia), but *not* in the manner that Chaplin suggests it should – a unitary state that apparently encompasses the entire world. I will later on show that his strategy of taking the monopoly of coercion away from the state's inner structural principle (thus side-stepping or allowing the expansion of its territorial bounds) could only be undertaken at great cost to Dooyeweerd's social ontology.

For now, a further remark is necessary for purposes of this chapter, and it concerns an important consideration in international law with respect to statehood and this is the matter of territorial sovereignty, which, in the language of the *Las Palmas* arbitration, "involves the exclusive right to display the activities of a State."[391] Statehood or an entity's standing as a state with the requisite range of powers and responsibilities recognized in international law implies the exclusive control over some territory. Insofar as boundaries are concerned, "it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory."[392]

The empirical case against Chaplin's proposal may be illustrated by the principle of *uti posseditis* (literally, "as you possess, so you may possess") which lies at the heart of the complex issue of state continuity and succession. While its application in concrete cases has not been without controversy, the principle, which defines borders of newly sovereign states on the basis of their previous administrative frontiers, stresses the continuing significance of claims to the power to define its own boundaries by states based at least on perceived continuities between old and new territorial and political regimes. Malanczuk says the principle originated from South America in connection with the independence of states from Spanish and Portuguese rule to protect territorial integrity under the old and already existent administrative boundaries.[393] But Enver Hasani, in a 2003 essay on the problem of Kosovo, traces it to an old Roman law principle that was later on developed in the medieval period and applied in Latin America, Africa and Asia by

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[391] Island of Las Palmas Case (Neth. v. U.S.), 1 Rep. Int'l Arb. Awards 829, 839 (Perm. Ct. Arb. 1928).

[392] Deutsche Continental Gas-Gessellschaft v. Polish State, 5 I.L.R. 11, 14-15 (1929). *See also* the declaration of the ICJ in the *North Sea Continental Shelf* cases, which confirmed the rule quoted above:

> The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long period they are not, as is shown by the case of the entry of Albania into the League of Nations. North Sea Continental Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, 1969 I.C.J. 3, 32 (Feb. 20).

[393] MALANCZUK, *supra* note 252, at 162.

the colonial powers in the age of colonization.[394] Historically developed in two forms – *uti possidetis juris* and *uti possidetis de facto* – with the former norm used in modern times, and the latter in the past – its first elaboration as a rule in international relations saw fruition in the medieval times, when the partition of territories proceeded in ways analogous to the division of private property so that for instance, Pope Alexander VI would become well known for his issuance of bulls that named the titleholder of a given territory.[395]

The gradual evolution of the principle proceeded in two directions, says Hasani. The first one embodied the practical implications of its application; that is, its transformation from a rule pertaining to claims over private property into a norm concerning state or territorial sovereignty while the other dealt with the transformation of "possession" as a factual and temporary situation in private law into a permanent legal status of sovereign rights over certain state territory. Such a transformation may be viewed from the fact that the principle emerged at a time when the use of unlimited force by states in conflict over territories was not considered illegal or illegitimate – a view that would persist until the Second World War.[396]

Today, *uti possidetis juris*, is anchored in two ideas: self-determination and the non-interference in the internal affairs of other countries, according to Hasani. Both can be traced back to Latin America at the turn of 19th century, where it reflected the nature of European affairs, on the one hand, and the relations between Europe and Latin America following the Napoleonic Wars of 1796-1815, on the other. Europe continuously interfered in Latin America in search of *terra nullius* (no man's land), with the continent eventually falling under the spell of colonial power. When Latin America gained independence (the period from 1810 to 1824) , Europeans tried to transfer the balance of power politics from Europe to Latin America, forcing Latin American states (except Brazil, until recently), to claim the *uti possidetis juris* principle to govern their relations as a way of warding off European interference. [397]It should be clear that the territorial delimitation of new sovereignties was based on *uti possidetis juris*, and not on *uti possidetis de facto*. This meant that national borders of newly independent countries retained the former colonial borders, so that there was no longer any free space left for the taking by

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[394] Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 THE FLETCHER F. ON WORLD AFF. 85, 86 (2003) [hereinafter, Hasani]. Hasani says the Romans, who introduced the principle into the body of international law, conceived it in this way:

> The Praetorian Edicts of Republican Rome, which regulated private property, made a distinction between possession and ownership. When possession of a thing was achieved in good faith – that is, not by the use of force or any fraudulent means –Roman magistrates applied the famous rule *uti possidetis, ita possideatis* ("as you possess, so you may possess"). This rule, however, did not apply to questions of ownership – such matters were decided before the courts of law. *Id.* at 86.

[395] Hasani, *supra* note 394, at 85.
[396] *Id.* at 87.
[397] *Id.*

colonizers. In 1823, the principle of *uti possidetis* would be strengthened by the Monroe Doctrine, which demanded noninterference in the internal affairs of the American continent.[398] The acceptance of *uti possidetis juris* by Latin American states did not stop either European interference or territorial disputes; still the *uti possidetis* principle, as well as the concept of noninterference in the internal affairs of sovereign states, would become well-established principles of general application after the end of the Second World War during the process of decolonization.[399]

In the territorial dispute between Burkina Faso and Mali, the International Court of Justice would affirm the principle in these words: "[t]here is no doubt that the obligation to respect pre-existing international frontiers in the event of State succession derives from a general rule of international law whether or not the rule is expressed in the formula of *uti possidetis*."[400] Hasani explains that in this case, the *uti possidetis juris* served to freeze the title over territory at the time of independence, in effect producing a "photograph of the territory." Here the ICJ defined *uti possidetis juris* as a principle that transforms former administrative borders created during the colonial period into international frontiers, according to Hasani.[401] "As such, it is logically connected to the decolonization process wherever it occurs, in that it protects the independence and preserves the stability of the new African states. This does not mean, of course, that there were no departures from the strict application of the *uti possidetis juris* principle during African decolonization. However, in most cases, previous administrative colonial borders have been accepted as international frontiers."

In the case of Yugoslavia, the Conference on Yugoslavia Arbitration Commission established in 1991 on the behest of the European Community, and

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[398] *Id.*

[399] *Id.* at 87. Hasani notes that after the end of the Second World War and following the process of decolonization in Africa, African leaders also insisted on preserving the preexisting colonial administrative borders. Indeed, with the collapse of colonial rule, most abstract lines running along given longitudes and latitudes that divided colonial "spheres of influence" were converted into international boundaries based on the principle of *uti possidetis juris*. Surprisingly, despite the fact that 40 percent of African borders are straight lines that divide scores of different ethnic groups and despite claims by African leaders themselves that these borders are impositions by colonial powers, they have proved to be stable and viable in most cases. In 1964, or one year after its establishment, the Organization of African Unity (OAU) would state that the borders of Africa reflect a "tangible reality", with its leaders committing commitment to respect the borders existing at the time of independence. Meanwhile African countries that expressed territorial claims on bases different from the *uti possidetis juris* principle, such as ethnic or historical entitlements, have gradually lost their standing, as in the "conspicuous" examples of Morocco and Somalia. Too, ethnic groups that attempted to secede from the parent state met severe resistance from the "international community," as in the cases of Katanga (Zaire/Congo) and Biafra (Nigeria). On the other hand, colonial powers that tried to stop by force their former colonies from becoming independent - such as in the cases of Algeria or Guinea Bissau -ran the risk of being censured via the so-called "premature recognition of the new states and movements fighting for national liberation" a concept designed primarily to help the process of independence of former colonies. *Id.* at 87-88.

[400] Case Concerning the Frontier Dispute (Burk. Faso/Republic of Mali), 1986 I.C.J. 566, *quoted by* MALANCZUK, *supra* note 252, at 162-163.

[401] Hasani, *supra* note 394, at 90.

the United States and the former USSR to address issues arising from the dissolution of Yugoslavia, would hold thus:

> Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice.[402]

If this is so, the *uti possedítis* principle may also be considered a supporting argument to the historical founding function of the state, at least, with respect to the issue of the monopoly of the power of coercion over a defined territory. At the very least, it presents a big hurdle to Chaplin's proposal that the state's historical founding function be reconfigured so that its territorial scope may be enlarged in a mature state encompassing many former states as well as underlines Dooyeweerd's insistence that political theory be continuously set against empirical reality in the task of surfacing norms or structural principles through the transcendental-empirical method.

3. The Meaning-kernel of the Jural Aspect as Retribution: Reaffirmation

I will place my discussion of the third critique ahead of that of the second since the former is intimately related to the first critique. This response to Chaplin's third critique is rooted in the insight already explained in my discussion of the first critique – that is, that the state as a public legal community built upon a monopoly of the power of the sword, with the task of public justice – is a preconceived divine response to a human contingency. The meaning Dooyeweerd ascribes to the jural mode, (retribution), is therefore, consistent with a good creation. The jural aspect in a fallen situation is what it is: God precisely intended it to be retributive as a response to the contingency of a fallen world (that unfortunately for us in historical space-time, became a reality). In this way, we can account for the fact that the order of creation calls for different human behavior in a fallen situation than would have been necessary in an un-fallen creation.

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[402] Opinion no. 3, 31 I.L.M 1499; at 1500 (Jan. 11, 1992), *quoted by* MALANCZUK, *supra* note 247, at 163. In the case of the former Yugoslavia, European decision makers in the end would explain their position in terms of *uti possidetis juris*, according to which the terrain of new sovereign states is defined on the basis of old colonial borders. They would reason that since Kosovo was not a federal republic within Yugoslavia, but rather an entity within Serbia, it had no right to claim sovereignty. But Hasani, who served as a legal adviser to the Kosovar delegates to the conference, objects that what the European politicians failed to recognize with respect to Kosovo is that *uti possidetis juris* has evolved throughout history and now includes such additional criteria as the rule of law, democracy, respect for human and minority rights. But since in practice, there are no implementation mechanisms to ensure the viability of these principles, as a result, nations of the world stood on the sidelines during the initial stages of genocide committed by the Serbian forces in Kosovo and in the end, "a new paradox emerged in the aftermath of NATO's intervention: Kosovo, in its final status, was equated with those entities that provoked the conflict." Hasani, *supra* note 394 at 93-94.

We can say that retribution as the core idea of the jural mode in Dooyeweerd's understanding specifically accounts for the fallen condition of humanity and humanity's relationships. It is a divine response to the disorder that the fall occasioned. It certainly does not and cannot restore in the temporal realm what was lost, but itself only points to that eschatological time when fallen creation will be ultimately redeemed and restored. Alan Cameron acknowledges in his introduction to the first volume of the philosopher's *Encyclopedia of the Science of Law* that the core-meaning Dooyeweerd assigns to his idea of justice maybe viewed as a major stumbling block to the acceptance of his philosophy by a broader audience, and this, especially at a time when retribution is viewed by many within Christian scholarship as unable to capture the biblical approach to justice.[403] His argument in support of Dooyeweerd's view is that we must make a distinction between societies in which the jural aspect remains in a "closed" or "unopened" state where law is tied to a strict or "undisclosed" concept of retribution and societies where the jural aspect has been "opened up" or "deepened" by legal morality under the leading of the Christian faith. He explains:

> Only in the latter does law relax its strict retributive character (lex talionis) as it comes under the influence of a "regulative" idea of justice. Not every "positing" of a jural norm within a particular legal culture need evince this opened up character, guided by an idea of justice, in order to establish itself as law - to satisfy the "existence conditions" of (valid) law as some legal philosophers might say. In the encyclopedic perspective, all law and jural phenomena are "qualified by their retributive character, but only in opened up legal cultures is this retributive core of law itself deepened into a recognisably "modern" or developed form where it is more appropriate to speak of the most fundamental principles of law requiring the implementation of those of "justice" than of "retribution" (even where use of the latter concept is confined to principles of criminal law).[404]

F. LEGITIMACY AND DEMOCRATIC ENTITLEMENT

Indeed, Dooyeweerd does seem no more than imply democracy as an opening up of the structural principle of the state. While in his thought, a genuine state must be a constitutional state according to its structural principle, Dooyeweerd does not rule out autocracy all together.[405] At the same time, as Chaplin notes, he recognizes that the internal organization of a state indeed has a vital role in how a state actually exercises its authority, observing that democracy provides a more reliable guarantee that a state observes material legal principles than would autocracy.[406] After all, if, as Dooyeweerd says, in the national State a people does not exist apart from the government and the government does not exist apart from the people[407]– that is, apart from those (citizens) subject to

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[403] II Alan M. Cameron, *Editor's Introduction*, *in* 8 HERMAN DOOYEWEERD, THE COLLECTED WORKS: ENCYCLOPEDIA OF THE SCIENCE OF LAW, SERIES A, 8 (2002) [hereinafter, II Cameron, *Introduction*]

[404] II Cameron, *Introduction*, *supra* note 403, at 8-9.

[405] II Chaplin, *Structural Principles*, *supra* note 100, at 29.

[406] *Id.*

[407] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 436.

government authority, inasmuch as all those in government are also part of the people! - there must be in place state mechanisms to show that the people have a say in how their government is run.

1. Fairness Discourse: Three Blocks

Chaplin's second critique has much to commend itself; in fact, it resonates with contemporary developments in international law which I will presently discuss, notably legitimacy and democratic entitlement. Perhaps, this trend is best captured in a pioneering essay by Franck published in 1992 in the *American Journal of International Law*, where he discusses the relation between legitimacy in the domestic level and the international level:

> The latter issue is of primary interest to the international lawyer, but its importance is due to its manifest connection with the former. We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitively by international rules and processes. We are not quite there, but we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement. For some states, that process will merely embellish the rights already protected by their existing democratic order. For others, it could be the realization of a cherished dream.[408]

Legitimacy for Franck refers to the property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with the generally accepted principles of right process. Significantly, he identifies legitimacy, along with distributive justice, as the two components of what he calls the "fairness discourse" in international law.

Fairness is defined by the openness of the process by which societies reached their understanding of fairness, rather than any particular definition of it. For him, the most important instrument of such discourse is democratic electoral politics, therefore attention must be paid to democracy as a right protected by international law and institutions.[409] He defines the right to democracy as "the right of the people to be consulted and to participate in the process by which political values are reconciled and choices are made"[410] - a right made possible by the voting booth.[411] He identifies three building blocks to the emergence of the right to democratic governance or democratic entitlement: the long-standing rule on self-determination, political right to free expression and electoral rights. Self-

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[408] II Thomas M. Franck, *The Emerging Right to Democratic Governance*, 50 AM. J. INT'L L. 45, 50 (1992) [hereinafter, II Franck, *Democratic Governance*].

[409] I FRANCK, FAIRNESS, *supra* note 243 at 83.

[410] *Id.*

[411] II Franck, *Democratic Governance*, *supra* note 408, at 83. He notes that as of 1994, 130 national governments are legally committed to permit open, multiparty, secret-ballot elections with universal franchise. *Id.* at 85.

determination posits "the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion."[412]

The second block is rooted in the anti-totalitarianism borne of World War II and was first elaborated in the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948. Though not a treaty but a resolution, it received overwhelming support and may now be considered as a customary rule of state obligation guaranteeing universal right to freedom of opinion and expression (Article 19) as well as to peaceful assembly and association (Article 20).[413] It would find expression in many other treaties of both general as well as regional application.

The third block, according to Franck, is the emerging normative requirement of participative electoral process, also first expressed in the 1948 Universal Declaration of Human Rights (Art. 21) and then elaborated on in many other regional and international instruments in the subsequent decades. He says: "[a] bright line links the three components of the democratic entitlement. The rules and the processes for realizing self-determination, freedom of expression and electoral rights, have much in common and evidently aim at achieving a coherent purpose: creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live in work."[414]

This objective is supported by a large body of treaties all promoting human rights: These include the UN Charter itself, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, the Convention on the Elimination of All Forms of Discrimination Against Women, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human an People' Rights, the Copenhagen Document and the Paris Charter.[415]

Fox and Roth point to four justifications for the diffusion of the theory of democratic entitlement in international law. First, there is a "perceived" connection between competitive multi-party elections and the range of

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[412] *Id.* at 52. The UN Charter uses the term in Art. 1(2) of Purposes and Principles, where the UN is said to aim for "friendly relations among nations based on respect for the principle of equal rights and self-determination among peoples" and in Art. 55, where it is used to express the general aims of the United Nations in socio-economic development and respect for human rights. Crawford traces the development of this concept under the UN Charter in I CRAWFORD, STATES, *supra* note 245, at 11-148.

[413] I FRANCK, FAIRNESS, *supra* note 243 at 61.

[414] I FRANCK, FAIRNESS, *supra* note 243 at 79.

[415] *Id.* [citations omitted].

internationally protected human rights.[416] This means that a commitment to principles of choice, transparency and pluralism that mark political democracy is essential to securing an institutionalized protection of other rights – a major theme in Western political order in the last 200 years;[417] second, democracy is seen as a means of preventing international armed conflicts, which in the 1990s, was unrivalled as a main form of deadly conflicts; third, democracy is asserted as a key to peace among warring states.[418] Though this is a contested proposition, the so-called "liberal" states do not go to war with one another;[419] and fourth, a range of emerging norms, though unrelated to democracy, have also come to rely on democratic processes for their implementation, matters such as environment, anti-corruption campaigns, and the rights of indigenous peoples.[420]

2. Statehood: the Great Debate between Fact and (Legal) Fiction

Legitimacy (or legality) is also at the center of the controversy over statehood, in which for a long time, the doctrine of "effectiveness" held sway. As Crawford notes, the dominant view has been that the classical criteria for statehood (the *Montevideo* criteria) were essentially anchored on the principle of effectiveness as a question of fact and not of law.[421] Indeed, even if it was generally conceded that such principle in fact embodied a legal rule, it was also generally denied that there exist criteria for statehood not based on effectiveness.[422] He distinguishes between two positions. The first is that there cannot be *a priori* criteria for statehood independent of effectiveness and the second is that no such criteria yet exist as a matter of international law.[423] Yet if the first position is correct, how must we account for effective entities that clearly exist but have been widely held not to be states –as in the case of Rhodesia, Taiwan, and the Turkish Republic of Northern Cyprus?, he asks. [424] There is too the matter of non-effective entities granted statehood under international law, as in the case of such entities unlawfully annexed in the period of 1936 to 1940 – Ethiopia, Austria, Czechoslovakia, Poland and the Baltic States, Guinea-Bissau before Portuguese recognition and Kuwait between 1990 and 1991 (under Iraq control) –a converse case. [425] Or, as he asks elsewhere in his book: "Does the fact that Belize was not recognized by Guatemala, Macedonia by Greece, or Liechtenstein by Czechoslovakia and its successors mean that these entities did not exist, were not

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[416] Gregory H. Fox & Brad R. Roth, *Introduction to Democratic Governance and International Law, in* DEMOCRACY AND INTERNATIONAL LAW 77 (Richard Churchill ed., 2006) [hereinafter, Fox & Roth].

[417] *Id.* at 77.

[418] *Id.* at 77-78.

[419] *Id.* at 78.

[420] *Id.*

[421] I CRAWFORD, STATES, *supra* note 245, at 97.

[422] *Id.*

[423] I CRAWFORD, STATES, *supra* note 245, at 97.

[424] *Id.*

[425] *Id.*

states, had no rights at the time?"[426] Crawford calls the matter of statehood in relation to recognition of a state in international law as "the great debate."

Perhaps, Koskenniemi's description explains well what the debate is all about.[427] Basically, the creation of states is a long-running issue of disagreement between the "factual" and the "legal" approaches (that is, the "declaratory" and the "constitutive" positions). [428] From the first view, the emergence of states is an extra-legal, sociological event that cannot be determined by the international legal order but is external to it.[429] A state's formation is a factual event so that whether or not other states recognize it is immaterial or tangential. Recognition only means to establish a formal basis for the relations between the recognized and the recognizing states.[430] Admission to statehood and acquisition of the consequences of rights and duties are seen as independent of recognition.[431]

However, Koskenniemi says the point cannot be consistently maintained, especially if we consider the cases of entities which present themselves as states but whose self-definition of statehood is set against external criteria for it to create legal consequences.[432] This is because in international law, statehood has attendant rights and duties that affect other states. Hence an entity recognized as a state may enter into treaties with other states and be bound by them. A non-state cannot do so by simply presenting itself as a state. As Koskenniemi puts it: "the factual approach must rely on a legal approach concerning the existence of a set of criteria which pre-exist the sociological process and the sense and consequence of that process."[433] This set of criteria is often referred to as the classic doctrine of statehood as "effectiveness", expressed in the *Montevideo Convention* – territory, people, government, capacity to enter into relations with other states.[434]

The legal approach, or the idea that law precedes statehood, has its own bevy of supporting arguments from diplomatic practice, notes Koskenniemi but it also has its own special set of problems. He refers to the fact that communities which have lacked actual effectiveness as states have been considered as states while communities which are for all intents and purposes effective have been denied recognition.[435]

Hence Koskenniemi says:

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[426] *Id.* at 25.

[427] For now, I will refrain from giving a full exposition of Koskenniemi's methodology or theoretical approach to international law; that will have to wait until the next chapter. But his discussion of the opposing views on recognition can be readily followed without need of theoretical background.

[428] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 236.

[429] *Id.*

[430] *Id.* at 237.

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Id.*

[435] II KOSKENNIEMI, APOLOGY, *supra* note 258, at 239.

> Both positions involve a combination of the pure fact and legal approaches. But this involves a contradiction. The two cannot be put together in a way that seem called or. For they are based on mutually exclusive assumptions. The factual approach assumes that a state's liberty, its will and interest must be effective. These must overrule external constraint. The legal approach assumes that the legal order must be effective therefore, that it can overrule the state's subjective liberty will or interest.[436]

And so the two positions are indefensible because both dissolve in the end into politics, says Koskenniemi. The former fails to draw the line between freedom and law. The latter will legitimize the imposition of existing states. The pure fact approach is, moreover, indefensible as far as facts alone cannot create law. Rules are needed but they must be interpreted first. The problem is that interpretations are subjective. Moreover, the doctrine of sovereignty equality makes it impossible to decide between competing claims to truth. One interpretation is better either because it is more just or because it is produced by this, and not that, state. And the former solution is utopian while the latter violates sovereign equality. Both, to Koskenniemi, seem purely political. [437]

a) Statehood and Collective Non-Recognition

But Crawford argues that the legal regulation of statehood other than in accordance with the principle of effectiveness now finds substantial support in international law, beginning with the development of peremptory norms and human rights norms and subsequently, with collective non-recognition. All these, he said, point to an important development in international law that addresses illegitimate or illegal acts of, states. Peremptory or (*jus cogens*) norms refer to a set of norms in international law commonly placed as belonging to a hierarchy inasmuch as they oblige all states. *Jus cogens* norms, literally, "the compelling law", or "peremptory norms of general international law", are defined by Art. 53 of the 1969 Vienna Convention on the Law of Treaties as "norm[s] accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[438] Breaches of *jus cogens* norms are illustrated in the following examples put forward by the International Law Commission: "(a) a treaty contemplating an unlawful use of force contrary to the principles of the [U.N.] Charter, (b) a treaty contemplating the performance of any other criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy, or genocide."[439] These *jus cogens* norms are said to hold all states bound by *erga omnes*

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[436] *Id.* at 245.

[437] *Id.*

[438] Vienna Convention on the Law of Treaties, *adopted* May 22, 1969,1155 U.N.T.S 331 (entry into force, Jan. 27, 1980). The convention was adopted by an overwhelming majority of 79 votes in favor, 1 against, with 19 abstentions and entered into force after the ratification or accession of 35 states.

[439] ILC, *UN Conference on the Law of Treaties, Off. Rec., Documents of the Conference*, 1st & 2nd sessions (26 March-24 May 1968, Vienna & 9 April-22 May 1969) UN Doc A/CONF/39.ll/Add.2 at 67.

obligations. As between *jus cogens* and *obligatio erga omnes*,[meaning, an obligation owed by all] the former refers to the legal status that certain norms reach, while the latter pertains to the legal implications arising out of a such norms characterization as *jus cogens*. In other words, from *jus cogens* norms arise *erga omnes* obligations, as explained by the International Court of Justice in the *Barcelona Traction* case:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[440]

Crawford mentions four categories of peremptory norms: first, rules protecting the foundations of international order, such as the prohibition on genocide, or the use of force in international relations except in self-defense; second, rules concerning peaceful cooperation in the protection of common interests, such as the freedom of the seas; third, rules protecting the most fundamental human rights; and fourth, self-determination and the basic rules for the protection of civilians in time of war.[441]

Crawford argues that there is now room for the insistence on general standards of human rights and of democratic institutions as an aspect of stability and legitimacy of a new State. However, this has not turned as yet into a peremptory norm disqualifying an entity from statehood even in cases of widespread violation of human rights. On the other hand, the duty of collective non-recognition[442] is singularly important not only because it reinforces the legal position but also prevents the consolidation of unlawful situations, even if it must be stressed that it is not a method of enforcement nor is it a sanction.[443] Such duty obtains in two situations. First, the duty arises when there is substantial illegality, that is, when it involves peremptory norms of international law or a substantive rule of general international law so that it concerns not just a few states but the "international community" as a whole. Second, it also obtains in a process of collective non-recognition in international organizations, as in the case of the UN system acting to bind member-states to collectively act towards an illegality in international law.[444] The difference in the two situations lies in the fact that in the first situation, there is no express act on the part of international organizations

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[440] The Barcelona Traction, Light and Power Company Limited Case (2nd Phase), Judgment, 1970 I.C.J. 3, 32 (Feb. 5).

[441] I CRAWFORD, STATES, *supra* note 245, at 101.

[442] As opposed to political non-recognition, which is discretionary. The non-recognition Crawford refers to is the legal one, which, according to him, "has achieved considerable prominence since 1932." *Id.* at 158.

[443] *Id.* at 159.

[444] I CRAWFORD, STATES, *supra* note 245, at 160.

declaring an act illegal but the states can on their own choose to treat it as illegal based on the same grounds on which the second situation can obtain.

Indeed, Crawford calls them "to some extent co-extensive."[445] Collective non-recognition has been practiced particularly with respect to territorial status or statehood, as was the case in 1932 of the Manchurian crisis through the resolution of the League of Nations, precursor to the UN, as well as in that of Southern Rhodesia, Namibia, the Bantustans created by South Africa in pursuance of *apartheid*, Northern Cyprus and Kuwait under the UN system.[446]

The consequences of collective non-recognition may be illustrated by a number of examples Crawford cites: the Namibia Case[447], the Draft Articles on State Responsibility,[448] the East Timor Case[449] and the Wall Opinion (concerning the security perimeter established by Israel in areas in Palestine).[450]

i. The Namibia Case

In the case of Namibia, the International Court of Justice held that the presence of South Africa in the mandated territory despite the revocation of its mandate was illegal. Here the ICJ said members of the UN are "under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia" as well as to refrain "from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia", subject to certain exceptions.[451]

Crawford summarizes the effect of non-recognition ordered in the *Namibia Opinion*: (1) non-recognition implied abstention from treaty relations concerning Namibia; (2) cessation of active intergovernmental cooperation under existing bilateral treaties relating to Namibia; (3), abstention from all diplomatic and consular activity in Namibia, as well as from economic and other forms of relationship dealing with South Africa on behalf of or concerning Namibia which may firm up is authority over the occupied territory, subject to exceptions, as in the case of humanitarian aid as well as civil matters that can only be ignored to the detriment of the inhabitants.[452]

ii. The Draft Articles on State Responsibility

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[445] *Id.*

[446] *Id.*

[447] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16 [hereinafter, Namibia Opinion).

[448] ILC, *Draft Articles On Responsibility of States for Internationally Wrongful Acts, Off. Rec. 56th session Supp. No. 10* (November 2001) UN Doc A/56/10, chp.IV.E.1, Arts. 40-41.

[449] East Timor Case (Port. v. Austl.). Judgment, 1995 I.C.J. 90 (Jun. 30) [hereinafter, *East Timor* case].

[450] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 200 (Jul. 9) [hereinafter, Wall Opinion].

[451] I CRAWFORD, STATES, *supra* note 245, at 163, *quoting* the Namibia Opinion, at 54.

[452] *Id.* at 164.

Arts. 40 and 41 of the Draft Articles on State Responsibility likewise lays down some ground rules in regard to serious breaches of international law which may be applied in cases of collective non-recognition, according to Crawford.[453] Art. 40 invokes international responsibility in cases of a serious breach by a State of an obligation arising form a peremptory norm of general international law, such a breach being one that "involves a gross or systematic failure by the responsible State to fulfill the obligation." Article 41 details the particular consequences, namely: one, states are mandated to cooperate to put lawfully end the breach; two, every state is obliged not to recognize as lawful a situation created by such a breach. Both are without prejudice to other consequences already provided by other articles of the law on state responsibility or under international law in general.[454]

iii. The East Timor Case

Since 1971, when it handed down the *Namibia Opinion*, the ICJ has had other opportunities to address collective non-recognition. In the case of East Timor, it dealt with Australia's recognition of the Indonesian administration of the island. In 1974, Indonesia spuriously annexed East Timor following a partial Portuguese withdrawal, a move that was criticized by the UN Security Council and the General Assembly subsequently. East Timor remained in the UN's list of non self-governing territories.[455] In 1989, Australia and Indonesia signed a treaty of cooperation in the area between East Timor and Northern Australia, known as the "Timor gap" – a move that Portugal questioned as a violation of the general obligation of non-recognition against Indonesia. While the ICJ said that it could not act on Portugal's complaint because Indonesia had not consented to become a party to the case, it also held that the right to self-determination is of an *erga omnes* character and is "irreproachable"[456] – the very first time that it had done so.

iv. The Wall Opinion

A final example – a very recent one – is the ICJ's 2004 opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[457], arising from a now well-known act by Israel to build a "security barrier" separating Palestinian from settler populations in the West Bank. The UN General Assembly called on Israel to stop the creation of the barrier as it violated the International

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[453] I CRAWFORD, STATES, *supra* note 245, at 168.

[454] ILC, *Draft Articles On Responsibility of States for Internationally Wrongful Acts*, *Off. Rec. 56th session Supp. No. 10* (November 2001) UN Doc A/56/10, chp.IV.E.1, arts. 40-41. As a special rapporteur, Crawford headed the ILC effort that completed a 40-year project to draft the articles on state responsibility. While these have not yet been adopted as a multi-party convention, and thus, are still in the nature of *lege ferenda*, of developing international law, the draft articles are considered to be reflective of state practice and hence, to a large degree, reflective of the state of the law. On this point, *see* ANDRE NOLLKAEMPER, STATE RESPONSIBILITY: A READER OF THE FACULTY OF LAW OF THE UNIVERSITY OF AMSTERDAM 26 (2006 ed.)

[455] I CRAWFORD, STATES, *supra* note 245, at 169.

[456] *Id.* at 170, citing the *East Timor* case.

[457] Wall Opinion, *supra* note 450.

Line of 1949 as well as general international law.[458] The ICJ stepped in when it was asked to render an opinion. The Court, following its holding in East Timor, said that the right of self-determination is one that is opposable to all states, so that all states have certain obligations regarding the occupied territory. It spelled these obligations as follows:

> ... .[A]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian territory, including in and around Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[459]

G. DOOYEWEERD, DEMOCRATIC ENTITLEMENT AND LEGITIMACY

"The formation of a new state... is a matter of fact, and not of law." Thus says a time-honored doctrine in international law that finds wide support in the literature. This is known as the declaratory theory – that is, that statehood is a legal status separate from what other states may make of it.

At first glance, it seems that Chaplin does have a case that Dooyeweerd has a singular obsession with the state's founding function as a normative historical task. In fact, in one passage in the *New Critique*, Dooyeweerd seems to have voted for the factual approach to statehood. There he notes that the internal structure of the monopolistic military organization is always subservient to a stable territorial public legal order, which, he stresses is the "ultimate criterion of the existence of a State" in international law[460] – an order that is "only *founded* in the monopolistic organization of armed force."[461] But as already discussed, this is only one part of the equation. In fact, the context of the aforementioned remark is his discussion of the founding function of the state, which he says, cannot be qualified by its territorial military power. He says that it becomes evident as soon as we consider that as a *res publica*, the state's founding function "is always in need of subordination of its armed force to the civil government in order to guarantee that *stability* of its public order which is characteristic of a State."[462]

1. The Indissoluble Coherence: Founding and Historical Functions.

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[458] GA Res. 10/13 27 October 2003.

[459] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 200 (Jul. 9) (para. 159), *cited by* I CRAWFORD, STATES, *supra* note 245, at 172-173.

[460] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21, at 434.

[461] *Id.*[italics in the original].

[462] *Id.* [italics in the original].

And so we are back to that indissoluble coherence between the state's founding and qualifying functions. As Koyzis says, Dooyeweerd's political theory accounts for these two elements not in a dialectical but a complementary way. "In this respect," he says, "Dooyeweerd's approach is better rooted in empirical reading than that of political realism."[463] Koyzis explains further:

> Like faith and reason, power and justice are not entities in themselves co-existing in dialectical tension. Rather, they are integral aspects - modal aspects, in Dooyeweerd's language - of a larger reality that must be acknowledged to be complementary and not anti-thetical to each other.[464]

Public justice cannot be accomplished without power. On the other hand, sheer exercise of power, without the guiding norm of public justice, is state absolutism. The internal political activity of the State should always be guided by the idea of public justice. This normed task requires the harmonizing of all interests obtaining within a national territory, insofar as they are enkaptically interwoven with the requirements of a retributive sense; this harmonizing process consists in weighing all the interests against each other in a retributive sense, based on a recognition of the sphere sovereignty of the various societal relationships.[465] Legitimacy in Dooyeweerd's terms is measured by the State's pursuit of its qualifying task, of its end-purpose. Following Chaplin's formulation, the democratic principle, if taken as an integral part of the state's inner structural principle, demands only what is justly due to the people who constitute an important pillar of the state: their right to participate in the process of government and governance. So the state's pursuit of public justice is achieved in one way by widening the participation of citizens in matters that affect their very own lives as members of the public legal community.

Recognition of such right has taken a tortuous road of historical development but, as Chaplin says, such an historical trajectory should not be interpreted as something structural but a directional dysfunction, or "glaring *directional* deviation from earlier, more democratic forms"[466] inasmuch as the original design for the state has always been participative democracy. As he argues, the gradual disclosure, in contrast to Koekek's and Van Eikema Hommes' contention, is an issue of variable human positivation, and not of invariant structural principle.

2. The Democratic Principle as a Constitutive Principle

Strauss explains that the structure of any public legal order is such that it rests upon multiple normative building blocks that are constitutive for its

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[463] II David T. Koyzis, *Political Theory in the Calvinist Tradition*, *in* 1 HERMAN DOOYEWEERD, THE COLLECTED WORKS: POLITICAL PHILOSOPHY, SERIES D, 13 (D.F.M. Strauss, ed., 2004) [hereinafter, II Koyzis, *Political Theory*].

[464] *Id.* at 13.

[465] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21, at 446.

[466] *Id.*

functioning and existence.[467] "Any and every constitutional state under the rule of law has the task to bind together (to integrate) the multiplicity of legal interests within its territory into one public legal order," he says, adding that through the appropriate jural organs such a state has to harmonize and balance these legal interests. [468] Such differentiated integration involves weaving into a coherent unity the domains of public law (here correlated with correlated with public freedoms, such freedom to express political views, to organize political convictions in political parties, and to participate in the capstone of political freedom: the right to vote), the domain of personal individual freedom (common law or civil law) and the domain of societal freedoms (non-civil private law). [469]

The nature and existence of these jural spheres are, for Strauss, constitutive of the existence of a just state. "In this context, [the] specification constitutive implies that the legal order of a state cannot function properly except on the basis of the presence of all three of these jural domains. A Bill of Human Rights certainly constitutes one of these building blocks."[470] This description of the constitutional state seems consistent with Chaplin's proposal that democracy be written into the inner structural principle of the state. For precisely these freedoms that are guaranteed in the constitutional state are the sort of freedoms that at the minimum, ought to be present in what we normally associate with a democratic state.

We can thus harness contemporary developments in the theory and practice of democracy in international law as affirmations of the basic correctness of Dooyeweerd's contentions about the unbreakable coherence between the state's historical task and its qualifying function. There is more to statehood than effectiveness. Effectiveness must be correlated with a judicious exercise of state power.

3. Beyond Fact versus Fiction: Power and Justice in Tandem

Indeed, we can say that this is his unique contribution to political theory, his ability to better account for what distinguishes the state from other institutions and relationships in society, especially the non-political ones. Moreover, our understanding of the state's founding function allows us to do justice to states that clearly have factual existence but under the constitutive theory, may not have the requisite status of statehood under international law. The factual approach, from a Dooyeweerd perspective, rests only upon the historical fact of creation. It is a one-sided consideration of the founding function of the state. It lacks that basic insight into the correlative aspect of the state, its normative task of public justice. Dooyeweerd's theory allows us to identify entities that only have a formal status of

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[467] III D.F.M. Strauss, *Democracy Between a Just Public Order and the Ideal of (Equitable) Transformation* 25 POLITIEA 159 (2006) [hereinafter, Strauss, *Democracy*]

[468] Strauss, *Democracy*, *supra* note 467, at 159.

[469] *Id.*

[470] *Id.*

statehood as *putative public legal communities*. The other side of the spectrum, the positivistic interpretation of what the state is according to certain legal standards is hopelessly inadequate without a full appreciation of the state's historical founding function.

More than that, it also allows us to hold to account states that have both formal and factual status of statehood but do not observe the principle of public justice (which in itself, is a critique as well of individualistic liberal democracy). Dooyeweerd's normative view presents itself as a compelling solution to Koskenniemi's seemingly irresolvable dilemma (made more stark by his constructivist position).

Fox and Roth argue that at the bottom of things, we really do not know what democracy *is* until we know what it is *for*;[471] then they point out that liberal democrats expressed sympathy with the coup in Algeria that prevented an Islamic fundamentalist landslide in 1992, the forcible expulsion of the supposedly pro-Communist legislature in 1993, and the Dayton High Commissioner's removal of the Republika Srpska's elected ethno-nationalist President in 1999.[472] What does this mean? "This is a sign," they argue, "not of hypocrisy, but of a teleological conception of democracy that permits only contingent loyalty to institutional forms."[473] For them, then, any attempt to give these forms a status that stands above ideology and politics is "problematic."[474]

In contrast, from a Dooyeweerdian perspective, democracy as part of the normative unfolding of the structural principle is always subject to the norm of public justice, which is its end-purpose. Perhaps we can say that democracy or democratic processes are an important element of justice. To do justice to the people who make up one pole of the state is to give them a say on how government is run. The state's qualifying function requires that a temporary delegation of the governmental authority to a military commander in times of emergency is an exception rather than the rule. Such military organization, in the long run, must be placed at the service of a stable territorial public legal order.[475] This passing remark by Koyzis in a footnote on Augustine's understanding of justice illuminates our understanding of the normative task of the state in regard to public justice:

> Augustine tested Cicero's definition of a *res publica* as a community bound together by ties of justice and found it wanting. After all, he reasoned, the old Roman republic was certainly a *res publica*, yet, by withholding from God the worship due him, it was lacking in justice. Thus if a known *res publica* lacks justice, we must exclude justice from any empirical definition of this phenomenon (*De Civitate Dei*, XIX, 21). The flaw in Augustine's reasoning comes

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[471] Fox & Roth, *supra* note 416, at 92 [italics in the original].
[472] *Id.*
[473] *Id.*
[474] *Id.*
[475] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 434.

> from his failure to understand the modal jural character of the *res publica* and his concomitant tendency instead to view justice as a substantial entity that is either present *in toto* or absent *in toto*.[476]

Justice, says Koyzis, is not a one-shot deal. Justice from Dooyeweerd's view is rooted in a higher standard but is also embodied in the normal aspirations of a community of people.[477] It is a creational norm that at the same time requires human agents to put it into effect, to express it according to the historical rootedness of their experience.[478] Skillen argues that even the right of self-determination does not really provide us with guidance for the promotion of national or international justice except insofar as it stands against colonialism (or what today is called neo-colonialism of various hues). Taking examples from history, he says: *if Belgium in the early 19th century was justified in revolting from the Kingdom of the Netherlands, then, what is there to stop the Flemish and the Walloon "nations" going their separate ways today? If Canada has some right to be independent of the United Kingdom, why should it not allow Quebec to take the independent road as well? If the United States was perfectly correct in throwing off the shackles of British domination, why was it improper for the confederate states to revolt against the Union? If African nations were justified in launching their liberation movements, why should not the First Nations (Indians) of North and Latin America have their own liberation movements as well?*[479] The point, he says, is that

> the cry for nationalistic sovereignty cannot clearly define the boundaries of a state much less the task of a state. Whatever the justice of anti-colonialism and anti-imperialism, these movements will have to be fashioned by a broader motive of domestic and international justice if any good is to come of them. If for example, the Western Pax Americana ought to be ended, even as the Pax Britannica and the Pax Romana came to an end, then a positive conception of just interrelation of free states must be unfolded to displace the merely negative reaction *against* imperialism and colonialism. The mere emergence and growth of independent states gives little guidance toward the development of equitable relations among them.[480]

4. Justice as the Criterion

And so in the case of collective non-recognition its legitimacy is not determined by the sheer number of states that rendered such decision – that is, the will of the so-called "international community". Following our theory of the state, justice is not some external standard imposed from the outside by some other entity or group of entities. As Koyzis says, justice, "far from being a goal for the future, is an intrinsic aspect – indeed one of the defining features – of the state's

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[476] II Koyzis, *Political Theory*, *supra* note 463, at 11 (fn. 2).

[477] *Id.* at 15.

[478] *Id.*

[479] II JAMES W. SKILLEN, INTERNATIONAL POLITICS AND THE DEMAND FOR GLOBAL JUSTICE 117 (1981) [hereinafter II SKILLEN, INTERNATIONAL POLITICS]. Skillen, writing here in 1981, could have been writing as well about the present times.

[480] *Id.* at 118.

structures."[481] In the words of Clouser, Dooyeweerd's theory of the state, while agreeing that the state's duty is toward the whole society, restricts state power not by some supposedly external limit set by another institution (the church, or business, for example) and enforced by the competing power of the other but by the very nature of the state itself. "It is the state's own internal structure which sets its proper limits. And it is the understanding of its nature by its own citizens which is the source of these ideas which then need to be embodied in its constitutional law.[482]

Collective non-recognition should embody a fundamental conviction about the inner structural principle of the state as defined by its founding and qualifying function. The standard against which we must measure the viability and integrity of the international legal order cannot be located in the will of the so-called international community itself, nor in the *raison d'etat*. The criteria are not external but internal to the state. In Dooyeweerdian thought, states do not establish the criteria from out of the blue but discern it from divinely-instituted societal structural principles.

Dooyeweerd's theory of the state anchored in a differentiated society also draws our attention to his critical modernity. Democratic theory in international law has often drawn criticisms that it is fundamentally a Western, liberal democratic imposition. Koskenniemi rejects the universal claim of international law (specifically democratic theory) as rooted in a European tradition and should not and could not speak for humanity.[483] He warns that such a tradition of liberal democracy may yet end up as another hegemonic imposition on non-Western states, reminding us of his arguments in his book the *Gentler Civilizer of Nations* about the international lawyers of an earlier era who thought none of the contradictions that came with assigning to international law a civilizing task and at the same time using it as justification for colonialism:

> As international lawyers, the only arguments open to us are those provided by our tradition: *jus cogens*, obligations *erga omnes*, and all the legal paraphernalia produced by treaties, customs, international institutions. They do not automatically express anything universal: indeed, more often than not they are used as instruments in hegemonic struggles. As soon as we lose sight of this, they turn into kitsch.[484]

5. Dooyeweerd and His Critical Modernity

For Koskenniemi, there is nothing special about the modern state, or its democratic aspirations. Yet at the same time, he is not about to celebrate the indigenous that easily either. Indeed, Koskenniemi's remark quoted as an epigraph

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[481] II Koyzis, *Political Theory*, *supra* note 463, at 16.

[482] I CLOUSER, *supra* note 94, at 312.

[483] III Marti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L. L. 113, 115 (2005). [hereinafter, III Koskenniemi, *Tradition and Renewal*]

[484] *Id.* at 122-123.

to this chapter stresses that point: the state can either be used for good or bad. But towards the end of his book's chapter on sovereignty and international law's supposed civilizing mission, he says that while indeed it may often be suggested from history that "it is better to live in a political society whose administrators speak our language, share our rituals and know our ways of life,"[485] he quickly adds that "there is no magic"[486] about these relationships. Lest we forget, "communities that are closed to outsiders will rot from the inside."[487]

For me, this somehow stresses Dooyeweerd's point first of all about the nature of the state as a differentiated public legal community. Koskenniemi and all his kindred spirits are correct in locating ideas of democracy in the Western tradition. Dooyeweerd's own account of the development of the theory of the state in its different stages draw from the Western, if largely European experience (with certain Dutch emphases). A differentiated society, in Dooyeweerd's systematic philosophy, could only arise from the disclosure of societal structural principles by human positivation. It is a process that is distinctive for its historical embedded-ness. A society could be closed, so that differentiation could not take place. (Koskenniemi's seems to realize this as he remarks about the decline communities slide into if they remain in autarkic existence. For all his hesitations, Koskenniemi has implicitly cast his lot with the comfortable choice, that is, his own tradition.[488])

We must not lose sight of Dooyeweerd's argument from history and the directionality of positivations. The development of a public legal community is so closely bound up with societal differentiation itself that we cannot measure the rest of the world's pace against the Western experience (or let alone consider the tragic injustices that most of them have suffered in the era of colonization). Skillen had long ago noted that human rights "are tied in with the very meaning of justice and injustice in states and thus cannot be protected or enhanced in abstraction from actual state and interstate structures."[489] In other words, if the very character of the sovereign state is part of the problem, every effort to advance human rights without changing the function and identity of states will lead to failure.[490] There then, is a certain realism to Dooyeweerd's theory of the state: *differentiation is an historical process that demands public commitment.* At the same time we must also realize that Dooyeweerd's theory of differentiation also shines through with a fundamental Christian conviction of the direction societal structures may take:

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[485] I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 177.

[486] *Id.*

[487] *Id.*

[488] Indeed, from the radical postmodernist prescriptions of his earlier work, Koskenniemi now calls for a "modest formalism" or a "culture of formalism" that acknowledges that law is now everywhere so that it is now a choice between a particular politics of law – a choice that Europeans must allow others to make and not impose on them. III Koskenniemi, *Tradition and Renewal*, *supra* note 483, at 123. *See* also I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 494-508.

[489] II SKILLEN, INTERNATIONAL POLITICS, *supra* note 479, at 107.

[490] *Id.*

differentiation by itself is not to be equated with development.[491] Perhaps, this is Dooyeweerd's answer to Koskenniemi's worries that international law is turning into kitsch, (by which he means an imperialistic and racist instrumentalism that looks at the Other as the savage, and the Western self as the epitome of human rights and civilization).[492]

And this does not in any way let off the hook the formers of the cultural way of being from the historical task of building a public legal community. They can only hold it off at the risk of grave injustices to their own constituencies. The normative view of the state is in fact a strong critique of the supposedly "civilizing" purpose of colonialism. The continuum between power and justice suggests that much. No political project can disregard the requirements of justice without risking its adverse consequences. While power is foundational to the state – the monopoly of the sword – it simply cannot survive on that count alone. Power must reach, or anticipate, justice. Power must open up to, and be deepened by, justice.

Our next discussion will be a case study of contemporary international legal theory that seeks to reconfigure the state in the wake of globalization. Anna Marie Slaughter, one of the leading thinkers in the intersection of international law and international relations, speaks of a "disaggregated state." Here I will attempt to show the continuing relevance of Dooyeweerd's critique of the theory of the state without a state-idea.

H. THE DEMANDS OF GLOBALIZATION AND THE SOVEREIGN STATE

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[491] A point explored in great detail in I Griffioen, *Development*, *supra* note 202. Griffioen in fact defends Dooyeweerd's broad conception of development. But *see* Lambert Zuidervaart , *Earth's Lament: Suffering and Hope* 1-16 (November 21, 2003),, available at http://icscanada.edu/events/20031121cn/inaugural_2003.pdf. Here Zuidervaart, in this inaugural address as a senior member of the Institute of Christian Studies in Toronto, charges that Dooyeweerd fails to properly account for structural evil. We quote Zuidervaart at length on this point:

> Religiously, the Kuyperian experience of antithesis had become so firmly tied to maintaining the community's own practices and institutions that even a great thinker like Dooyeweerd tended to equate the conflict between good and evil with a power struggle between concrete communities of commitment. Yet this tendency violates Dooyeweerd's own better insight when, for example, he says the spiritual antithesis "runs right through the Christian life itself" Philosophically, Dooyeweerd was unable to plumb the depths of societal evil in the West because he gave normative priority to structural differentiation in society. He turned the idea of sphere sovereignty—Abraham Kuyper's crucial contribution to modern social policy—into a creational principle that lies beyond critique. Hence Dooyeweerd could not seriously ask whether the Western differentiation of social institutions, such as government, business, and universities, might not itself embody and foster societal evil. When the historical process of differentiation becomes a structural hypernorm for evaluating social change, it becomes difficult to assess the environmental, cultural, and interpersonal costs of this process. They come to seem like mere "side effects" of a process considered intrinsically good, rather than potential signs of societal evil. *Id.* at 6 [citation ommitted].

[492] III Koskenniemi, *Tradition and Renewal*, *supra* note 483, at 123.

In her pioneering study on the role of non-governmental organizations in the shaping of international law, Anna-Karin Lindblom refers to the work of the sociologist Manuel Castells to show the effect of globalization on state sovereignty and its interactions with private actors.[493] She argues that globalization has led to the diffusion of state power in many ways. First, interdependent financial markets and coordinated currencies diminish the state's control over monetary and budgetary policies; second, increasing transnationalization and relocation of problem cause employment and fiscal problems for the state; third, welfare states run into problems when transnational corporations operate in global markets where there are differences in costs for global benefits. The downward spiral of benefits resulting from the effect of these differences erode the legitimacy and stability of the nation-state; fourth, the increased privatization and globalization of media takes away from the state its control of information and opinion; and fifth, growing multi-lateralism in such areas as foreign policy and defense undercuts state power.[494] As Castells states:

> The main transformation concerns the crisis of the nation-state as a sovereign entity and the related crisis of political democracy, as constructed in the past two centuries. Since commands from the state cannot be fully enforced, and since some of its fundamental promises, embodied in the welfare state, cannot be kept, both its authority and legitimacy are called into question. Because representative democracy is predicated on the notion of a sovereign body, the blurring of boundaries of sovereignty leads to uncertainty in the process of delegation of the people's will.[495]

With the supposed retreat of the state and its political government, there is a demand for an alternative form of government that is more in conformity with the challenges of a borderless world. That is where the idea of governance is supposed to come in.

I. A CASE STUDY: SLAUGHTER'S DISAGGREGATED STATE

A radical example in contemporary international law theory on the state in a globalized world can be seen in work of Anna Marie Slaughter. She advances a thesis of a network of networks of "disaggregated" [496] states, that is, "the different institutions that perform the functions of government's - legislation, adjudication, implementation - interacting both with each other domestically and also with their foreign and supranational counterparts."[497] She claims these aggregated states embody in themselves a "conceptual shift"[498] from the traditional statist view of

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[493] ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 13 (2005) [hereinafter, LINDBLOM]. We will have the opportunity as well to discuss at length Lindblom's book in the next chapter.

[494] *Id.*

[495] MANUEL CASTELLS, END OF MILLENNIUM 377 (2nd ed. 2000), *quoted* in LINDBLOM, *id.*

[496] ANNA MARIE SLAUGHTER, A NEW WORLD ORDER 5 (2004) [hereinafter, SLAUGHTER].

[497] *Id.*

[498] *Id.* at 5.

sovereignty and form the "building blocks"[499] of a "future world order"[500], these "parts of states",[501] or courts, regulatory agencies, ministries and legislators. She explains how:

> The government officials within these various institutions would "participate in many different types of networks, creating links across national boundaries and between national and supranational institutions.[502]

This shift, she argues, would result in a world that looks "like the globe shouldered by Atlas at the Rockefeller Center in New York, crisscrossed by an increasingly dense web of networks."[503] The big difference in this new world order is this (and I quote her at length to give a full appreciation of her arguments on this point):

> ... [A] world of government networks would be a more effective and potentially more just world order than either what we have today or a world government in which a set of global institutions perched above nation-states enforced global rules.
>
> In a networked world order, primarily political authority would remain at the national level except in those cases in which national governments had explicitly delegated their authority to supranational institutions.
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> National government officials would be increasingly enmeshed in networks of personal and institutional relations. They would be operating both in the domestic and international areas, exercising their national authority to implement transgovernmental and international obligations and representing the interests of their country while working with their foreign and supranational counterparts to disseminate and distill information, cooperate in enforcing national and international laws, harmonizing laws and regulation, and addressing common problems.[504]

A clue as to why she has chosen to clothe her revisionist project with the particular form it takes here is the comment she makes on globalization. She takes for granted that in today's world, people and governments around the world cannot do without global institutions to solve collective problems that can only be addressed on a global scale.[505] The paradox is this: "we need more government on a global and regional scale but we don't want the centralization of decision-making power and coercive authority so far from the people actually governed."[506] She

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[499] *Id.* at 6.

[500] *Id.*

[501] *Id.*

[502] SLAUGHTER, *supra* note 496, at 6. She defines the network as "a pattern of regular and purposive relations among like government units working across borders that divide countries from one another and that demarcate the 'domestic' from the 'international' sphere." *Id.* at 14.

[503] *Id.*

[504] SLAUGHTER, *supra* note 496, at 6-7.

[505] *Id.* at 8

[506] *Id.*

adds that we also need global rules without centralized power but with government actors who can be held to account through a variety of political mechanisms, in other words, the "governance tri-lemma."[507]

Her solution to the paradox of governance is to disembody states and construct a network of interacting parts of disembodied states. Hence, Slaughter's theory stresses the changed nature of sovereignty, from the traditional concepts of autonomy and unitary exercise of power - the power to be left alone, to exclude, to counter any external meddling or interference - to a disaggregated and transnationally accountable one.[508] She argues that this would necessitate a move from interdependence to a system that is a "tightly woven fabric of international agreements, organizations and institutions that shape [state] relations with one another penetrate deeply into their internal economics and politics" (since according to her mutual dependence is still based on a baseline of separation, autonomy and defined boundaries). [509]

And so for her, the new world order would be based on "connection rather than on separation, interaction rather than isolation, institutions rather than free space, the new concept of sovereignty is based on status or membership, in other words, "connection to the rest of the world and the political ability to be an actor within it."[510] Such a network of connections of parts of states is built on the following premises, which according to her, have been distilled from empirical data:

- The state is not the only actor in the international system but is still the most important actor;
- The state is not disappearing, but it is disaggregating into its component institutions, which are increasingly interacting principally with their foreign counterparts across borders;
- These institutions still represent distinct national or state interests, even as they also recognize common professional identities and substantive experience as judges, regulators, ministers and legislators;
- Different states have evolved and will continue to evolve mechanisms for reaggregating the interests of their distinct institutions when necessary. In many circumstances, states will still interact with one another as unitary actors in more traditional

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[507] *Id.* at 10.

[508] *Id.* at 34.

[509] *Id.* at 267, *quoting* ABRAHAM & ANTONIA CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 4 (1995)

[510] *Id.*.

ways;

- Government networks exist alongside and sometimes within more traditional international organizations.[511]

J. THE DISAGGREGATED STATE: *DUGUIT REDUX*?

If Dooyeweerd's critique of the thought of the French constitutionalist Leon Duguit (1859-1928) is brought to bear on Slaughter's own notion of the "disaggregated state", we can see that the latter's notion of the state strikes us as a curious variation on the age-old proposal broached by the French thinker. So I will use Dooyeweerd's discussion of Duguit's syndicalism to shed light on Slaughter's proposal to disaggregate the state. Duguit was the originator of what Dooyeweerd called a theory of "political pluralism," or the theory, as introduced by the French legal theorist, that conceived of the state as a federation of mutually independent syndicates or corporations, each administering a particular branch or function of public services.[512]

Duguit based his theory of the state on Emile Durkheim's positivist view of social development, where the "solidarity by division of labour" gives rise to an organic pattern of differentiated societal organization according to different industrial and occupational syndicates, each of which fulfils a particular social task or function.[513]In Duguit's scheme, each branch is subjected to an economical viewpoint while the political function proper, the executive function backed up by military power – has to be organized separately, though it is charged with the task of weighing the interests of the whole against each of the governmental syndicates.[514] Dooyeweerd says that Duguit, while he keeps on referring in his theory to the state, in principle really "want[ed] to eliminate the structure of the latter from the internal administrative activity of the projected syndicalist federation." [515]

The famous French jurist did not view the State as a *res publica*, that is, in the sense of an organized sovereign community endowed with a legal personality. Instead, he reduced it to nothing but a factual relation of force between stronger and weaker individuals, so that there is no single legal authority or competence in

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[511] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 18.

[512] *Id.* at 464. Koskenniemi concurs with Dooyeweerd that Duguit, a collaborator and friend of the famous sociologist Emile Durkheim, borrowed from the latter's theory of the division of labor to construct his own syndicalist system. Says Koskenniemi: "[i]n Duguit's view, Durkheim's 'brilliant' theory on the division of labor had demonstrated how interdependence and solidarity emerged between groups of workers that carried out different types of work and provided for different types of need." I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 301.

[513] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 460.

[514] *Id.* at 464-465.

[515] SLAUGHTER, *supra* note 496, at 465.

the Duguit's state, nor can it demand obedience from its constituent elements in a normative sense. [516]

First of all Slaughter is to be commended for bringing to light empirical data about how various individual government institutions now interact with their counterparts abroad or above them, alongside more traditional state-to-state interactions in a network of networks. The main chapters of her book are a demonstration of how these interactions are now happening or may happen in executive, judicial and legislative networks. Yet in a crucial way, this strength is also the weakness of her theoretical project, because it shows how she manages to confuse the state with governmental institutions, or seems to have only a vague notion of what a state is, her references to a "unitary state, and her attempt to be guided by no more than empirical data in her legal analysis notwithstanding.

Just what does she mean by the state? Her theory, in fact, treats the state in an identical manner with that of Duguit's, with the added novelty that in her scheme, the state's various parts is now enmeshed in a network of parts of other disembodied states. Her confusion is evident when she speaks of networks of governmental institutions/officers of various government agencies working hand in hand with their counterparts elsewhere and at the same time, says that for sure, in the network, unitary states would still be interacting as their old unitary selves, in a world where military and economic powers still mattered; indeed, governmental networks, she says, "are not likely to substitute for either armies or treasuries." [517] Elsewhere in the book, she says:

> The conception of the unitary state is fiction, but it has been a useful fiction, allowing analysts to reduce the complexities of the international system to a relatively simple map of political, economic, and military powers interacting with one another both directly and through international organizations. But today, it is a fiction that is no longer good enough for government work. It still holds for some critical activity such as decisions to go to war, to engage in a new round of trade negotiations, or to establish new international institutions to tackle specific global problems. But it hides as much as it helps.[518]

1. The State as Fiction or as Res Publica?: the Perils of Solidarism

Like the French jurist of an earlier era, she does not view the State as a *res publica*, that is, in the sense of an organized sovereign community endowed with a legal personality. But she cannot provide a convincing account of just what a state is other than saying it is a fiction (a fiction, we might add, with very real powers

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[516] *Id.* at 461.
[517] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 461
[518] SLAUGHTER, *supra* note 496, at 32.

and effects on people's lives!). The premises she lists as the springboard for her theory evidently shows how she conflates the state with governmental institutions. First, she calls the unitary state a useful fiction and then in the same breath, says that it is still necessary for some "critical activity." It seems then that she is talking here of essentially different entities at the same time: a unitary state that exists contemporaneously with its various parts.

In its reincarnation, she reduces the state into the atomistic workings of officers who run its different branches and here nominalistic tendencies show clearly. These officers are then subjected to what Slaughter calls national and global responsibilities, such that as representatives of state (or government) institutions embedded in the global network, they now answer to both domestic and global constituencies. In the language of international law, state responsibility becomes individual responsibility.

This is in many ways a mirror of Duguit's syndicalist system, where various parts of the state perform tasks according to their specific purposes (except that in the main, they are qualified by socio-economic factors). The aims of her scheme is laudable, as it is meant to put in place a seemingly more effective means of checks and balances against the absolutist unitary state's abuse of power – a means that is decidedly international this time – and we can sympathize with her aim. Yet, it must be said that her solution, in Dooyeweerdian terms, fails to properly appreciate the internal structural principle of the state. This is because, in the very first place, hers is a theory of the state without a state-idea.

The implications of her theory are truly radical: there is a unitary state with a legal personality all its own that is then disaggregated into officers of various governmental agencies acquiring separate legal personalities, with the aim of holding them accountable both under domestic and international law for their actions. Lost in the flurry of this dismemberment of the state are key questions of just what the state is, how we distinguish it from other non-political institutions, and what the state is for; however it must also be said that under present international law, even without the disaggregation of the state, there is now a system in place since the Nuremberg trials of holding individuals responsible for grave breaches of international law, although at present, these are still confined primarily to the fields of international criminal law, international human rights law and international humanitarian law). Slaughter herself seems to have an intuitive grasp of the need to distinguish the state from other institutions but she cannot, in the limitations of her theory of the state (or its lack of a clear idea of the state), say for sure just where to begin. Hence she can speak of the continuing need in some way for a unitary state and at the same point to a different ensemble of its disembodied parts functioning in their diverse ways and aims; she speaks of the state as a "useful fiction" but on the other hand, she says that it is disaggregating in a very real way, as if the state has a real physical presence that is then disembodied. Does she mean that the fiction that is the state is being erased in a metaphorical way? It is hard to accept an affirmative answer, especially when she then says that the fiction gives way to very real flesh-and-blood governmental functionaries now

engaging in countless interconnected horizontal and vertical networks of similar governmental functionaries from other jurisdictions.

2. The State in Search of a Definition in International Law

Perhaps, this should not be surprising, given the reluctance prevalent in international law itself to define what the state is. As Crawford notes, until now, the ILC has yet to make any real progress on the topic of recognition of States and governments since it began its work in 1949. The best it can come up with in its Draft Commentaries is "fine circularity"[519] – the term "State", it said in the Commentaries, "is used... with the same meaning as in the Charter of the UN, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations: that is, it means a State for the purposes of international law."[520] Of course, none of the legal texts the Commentaries refer to provide any definition of what the state is! Crawford notes further that subsequent ILC drafts would fail to define the term;[521] even the General Assembly's definition of "Aggression" does not provide a definition but resorts to the same evasive procedures:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.
>
> Explanatory Note: In this definition the term "State" (a) is used without prejudice to questions of recognition or to whether a State is a member of the UN, and (b) includes the concept of a "group of States" where appropriate.[522]

Werner precisely makes that methodological move – appeal to international law – in an attempt to get past the problems posed by the concept of state sovereignty as traditionally defined. Unable to recognize the material principles that govern the sphere occupied by the state as a public legal community, he consigns in a Kelsenian manner the task of defining the limits and bounds of sovereignty to international law, saying that international law does not only grant states certain rights and powers but also imbues them with an obligation to respect the rights and powers of other states.[523] The state he takes as an "abstract entity" whose very abstracted nature "makes it difficult, if not impossible, to answer the question what state sovereignty *is*."[524] He explains:

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[519] I CRAWFORD, STATES, *supra* note 245, at 39.

[520] *Id.*, *quoting* ILC Ybk 1956 II, 178, 192.

[521] *Id.*

[522] I CRAWFORD, STATES, *supra* note 245, 39-40, *quoting* GA Res 3314 (XXIX), Dec. 14, 1974 (adopted without vote).

[523] Werner, *supra* note 3, at 156.

[524] *Id.*

> There is not something in reality simply corresponding with sovereignty; something which is so to say mirrored by the concept of sovereignty. Rather than a concept describing a pre-existing reality, sovereignty is a scheme of interpretation, used to organize and structure our understanding of political life. Instead of looking for a corresponding reality, therefore, it is more fruitful to reconstruct the use and function of the concept of state sovereignty in international (legal) discourse.[525]

As Crawford notes:

> It may be asked how a concept as central as statehood could have gone without a definition, or at least, a satisfactory one, for so long. This may be because the question normally arises only in the borderline cases, where a new entity has emerged bearing some but not all characteristics of statehood. The resulting problems of characterization cannot be resolved except in relation to particular facts and circumstances. But, it may be asked, are there any legal consequences that attach to statehood as such, which are not legal incidents of other forms of international personality? To put it in another way, is there a legal concept of statehood at all or does the meaning of the term vary indefinitely depending on context?[526]

So sovereignty, like the state, is really nothing more than legal fiction that must be used to advance the interests of international law. This of course, assumes that international law pre-existed the state system, which is historically untenable. This could only happen because of the inability of much of contemporary thinking in international legal theory to grasp the inner structural principle of the state. Just as Dooyeweerd predicted, the result is a perennial crisis in the theory of the state; this time, globalization is said to make significant inroads into the territory that properly belongs to the state so that the state as we knew it must, and in fact has come, to an end. Yet as Dooyeweerd says, there may yet be some value to be had from such a crisis. For one, these developments show that no state can exist all by itself. The

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[525] *Id.* at 155. Werner says that the recurring controversies surrounding the concept, as in the contemporary debates about globalization, humanitarian intervention, human rights and international criminal law, shows its enduring importance, as well as underlines the fact that its meaning is inseparable from developments in international law as a whole. *Id.* at 156.

[526] I CRAWFORD, STATES, *supra* note 245, at 40. Instead of providing a definite description of the ontology of the state, his solution, paralleling Werner's method, is to present a list of what states may do or not do under international law, summarized in "five principles" that deal with the "exclusive and general legal characteristics of States", or the core of statehood (subject of course to certain qualifications and exceptions). These principles are, namely:

> (1) In principle, states have plenary competence to act, make treaties, and so on, in the international sphere, which reflects one meaning of the term "sovereign";
>
> (2) In principle, states are exclusively competent with respect to their internal affairs, based on Art. 2(7) of the UN Charter;
>
> (3) In principle, states are not subject to compulsory international processes, jurisdiction or settlement without their consent, given either generally or in the specific case;
>
> (4) States are regarded as "equal", in accordance with Art. 2(1) of the UN Charter.
>
> (5) Derogations from these principles are not to be presumed so that in case of doubt, an international court or tribunal will tend to decide in favor of a state's freedom, in keeping with the *Lotus principle*. *See Id.* at 40-45.

absolutist state cannot be truly absolutist, given the increased interdependence that a highly integrated world economy now requires, or the menace of terrorism or the reality of global warming, for that matter.

3. Absolutizing The Social

Slaughter, it seems, is in the same bind as Werner is. Yet, parallels between Slaughter's theory and Duguit's solidaristic sociological view of the state are unmistakable, although if there is any influence at all by the latter on the former, Slaughter does not show it in her rather extensive 14-page bibliography at the end of her book. As shown by Koskenniemi's own account of Duguit's solidarism, the French constitutionalist unrelentingly attacked in his time the prevailing German conception of the state as a sovereign jural personality and of public law as an effect of state will, calling both "metaphysical fictions."[527] In his 1901 *magnum opus*, Duguit wrote:

> Here are the facts: Individuals with common needs and different inclinations who exchange services, who have always lived together and have always exchanged services, who by virtue of physical constitution cannot avoid living together and exchanging services, individuals of whom some are stronger than others, and of whom the strongest have always exercised constraint on weaker ones, individuals that act, and have consciousness of their actions. Here are the facts. Beyond them, there is only fiction.[528]

Such nominalism was based on a social scientific ambition Duguit claimed for the legal sciences. Facts – of interdependence and solidarity – and nothing else, a mantra that betrayed his intellectual debt in many ways to his contemporary, compatriot and friend, Durkheim. For Duguit, Koskenniemi writes, "[t]he State was, as it were, wiped away from reality by a conceptual *fiat*. What was real was always and already cosmopolitan: the complex (but single) network of interdependencies into which individuals were born and lived their lives."[529] Ultimately, in Duguit's syndicalism, the distribution of public functions to the *syndicats* would pave the way for the dismantling of the state and thus free society from that "false and dangerous political system based on sovereignty and the personality of the State."[530]

In terms of the Dooyeweerdian vision, Slaughter abstracts and absolutizes one aspect of state functioning – the social aspect – and turns it into the full explanation for what the state (or its disembodied parts) is supposed to do (the equivalent of Duguit's solidarism of individuals). Slaughter needed this device to address fears of the absolutist state, which is apparently her definition of state

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[527] I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 298-299.

[528] LEON DUGUIT, ETUDES DE DROIT PUBLIC: L'ETAT, LE DROIT OBJECTIF ET LA LOI POSITIVE, Vol. 1 6 (1901), *quoted by* I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 299.

[529] I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 299 [italics in the original].

[530] 1 LEON DUGUIT, ETUDES DE DROIT PUBLIC: L'ETAT, LE DROIT OBJECTIF ET LA LOI POSITIVE, 147 (1901), *quoted by* I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 244, at 303.

sovereignty. The result is that the state is indeed erased and absorbed into a giant whole of inter-connected networks.

Yet in the same Dooyeweerdian vision, it can in fact be shown how various societal structures may be related to one another *externally*; such relationships may give rise to variable social forms (as in the case of states entering into an agreement among one another to establish a supra-national organization as far instance, the World Bank or the Asian Development Bank, or the European Union, for that matter). Such relationships do not and cannot collapse into a part-whole relation, inasmuch as the societal structures that come together to establish the social form does not alter their characteristic inner nature. The World Bank may require the debtor-state to follow certain economic prescriptions but it does not mean that the state has been transformed into a mere part of the greater whole that is the Bank. In other words, the individual state does not cede its inner structural principle to the new societal form. It does not lose its sovereignty within its own sphere; it does not lose its nature as a state (although it can well be said that the economic policies that the Bank imposes do have important ramifications for the life of the state and its citizens). In Dooyeweerdian terms, what results in such economic prescriptions, are enkaptic relations between a debtor-state and the World Bank. There is no question about it that globalization requires new modes of governance; but it does not in any way diminish the proposition that the state, as a monopolistic organization of power over a territory, integrates into its sphere a public legal community, guided by the norm of public justice. In the confluence of technology and changing ways of life, the viability of such a public legal community would certainly require new partnerships, new modes of governance as doing justice to the needs of the public legal community requires. Globalization does not erase the state; on the contrary, it only highlights the need for the state to adapt to the changing global situations as it pursues the task of public justice. This could mean, as Slaughter suggests, opening itself up to various international and trans-national arrangements that would assist it in its task.

4. The State: Beyond the *sein* and *sollein* Divide

Slaughter's theory is the *sein* to Werner's (and Crawford's *sollein*); in other words, the two irreconcilable tendencies in theorizing on the state that Dooyeweerd notes, spring from the failure to recognize the inseparable structural connection between its two characterizing functions, the historical and the jural.[531] As Dooyeweerd argues, these tendencies have led to a dualistic concept of the state – the sociological (the *is*) and the jural (the *ought*). He explains thus:

> These concepts are logically anti-thetical; their opposition has led to a fictitious problem concerning the relation between state and right which, of course, are incomparable.

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[531] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97, at 89.

> Positivist sociologists, by expunging all normative perspectives, believed that they could view the state as a sovereign territorial power organization between upon fulfilling merely subjective, strictly variable political goals. This approach compelled jurists to construct their own normative concept of the state that would have a [jural] significance. Furthermore, this sociology of the state erased a fundamental distinction between undifferentiated organizations and the state organization.[532]
>
> ....
>
> A result of so-called critical epistemological reflection in the general sociological theory of the body politic was the reduction of this organized community to a subjective synthesis of a multiplicity of socio-psychical relations into a teleological unity....which was supposed to function only in human consciousness, without any correspondence to reality. The so-called pure legal theory of the State, on the other hand, even resolved the body politic as an organized community into a logical system of legal norms, which should be conceived apart from any causal sociological viewpoint. This entire epistemological reflection remained oriented to a naturalistic, merely functionalistic and individualistic conception of reality. All individuality structures in human society [that is, the various societal structures], were in principle levelled down, and the organized communities were resolved into a formal synthesis of elementary relations. The material content of this formal synthesis was completely abandoned to the historicistic view.[533]

The above observations remain as relevant as when they were first broached by Dooyeweerd a little more than 50 years ago.

In Dooyeweerd's scheme, states are not the ultimate reality. They are special in the sense that they perform a special task in historical development as jurally-qualified entities. For Dooyeweerd, the sphere sovereignty principle dictates that what is internal to each sphere is determined by its leading function and its structural nature. The limits to the state are found in the structural principles that govern its functioning: "[t]he state is led by norms of justice, not ethics; the accomplishment of public justice is the structural principle of the state, not the enforcement of non-public morals."[534] Within the sphere of that task, the state is sovereign, but so are the other non-political entities in their own spheres of competence. This means that the state may in fact require the support of non-political spheres for the viability of public life. (The theme of partnerships among different public legal communities – or Dooyeweerd's inter-communal legal order – will be explored in the next chapter).

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[532] *Id.*

[533] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21, at 385.

[534] I CLOUSER, *supra* note 94, at 316.

K. CONCLUSION

In this chapter, first of all, the foundations of contemporary ideas of the state within international legal theory were laid bare, showing, if in a rather broad sweep, the marked influence of nominalism in much of theoretical reflection on the state as an entity in international law. It is an influence that lingers even in contemporary deliberations about the so-called end of the state in the era and globalization and to which a Dooyeweerdian social ontology presents itself as an attractive alternative.

Yet the historical embedded-ness of state formation is a strong empirical argument against Chaplin's proposed reformulation of the state within the framework of reformational philosophy. A proper appreciation of the state's historical founding function must be based on a robust view both of a good creation and of a good Creator and I have demonstrated how an un-Augustinian view provides an answer to Chaplin's challenge to Dooyeweerd's Augustinian account for the existence of the state (first critique) and of justice as its qualifying function (third critique). The inconsistencies Chaplin sees in Dooyeweerd's account can be reconciled by positing the state as a divine response to an anticipated (determined or foreseen, in Augustinian terms) human contingency instead of as an *ex post facto* imposition. Within international law itself, there is more than ample historico-empirical support for the indispensability of the state's historical founding function, as Dooyeweerd formulates it *contra* the Thomistic account.

The corollary of this are the principles of *uti possidetis* and self-determination in international law, which present a formidable challenge to the logical end of Chaplin's proposal to let go of the state's historical founding function, that is, the widening of the state's territorial reach, ultimately giving birth to something of a super-state (a "mature state", in Chaplin's terms). Dooyeweerd's insight into the very roots of state formation is somehow confirmed in the historical process of decolonization, state break up and state reorganization.

It is Chaplin's second critique which shows much promise. Along this line, I explored the possibility and viability of Chaplin's proposal to firmly ground democratic practice as an essential ingredient of the unfolding of the state's structural principle, borrowing from developments in international law itself, notably, calls towards democratic entitlement and concern for the international legitimacy of states in relation to the issue of statehood. It is here where Dooyeweerd's theory of structural differentiation proves relevant.

This discussion paved the way for a study in contrasts between prevailing notions of state sovereignty and Dooyeweerd's notion of sphere sovereignty as applied to the state's differentiated responsibility in the context of contemporary discussions on globalization. Here, I have detailed how international law and international legal theory seem unable to grasp just what the state is, see-sawing between a nominalism of the state as the only true sovereign, and a nominalism of

individuals as the basic elements of the international legal order. It is here where the strengths of Dooyeweerd's transcendental-empirical approach to the theory of the state are demonstrated. Dooyeweerd's critique of the theory of the state without a state-idea continues to be relevant, as demonstrated in this chapter's treatment of Slaughter's disaggregated state. Here I demonstrated what happens when, in response to empirical developments, theories of the state without a state-idea, because unable to grasp the material principles on which the sphere of the state is founded, simply proceed to mangle the state beyond recognition. One form of nominalism (the state as the ultimate measure of political reality) gives way to another form of nominalism (the individuals as the basic elements of society). Slaughter's disaggregated state, it turned out, is an updated version of Duguit's discredited syndicalist solidarism. Slaughter is not the first to proclaim the death of the state; she will not be the last, so long as theorists continue to reject the normative structural principle of the state and insist on a purportedly empirical examination of the state that is nevertheless founded on a certain untheorized theory of the state without a state-idea.

IV. RE-CONFIGURING THE INTERNATIONAL LEGAL ORDER: DOOYEWEERD, THE INDIVIDUAL, THE INTERNATIONAL CIVIL SOCIETY, THE "INTERNATIONAL COMMUNITY" AND THE UNITED NATIONS

As soon as the inter-individual and inter-communal relationships are viewed as intra-communal, and the structural idea of internal sphere-sovereignty of the different orbits of societal life is replaced by those of autonomy or functional decentralization, there is no fundamental and radical defense against the totalitarian systems.[535]

The foundation of law is not force but justice.[536]

A. INDIVIDUALITY V. COLLECTIVITY: LAUTERPACHT'S EXAMPLE

"An age overestimating the individual," Dooyeweerd notes, "is necessarily followed by one overestimating the community."[537] The reverse could also well be

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[535] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21 at 603.

[536] Philip Allot, *State Responsibility and the Unmaking of International Law* 29 HARVARD INT'L L J 16, 24 (1988)

[537] XII HERMAN DOOYEWEERD, *The Relation of the Individual and the Community from a Legal and Philosophical Perspective*, *in* THE COLLECTED WORKS: ESSSAYS IN LEGAL, SOCIAL AND POLITICAL

true. The renowned British international law jurist Sir Herscht Lauterpacht, in the wake of the horrors of the Nazi regime (which he had personally experienced in the extermination of members of his family in the *shoa*[538]), would reduce the sovereign state to a mere "administrative convenience"[539] that had become a monster, an "insurmountable barrier between man and the law of mankind."[540]

His strategy, according to Koskenniemi, was to find a spiritual counter-force to the menace of unbridled state sovereignty; this he established in human rights. In his work *International Law and Human Rights*, Lauterpacht unleashed a critique of "[t]he orthodox positivist doctrine... that only States are subjects of international law"[541] based on what Koskenniemi calls a revivalist natural law argument: natural rights – that is, individual human rights – are rooted in the Western legal and political thought, from Greek philosophy to modern Western constitutions.[542]

From the perspective of reformational philosophy, we can agree with his assessment as regards the narrow view of the subjects of international law (as we shall also see in the succeeding sections of this chapter). However, we can likewise note that his solution to the problem of the absolutist state is to place an external limitation – individualistic human rights – which unfortunately cannot properly conceive of its internal structural principle. What results is an unhappy opposition between the state and the individual, which fails to properly recognize their respective competencies, as well as the existence of other spheres in society. We will look at these seemingly irreconcilable doctrinal positions in detail below.

Yet, as Koskenniemi notes, Lauterpacht's attitude towards the state was, at the least, ambivalent, inasmuch as he himself supported the creation of the state of Israel in 1948[543] (a return in some way to the Zionism of his youth in Galicia[544]) and offered his services to the British state to defend British sovereignty "to the extent that it can be used to attain his preferred outcomes."[545] This shows a basic intuition on his part that that the sphere belongs within its own sphere.

As we have already seen in the previous chapter, from a Dooyeweerdian perspective, it is a sphere of competence to which we cannot give justice by

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PHILOSOPHY, SERIES B, VOL. 91 (A. Wolters trans. & John Witte Jr. & Alan M. Cameron eds. The Edward Mellen Press, 1997)(1925) [hereinafter, XII DOOYEWEERD, *Individual and the Community*].

[538] I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 243 at 388. Lauterpacht's turn to human rights would herald what has been billed as the neo-Groatian renaissance in international legal theory. On this latter point see, NIJMAN, *infra* note at , which vigorously questions Koskenniemi's interpretation of Lauterpacht's intellectual project.

[539] *Id.* at 396, *quoting* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 68 (1950)

[540] *Id*, *quoting* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 77 (1950)

[541] *Id.* at 193, *quoting* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 6 (1950)

[542] *Id.* at 391.

[543] I KOSKENNIEMI, GENTLER CIVILIZER, *supra* note 243 at 396. In fact, Lauterpacht participated in the drafting of Israel's Declaration of Independence.

[544] *Id.* at 369-372.

[545] *Id.* at 396 [fn. 209].

consigning the state to the category of mere administrative convenience. Yet Lauterpacht's position is characteristic of contemporary liberal perspectives on international law.

In the previous chapter, we saw how nominalism pervades so much of international law. Either the state is taken as a monadic individual or it is reduced to a social contract among its basic elements - the free and autonomous individuals. In either case, a plurality of societal spheres cannot be properly taken account of. Either the state eclipses everything else or everything else is explained away by recourse to atomistic individuals as the ultimate explanation of social and political reality. Hence, the now proverbial opposition between the individual and the state (on the level of domestic politics) or state sovereignty versus international community (on the level of international relations).

In this chapter, I will continue the discussion of contemporary critiques of state-dominated international relations, which highlight both the erosion of the power of the territorial state as well as the calls for a more inclusive "international community". Hence the tension between state individuality and the notion of a wide-embracing international community that now includes non-state actors as active participants.

I will first discuss how much of contemporary international legal theory looks at this conflict of positions. Then I will show in Dooyeweerdian social ontology, that various associational spheres, along with individuals, are themselves bearers of rights. Important in this discussion is the need in international law to rethink notions of international legal personality as well as the sources of international law. Dooyeweerd's social ontology offers a viable if truly radical account of the place of non-state actors in international law that is not available in contemporary international legal theory.

On this point, I will investigate the possibilities and limits of civil society groups, families, churches, associations and the like, along with individuals, as actors/participants in international law. I will show how Dooyeweerd's notion of societal sphere sovereignty lays bare the misconceived foundations of an "international community." Here, an examination of Dooyeweerd's notion of an "inter-communal legal order" - albeit admittedly preliminary in nature - comes to the fore.

1. Between Two Equal Rights?

Koskenniemi argues that the discourse on the international legal order has been characterized by a binary opposition, one that, he stresses, is an irreconcilable doctrinal contradiction. Indeed, the main thesis of his path-breaking 1989 book *From Apology to Utopia: The Structure of International Legal Argument*, is that international law, insofar as it comes under the influence of liberal political theory, is an assemblage of contradictory, if not ultimately indeterminate set of doctrines. The structure of international legal argument, he says, is such that doctrine

> is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice versa* without being able to establish itself permanently in either position... This... is ultimately explained by the *contradictory nature of the liberal doctrine of politics.*[546]

For much of the book, Koskenniemi subjects international legal discourse into a withering critique that lays bare for all to see how such discourse travels in opposites, that is, in terms of "descending" and "ascending" arguments, each of which presents an equally persuasive case so that it is impossible to reconcile them.[547]

The first reaches down to "justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, superior, to State behavior, will or interest" as the ultimate bases for order and obligation in the international sphere. The second however, looks up precisely to the same State behavior, will or interest as justification. [548]

He notes that what obtains in the local level is true in the international level. The position is seen in how liberal doctrine assumes a given conflict between individual freedom and communal order and takes as its solution by thinking of one in terms of the other.[549]

Hence it is argued that a legitimate community is one which arises from a freely arrived upon order by individuals and legally protected freedoms are those which the community agrees on.[550] In the international legal order, this means a world order which can construct a community without falling into totalitarianism and which provides for autonomy without degenerating into furthering egoism.[551]

The individualist, he says, lays stress on the "ultimate freedom" of the State to participate in any project to build a community, where a beneficial order is one based on "freely concluded cooperative arrangements" realized out of the State's "enlightened interests." Inasmuch as Koskenniemi, a social constructivist, rejects any appeal to the transcendent, no ultimate value or common interest (the last refuge of the communitarian) is considered. Yet the individualist's problem is that he cannot, on his insistence on the absence of common values, explain in the first place why States should enter into a cooperative arrangement even where it does not support self-interest.[552] This is because to do so – that is, to say that cooperative action does enhance the international order – means to accept that "there do exist extralegal forces of interdependence or history which bind States

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[546] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 46 [italics in the original].
[547] *Id.* at 40-41.
[548] *Id.*
[549] *Id.* at 423.
[550] *Id.*
[551] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 424.
[552] *Id.* at 429

together and explains why a *bellum omnium* does not necessarily have to prevail between them."[553]

Ultimately, in Koskenniemi's eyes, the individualist is forced to resort to a communitarian position. On the other hand, the communitarian cannot explain "why her postulated community would avoid becoming a negative utopia otherwise than by referring back to freely concluded agreements between States."[554] For the moment she does this, he says, she steps into the shoes of the individualist: for, to be able to successfully argue for such a community, she first needs to assume "that the existence of free and individualistic states with a given right to make a social order of their liking is prior to any community between them."[555]

And so we come to what he says is the "standard discourse"[556] about the international legal order, that of irreconcilable opposites – a law of coordination v. a law of subordination; vertical v. horizontal; international v. transnational; world law v. inter-state law; charter system v. westphalian system, etc.[557]

As the persistence of these dichotomies – and the corresponding arguments – suggests, neither of the polar opposites occupies a definite superiority vis-à-vis the other. Each seems defensible only if it receives support from its opposite; how can competences be allocated in boundaries established in a "horizontal system" without the existence of "vertical criteria" to which States would have to be bound? Or, conversely, how could such values exist or at least become known in any other way than through "horizontal" or "coordinated" State action? And so on.[558]

The dilemma leaves the international legal theorist moving ("happily," Koskenniemi says with sarcasm) from one side where she argues for the inevitable existence of independent states and into another where she argues for world community, world economics or the need for interdependence.[559]

Of course, the result is fatal, and this, not only to the international legal scholar's intellectual pride. From a constructivist's point of view – Koskenniemi's at least – laws cannot be based on any material (that is, transcendental) principle of justice (since it is ultimately a subjectivist argument that cannot be objectively verified).

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[553] *Id.*
[554] *Id.*
[555] *Id.*
[556] *Id.*
[557] *Id.* 429-430.
[558] *Id.* at 430.
[559] II KOSKENNIEMI, APOLOGY, *supra* note 257 at 430.

The best thing that an international lawyer can do is to describe this unhappy state of affairs in a "purely formal way," in other words, "without regard to anybody's ideals about the desirable limits of autonomy or kinds of community." Law is only allowed to rely on "pre-legal freedom and autonomy of States," and nothing else. But such a stance is vulnerable to critique from substantive perspectives. "Immediately as it is given concrete content – as soon as it becomes a programme of what to do – it will appear to overrule somebody's preferred substantive view and seem illegitimate as such."[560] The poor international lawyer is caught in the cross-hairs of indeterminacy. As soon as she appeals to give substance to autonomy, she faces objections that she is in support of unbridled egoism; yet as soon as she attempts to enhance community will, she is subjected to criticisms that she is supporting a creeping authoritarianism.[561]

Koskenniemi's verdict:

> [I]nternational law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and under-legitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behaviour (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism).[562]

Of course, underlying this binary opposition is the unquestioned nominalistic presupposition that effectively erases all other societal spheres from the equation. In addition, Koskenniemi's account is sustained by an unremitting rejection of the normative as the merely subjective.[563] And so with Mieville, it may be asked, between apparently equal rights, how do we decide – by force, as it were? Koskenniemi's analysis-paralysis notwithstanding,[564] many other legal scholars persist in their individualistic account of international law.

A further complication arises when a new set of participants in international legal relations – non-state actors like non-governmental organizations (NGOs) – get in the way of this *state v. individual, state v. community* discourse.

2. Anno Mirabilis: the Rise of Non-State Actors in International Law

The year 1985 may well be considered an *anno mirabilis* for non-state actors – or at least, for non-governmental organizations (NGOs) – in international

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[560] *Id* at 431.

[561] *Id.*

[562] *Id.* at 48.

[563] Koskenniemi's Foucauldian history of the liberal doctrine prevalent in international law, impressive as it is, simply does not go deeper into the nominalistic philosophy that informs many if not most of the thinkers he deals with. *See Id.* at 50-130.

[564] To be fair to the celebrated legal scholar, I have also earlier noted that he seems to have changed his mind about the whole thing and now calls for a modest formalism. For a critique of his newest book-length effort already referred to in the previous section that surfaces this new tendency in his thinking, *see* Robert Cryer, *Déjà vu in International Law* 65 MLR 931-949 (2002)

law. It was the year of the *Rainbow Warrior* incident, an incident that, while on the surface, was a disastrous end to a spectacular environmental campaign launched by the environmental NGO Greenpeace, in the long run, also signified an important break in how states usually comport themselves in their relations with what are traditionally considered as mere objects in international law.

In the words of the legal scholar Peter Malanczuk, the *Rainbow Warrior* affair would lead to "the first international case in history of an agreement between a sovereign state and an NGO to submit a dispute to arbitration."[565] The affair arose from the involvement of French secret agents in the bombing of the Greenpeace ship *Rainbow Warrior* in the harbor of Auckland, New Zealand on July 10, 1985. The ship was supposed to sail for the Mururoa Atoll in French Polynesia to protest the continuing nuclear tests being conducted by the French military in the area, when it was scuttled by the French security men in an undercover operation. The bombing sank the ship and killed a crewman.[566]

A diplomatic row erupted between New Zealand and France over the incident, leading to arbitration proceedings.[567] On the side of the state-to-state proceedings, France also entered into settlement proceedings with Greenpeace and the family of the dead crewmember. France settled with the family for 2.3 million francs in reparations as well agreed to reimburse the insurers.

As to the claims of Greenpeace itself, when settlement negotiations failed, both parties referred the matter to an arbitration panel, which in the end, awarded the international NGO US$ 8,159,000 in damages and other charges.[568] With that, a new era in international law and international relations dawned – the era of the international civil society, or of mediating structures and institutions that now seem ubiquitous in the international arena.

The next section will discuss how some leading contemporary international law theorists account for these non-state actors that answer to some form of group rights. As a narrative of group rights, much of it however, ultimately rests on an individualistic-nominalistic account.

3. Thomas M. Franck: Group Rights in the History of International Law Jurisprudence

Two strands of thought have historically sought recognition for some notion of group rights under international law, according to the legal scholar Thomas M. Franck, who may be classed among those who attach a prime importance on the individualist interpretation of international law. Yet in both

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[565] MALANCZUK, *supra* note 251 at 98.

[566] *Id.* at 98.

[567] *See* Rainbow Warrior Arbitration (New Zealand v. France) (Arbitration Tribunal) (1986) 26 ILM 1346.

[568] MALANCZUK, *supra* note 251 at 99.

strands, group rights as understood have primarily been defined along the lines of ethnic, tribal or minority claims.

The first strand, the integrationist, has articulated a discourse for equal opportunity by way of affirmative action while the second has fought for an independent state, or if that was not possible, for some form of autonomy.[569]

The post-World War II era saw the ascendancy of the integrationist wing, as exemplified by the civil rights movement in the US. The separatist wing, on the other hand, saw its heydays in the inter-war period following the establishment of the League of Nations in 1919. Here we see some important pronouncements made by the Permanent Court of International Justice (PCIJ), predecessor to the present-day World Court, the International Court of Justice under the UN System.

Indeed, the end of World War I also meant the collapse of the Central European empires and rise of new nation-states. A "partial" redrawing of the European political terrain along national-ethnical lines gave rise to the difficult issue of displaced minorities who were not powerful enough to successfully claim self-determination for themselves.[570]

To address this issue, the League of Nations set in place a treaty system to protect or allow the minorities to exercise some degree of autonomy in countries where they could not quite fit – "an internationally mandated and monitored minority group rights imposed by the international community on states forced to accept some diminution of traditional sovereignty."[571]

It meant countries like Austria, Hungary, Bulgaria and Turkey pledging to provide legal protection to minorities within their territories. [572] In lieu of statement, according to Franck, these groups were granted some degree of autonomy. It meant that other than individual rights granted to their members, as groups, they were also allowed to maintain separate cultural, educational, religious, charitable and sometimes, legal institutions and practices.[573] Three major cases were decided by the PCIJ weighing how far these group rights could be recognized and implemented according to the treaty system.

Three Cases under the League of Nations

i. Acquisition of Polish Nationality

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[569] III THOMAS M. FRANCK, THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM 225 (1999) [hereinafter, III FRANCK, EMPOWERED SELF]

[570] *Id.*

[571] *Id.*

[572] *Id.* at 229.

[573] *Id.*

In the first case, *Acquisition of Polish Nationality*,[574] judges resolved the issue of access to minority education. In this case, filed by Germany under the German Polish Convention relating to Upper Silesia of 15 May 1922,[575] Poland had set in motion an inquiry into the "authenticity of applications for admission to the minority schools and to ascertain whether such applications emanated from persons authorized to submit them" on behalf of their children.[576]

The controversy arose when Polish authorities, in their eagerness to implement integration, claimed the right to refuse access to German education to anyone they deemed insufficiently German. This was challenged in court by Germany. The PCIJ judges ruled for the plaintiff, saying that every person had the right to "freely declare according to his conscience and on his personal responsibility that he does or does not belong to a racial, linguistic or religious minority... " although "these declarations must set out what the author regards as the true position." They added that these declarations are not subject to verification, dispute, pressure or hindrance of any nature from authorities.[577]

Franck opines that while this decision supported group autonomy, it as well ratified the right of individuals to decide for themselves, on reasonable grounds, whether or not to be identified as part of a group.[578] "Over time this solution was perceived as more threatening to group-interests than to the sovereign rights of the state" inasmuch as it left so much to the discretion of the individual whether or not to be identified with the group in question.[579]

ii. The Greco-Bulgarian 'Communities'

In the second case – *The Greco-Bulgarian 'Communities'*[580] dispute – PCIJ judges accorded rights to both communities and individuals under the *1919 Convention Between Greece and Bulgaria Respecting Reciprocal Emigration*.[581] Under the agreement, both parties were under an obligation to facilitate the right of their subjects who belong to racial, religious or linguistic minorities to immigrate freely to their respective territories, allowing them to take with them personal and community property, and to be compensated for immovables. Under the terms of

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[574] Advisory Opinion no. 7, 1923 PCIJ (ser. B) no. 7, at 13-16, cited in III FRANCK, EMPOWERED SELF, *supra* note at 231.

[575] 16 Martens Nouveau Recueil (IIIe Serie) Tome XVI 645 (1926), cited in III FRANCK, EMPOWERED SELF, *supra* note 569 at 231

[576] Advisory Opinion no. 7, 1923 PCIJ (ser. B) no. 7, at 13-16, *quoted* in III FRANCK, EMPOWERED SELF, *supra* note 569 at 231.

[577] Advisory Opinion no. 7, 1923 PCIJ (ser. B) no. 7, at 13-16, *quoted* in Advisory Opinion no. 7, 1923 PCIJ (ser. B) no. 7, at 13-16 , *quoted* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 232.

[578] II FRANCK, EMPOWERED SELF, *supra* note 569 at 232..

[579] *Id.*

[580] Advisory Opinion no. 17, Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, 1930 CPIJ (Ser. B) no. 17, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 232.

[581] 1 LNTS 67 (1919), *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 232.

the agreement, immovables like churches, schools, convents, hospitals and cultural foundations were compensable.

Bulgaria had argued that inasmuch as communities were "legal fictions" that, unlike individuals, cannot bear any rights, claims by Greek churches and monasteries seeking compensation for properties they cannot take with them to Greece should be denied. But the PCIJ said communities should be compensated for the loss of such immovables. It recognized the community as a distinct legal entity, separate from its individual members, thus carefully balancing the recognition of rights of both individuals of minority groups as well as communities into which such minority groups have been constituted.[582]

iii. Minority Schools in Albania

The PCIJ would again face the issue in 1935, this time, in the case of *Minority Schools in Albania*,[583] which concerned the nationalization of schools under a 1933 law. The law made primary education in state schools free and compulsory for all but required the shutdown of all private schools.[584] Of course minorities opposed the law, invoking their rights under a declaration Albania had made on October 2, 1921 undertaking to provide legal equality and full civil and political liberties to all Albanians, irrespective of race, language and religion.

The law said in part thus: "Albanian nationals who belong to racial, linguistic, or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain and control... schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."[585]

Rejecting Albania's argument that nationalization had in fact achieved the goal of legal equality, the PCIJ judges held Albania obligated to abide with its pledge to observe both equality in law and in fact. Equality in law means preclusion of any form of discrimination, so said the PCIJ, "whereas equality in fact may involve the necessity of different treatment in order to attain the result which establishes an equilibrium between different results."[586]

Equality in fact requires that minorities be entitled to their own separate educational institutions and to abolish these institutions, which alone can meet their special requirements, means denial of equal treatment, since it results in the

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[582] 1 LNTS 67 (1919), *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 232

[583] Advisory Opinion no. 64, Minority Schools in Albania, 1935, PCIJ (ser. A./B). Fascicule no. 64, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 233.

[584] Advisory Opinion no. 64, Minority Schools in Albania, 1935, PCIJ (ser. A./B). Fascicule no. 64, at 12, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 233.

[585] Advisory Opinion no. 64, Minority Schools in Albania, 1935, PCIJ (ser. A./B). Fascicule no. 64, at 18-19, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 233.

[586] Advisory Opinion no. 64, Minority Schools in Albania, 1935, PCIJ (ser. A./B). Fascicule no. 64, at 17-18, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 233.

deprivation of the institutions appropriate to their needs while the majority continues to enjoy the institutions appropriate to them.[587]

"In effect," opines Franck, "the Court's opinion further confirmed that groups have rights transcending the right to equality of treatment. It proceeds from an assimilationist legal notion of an equal right on the part of minorities to a secessionist one of particularist rights that accrue collectively and differently to a protected group."[588]

But taking stock of this jurisprudence of the interwar period, the legal scholar says the three cases underline an important development in international law; in fact, they mark a shift from the purely Vattelian, state-only system of international law that has dominated for the last three centuries to an open one that gave recognition to some form of personal and group rights. In fact, the three cases that gave a nod to group rights are a landmark of sorts because they came at a time when there yet was little to speak of by way of recognition of individual rights on the international sphere.[589]

4. The Empowered Self?

His account of the history of group rights notwithstanding, Franck now claims that a new era of the "empowered self" has arisen at the end of the 20th century and the dawning of the next, which he calls the age of the "post-postmodernity."[590] Just what he means by this can be gleaned from this lengthy description:

> Now at the cusp of the twenty-first century, the realities of social interaction, conflict resolution, economic, scientific, and cultural development, and ecological and resource management have combined with various facets of the communications revolution to point us towards the infrastructure of a global civil society. That society features growing, interactive transnational factions, passionate global value-and-policy discourses, and emerging public and private transactional networks: *in short, a community of communities is emerging which, for the first time, individuals are comparatively free to choose their affinities.* As if computerized personal identities can be constituted by adding or deleting almost at will. Thus, "one might say that an individual in the unbundled world consists of the intersection of multiple communities" even as the world becomes an interactive system in which powerful new communities join states as the principal participants in the processes for making law, developing wealth, controlling crime, and providing health and recreation.

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[587] Advisory Opinion no. 64, Minority Schools in Albania, 1935, PCIJ (ser. A./B). Fascicule no. 64, at 19-20, *cited* in II FRANCK, EMPOWERED SELF, *supra* note 569 at 233.

[588] II FRANCK, EMPOWERED SELF, *supra* note 569 at 234.

[589] II FRANCK, EMPOWERED SELF, *supra* note 569 at 234.

[590] *Id.* at 98. One can perhaps quibble with how Franck manages to conflate post-structuralist language with a decidedly modernist account of the self in arriving at his description of the "post-postmodernist" condition. In other words, he talks of the de-centered self as if it were still the center – or even the new center.

> That liberation has begun, but it does not yet engage the majority of the world's people. It may never do so, leaving the world half-determinist and half-autonomous. The direction, however, is towards an eventual outcome in which the dynamism of growing individual freedom engulfs the lingering static forces that confine personal choice by mandating racial, cultural, national, linguistic, and religious particularity. What will then have been wrought is not necessarily world government - some aspects of which, by necessity, are already in place, but rather, a liberal global neo-community, a civil society based on socially and legally protected individualism.[591]

If that is not clear enough, perhaps, the title of the chapter to which this long quote belongs, is: "Community Based on Personal Autonomy." In other words, yet another account of institutions and communities in society where such institutions and communities are ultimately defined according to the supposedly autonomous individuals who elect to join them or reject them - that is, from the perspective of the nominalism.

5. The Rights Triad and the Moral Priority of Individual Rights

For Franck then, what he calls the age of post-postmodernity gives rise to a triad of rights claims: that of the state, of the group, and of the individual. Yet, he stresses that [t]o acknowledge the need for balance and accommodation among the triad of rights holders... .is not quite the same as recognizing the equivalence of three claimants."[592] He explains further:

Of the three components of the rights triad, only the person has a natural right to be. In Professor Mullholland's terms, the "status of a person is right that cannot be derived from any higher moral principle, and is at least presupposed in any enumeration of rights." In this sense, personal autonomy claims are different in kind from the rights-based claims of groups and of states. Both the latter are non-inherent historico-social constructs. They are validated only derivatively by persons' identification with, and recognition of, their existence, in contrast, a person's rights are implicit and inherent in the objective fact of being.[593]

So both the group and the state have acquired rights, since according to him, they are mere historical-social constructs of individuals while the individual herself has un-acquired rights. But the individual, he stresses, borrowing from Kant, is an end in himself.[594]

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[591] *Id.* at 100[italics supplied].

[592] II FRANCK, EMPOWERED SELF, *supra* note 569 at 252. Franck does refer to a minimum condition that any of these rights claimants should be able to enjoy rights that are essential to survival under what he calls the "survival principle". *Id.* at 246.

[593] *Id.* at 246.

[594] *Id., citing* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (L.W. Beck trans., 1969). This is how he accounts for community and institution from his individualistic perch:

B. NIJMAN'S NARRATIVE: RE-CONCEPTUALIZING INTERNATIONAL LEGAL PERSONALITY?

Any discussion on rights in international law is inseparable from a determination of international legal personality. International law, as expressed in the *Lotus principle*, has traditionally been an exclusive preserve of the state as the principle creator of law in the international sphere. International legal personality (ILP), or the capacity to be a bearer of rights and duties under international law,[595] is seen as primarily the state's prerogative.

Other entities only acquire legal personality in the international sphere to the extent that they can derive such personality from the primary personality of the state[596] (that is, if and when the state chooses to recognize an entity as imbued with legal personality so that it can participate in law-making processes in international life). Thus, Crawford notes that a distinction is often made between general (or objective) personality, which is opposable to the whole world (capable of eliciting *erga omnes* obligations on the part of others) and special (or particular legal personality), which binds only those who consent to it.[597]

This was illustrated in the case of the United Nations, when the issue arose as to whether it could sue for injuries which its agents as well as itself suffer as a result of the conduct of a non-member State. In the *Reparations* case, passed upon by the International Court of Justice barely four years after the UN was established, would say thus:

> whether the Charter has given the Organization such a position that it possesses, in regard to its members, rights which it is entitled to ask them to respect. In other words, does the Organization posses international personality? This is no doubt a doctrinal expression, which has sometimes given to controversy. But it will be used here to mean that of the Organization is recognized as having that personality, it is an entity capable of availing itself of obligations incumbent upon its members.[598]

The ICJ would likewise hold that the UN may indeed claim reparations for injuries suffered by its agents in the hands of nationals of a non-member state, saying that "fifty States, representing the vast majority [at that time] of the

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> Of course, persons tend to develop and to realize their desires in association and community; and in that secondary, or derivative, sense, the various forms of human society – the nation, the tribe, or ethnic etc. – also are "natural" or manifestations of individuals' irrepressible associational drive. But, lexically, it is the individual who constitutes society. The group, the nation, and state do not constitute the individual, except in the literature of romantic nationalism. III FRANCK, EMPOWERED SELF, *supra* note 569 at 253.

[595]G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 53 (6th ed. 1976), *cited* in I CRAWFORD, STATES, *supra* note 244 at 28.

[596]See for instance the ruling of the PCIJ in the case of *Danzig Railway Officials*, PCIJ ser b No. 15 (1928) 17-18.

[597] I CRAWFORD, STATES, *supra* note 244 at 30.

[598] Reparations Case, Advisory Opinion 1949 ICJ 174, 178 (April 11)

members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."[599] Because of the importance of the functions and aims of the UN, as well as of the wide embrace of its membership, the organization possesses objective legal personality, just like states, so said the ICJ in its ruling.[600]

One of fresh and innovative efforts to redefine ILP can be found in the work of a young Dutch scholar of international law, Janne Elisabeth Nijman, who utilizes for her intellectual project a contextualist narrative approach to the history of international legal personality.[601] Nijman contends against the prevailing doctrine that international legal personality began at the Treaty of Westphalia in 1648, when a state-based system of international legal order was laid in place (in other words, the traditional conception that only states are subjects and creators of international law).

As a short background, in her book, she begins her attack by uncovering the origins of the concept of ILP in the philosophy of Leibniz,[602] and argues that the latter's use of the ILP was in response to political developments of his time; that is, the demand for recognition in the political realm by German princes who were then emerging as political sovereigns where there was both Pope and Emperor to contend with.[603]

Leibniz, she says, first conceived of the ILP to legitimize the participation of the German princes in the nascent European international legal order and at the same time, to subject them to the rule of law and the responsibility of justice.[604] Leibniz introduced the notion of ILP in this wise:

He possesses a *personality in international law* who *represents the public liberty*, such that he is *not subject to* the tutelage or power of anyone else, but has in himself the power of war and of alliances ... If his authority, then, is *sufficiently extensive*, it is agreed to call him a potentate, and he will be called a *sovereign* or a sovereign power ... Those are counted among sovereign powers ... who can count on sufficient

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[599] Reparations Case, Advisory Opinion 1949 ICJ 174, 185 (April 11).

[600] Reparations Case, Advisory Opinion 1949 ICJ 174, 185 (April 11).

[601] JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (2004) [hereinafter, NIJMAN].

[602] For a generally constructive review of the book from a CLS theorist, *see* Anthony Carty, *Review Essay, The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* 6 MELB J.I.L. 534-553 (2005) [hereainafter, Carty]. Carty's essay is available at http://mjil.law.unimelb.edu.au/issues/archive/2005(2)/12Carty.pdf For the most part, I follow Carty's description of Nijman's project.

[603] *See* NIJMAN, *supra* note 601 at 29-80.

[604] *Id.* at 77.

freedom and power to exercise some influence in international affairs, with armies or by treaties.[605]

Hence her argument that the orthodox account of the origins both of international law and ILP must be revised. In her book, such account rejects the role of justice (based on natural law) in international relations inasmuch as it gives the state the lead role as the ultimate decider of what law is. But in contrast,

> Leibniz's late-17th century thinking gave us a different, complementary identity of (modern) *ius gentium*: a law of nations that is binding upon those entities which are able to employ international power and are therefore obliged to take into account the common interests of a universal human society and pursue universal justice.[606]

As Carty explains, Nijman's intention is to recover pride of place for the individual in international legal thinking and practice. She finds in Leibniz a framework for exploring whether an entity has international legal personality.[607] From then on, her book is a broad sweep of a 300-year history of ILP, one of the highlights of which are her treatment of post-World War I international law thinkers who challenged their 19th century predecessors' preoccupation with state sovereignty, arguing instead that states are only the institutional frameworks assigned the task of protecting and enhancing the welfare of individuals.[608]

She pointedly criticizes the postmodern account of the "end of the subject" in Foucault[609] (as well as postmodern international lawyers like Koskenneimi.[610]) Against Foucault she deploys the hermeneutical philosophy of Paul Ricoeur. According to her, in Ricoeur, we find that the self is not a complete fiction nor an illusion because it can in fact be referred to: "By arguing that the self

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[605] *Quoted* in NIJMAN, *supra* note 601 at 58-59 [italics in the original].

[606] NIJMAN, *supra* note 601 at 449. Carty argues (and rightly so) that Nijma employs an "uncritical" historiography of Leibniz's philosophy, ignoring his philosophy's monadic ontology. Carty, *supra* note 601 at 539. In my view, Carty however does not pursue the logical implications of Leibniz's monadic ontology to ILP itself (that it as well conceives of society in individualistic terms). But the implications of this philosophy becomes clear later in Nijman's approach to ILP.

[607] Carty, *supra* note 602 at 535.

[608] *Id.* See Chapter 3 of her book, where she discusses the works of James Leslie Brierly (1881-1955), Hans Kelsen (1881-1973) and Georges Scelle (1878-1961). NIJMAN, *supra* note 601 at 85-243. In Chapter 4, she also finds the theologian Emil Brunner and the international legal scholar Hersch Lauterpacht as kindred spirits. *Id.* at 262-275 and 297-312 respectively.

[609] See NIJMAN, *supra* note 601 at 347-378 for a discussion on this point.

[610] She says for instance of Koskennemi and his intellectual mentor, David Kennedy:

> It would be fair to say that during the 1990s international law scholarship, largely due to the influence of post-modern 'critical' scholars, like Martti Koskenniemi and David Kennedy, rather than approaching problems of international law from a theoretical perspective focuses on discourse analysis to demonstrate the *indeterminacy* of the international law discourse and how it is being held captive in its linguistic prison. In other words, because language determines our thinking (a popular post-modern theme) this language currently seems to prevent international legal scholars from advancing international law. *Id.* at 398 [italics in the original].

attests of himself by esteeming and respecting others and himself, Ricoeur not only provides evidence of the human subject, but also by his 'little ethics' a model of thinking about the constitution of the self and, beyond that, about the institutions of society."[611] As Carty describes her method:

> So a new concept of international legal personality must be rooted in a theory of justice, crossing between the moral and ethical realm on the one hand and the legal order on the other, linking the two and insisting that the latter has its origin in the former. The approach will avoid idealism by taking the hermeneutics of the self as a starting point. The approach has to be a natural law one, because, recalling Leibniz, Nijman effectively defines legal personality from the starting point of human capacity, which brings with it responsibility. Following Ricoeur's hermeneutic phenomenology, she understands his idea of capacity or capability as responsibility for self in relation to others, and primarily in relation to the self as another.[612]

And so, at the end of her remarkable 500-page study, Nijman comes to the conclusion on the side of "justice"[613] – that is, the individual. She argues for the re-conceptualization of international legal personality as a means "to express that the natural right to be a person is an international right that finds its correlative duty on the responsibility vested in the international community."[614] In her reformulation, states are only secondary persons to the primary legal personality of individuals, whom she calls "both the source and the final destination of the law of nations."[615]

Her re-conceptualization is anchored in four broad arguments.

First, borrowing from Emil Brunner, she argues for the notion of a "person-in-community" who not only has rights but also responsibilities; moreover, the rights of the community are really individual rights, so that instead of saying that the rights of individuals are limited by the rights of community, individual rights are limited by a responsibility towards a community.[616] The individual has the capacity to be a bearer of rights as well as of responsibilities.

Moreover, instead of casting the individual after the liberal political fiction of the individual as citizen divorced from the individual as a social and moral agent, Nijman enlists the unified individual who is also a social and moral agent. Through this, she argues, we can circumvent the social contractualism of liberal

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[611] *See* NIJMAN, *supra* note 601 at 386.
[612] Carty, *supra* note 602 at 544.
[613] NIJMAN, *supra* note 601 at 448.
[614] NIJMAN, *supra* note 601 at 473.
[615] *Id.* at 459.
[616] *Id.*

political theory (a nod perhaps, to Lauterpacht's revival of the Grotian individual derived from the Stoic conception of the social instinct of human nature.[617])

Second, borrowing this time from Hanna Arendt, she conceives of political participation as an existential condition of human life, so that without being a political participant, man cannot be fully human:

A life without speech and action, without any participation in the political realm, is no longer human life, for it would be a life without fellow men and (therefore) devoid of meaning. Political participation is thus not a right of man, but more fundamentally, a condition sine qua non. (Democratic) governance and politics need speech and action. They require political participation in the discursive public realm and the *res publica* is the public realm of freedom.[618]

Third, the protection of human status must rely on an international community, whose structures and institutions should be sufficiently representative of humanity's equality and diversity. It is here where international law must play an important role for it is through international law that states acknowledge their common responsibility to protect humanity and human rights.[619]

Fourth, she argues for a concept of the international legal person protected by the international community, where international law and the concept of the international legal person are developed on the basis of the natural unity and diversity of humanity and at the intersection of both politics and humanity. Following Franck, she basically defends this proposition from a Kantian perspective:[620] the participant who reflects on the basic political and legal framework and who at the same time enjoys the perspective of an autonomous agent outside the socio-historical context, the individual who has innate rights to have rights, to be person.[621] It is here where international legal structures, and organizations and institutions - by implication, including international civil society - are needed:

For these (innate) rights of humanity to become effective, interpersonal and institutional otherness is required, in other words: political and legal institutions are needed. The socio-political institutions and legal systems are mediators to ensure that each gets his due; they are dispensers of *justice*. This

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[617] *See* III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 232 on the Stoic notion of human sociality.

[618] NIJMAN, *supra* note 601 at 461.

[619] *Id.* at 463.

[620] In fact, like Franck, she invokes the authority of Prof. Mulholland in arguing for an "innate right to be a person and the "right to have rights" on the basis of the so-called "impartiality principle" which is constitute by the idea of "collective autonomy". Collective autonomy can be understood as constitutive of impartiality in the determination of principles of rights. a) Each individual must be represented as having independent judgment on the rules that govern everyone. b) Any accepted principle must be collectively acknowledged. NIJMAN, *supra* note 601 at 464-465, *quoting* L.A. Mulholland, *The Innate Right to be a Person*, *in* ETHIQUE ET DROITS FONDAMENTAUZ 132 (G. Lafrance, ed., 1989)

[621] *Id.* at 465.

institutional mediation confirms that human persons are subjects with rights; it makes them *legal* persons. To be a legal person is a necessity for living a humane life.[622]

In this scheme, institutions such as the state have the responsibility of providing the necessary institutional structure to reconnect the individual to the political and thus transform her back from being a thing to being a person in a process of inclusion.[623] Otherwise,

> if the state fails, collapses or falls victim to civil war, the ILP [international legal personality] of the state is withdrawn or returned to the people it was supposed to represent. In situations like these, humanity, by way of the international community, has to open up its institutions and law, even if only temporarily, to include these human beings and by this international recognition to reaffirm their "personality."[624]

In other words, the international legal personalities of these institutions are in the end, only derivative of the so-called innate rights of persons to be persons, to be persons with rights. Put in another way, only the international legal personality of the individual is *not* fictional, that of everything else *is*, inasmuch as these institutions and communities only arise as incidents of human *doing* to protect and enhance human rights. As Nijman intones, "[t]he well-functioning state has full ILP, but only derived from its citizens."[625]

Thus far we have shown how in contemporary international law or international legal theory, states and individuals are conceived – in nominalistic terms. In § 3.2 we have outlined how the philosophical movement of nominalism paved the way for the construction of theories of the state in terms of either the all-encompassing whole or of something identifiable only through its supposed basic elements: the individuals who make up the social contract. Nominalism pervades so much of thinking in international legal theory that no matter where we turn to we only face either the nominalism of the total reality of the state (or community) or that of the individual as the ultimate measure of reality.

The binary opposition endemic to liberal thought has been chronicled with pinpoint (and devastating) accuracy by a critical theorist like Koskenniemi, who nevertheless abstains from offering a viable alternative ontology.

However, the traditional state versus individual clash has been made a little more complicated by developments over the last few decades; that is, the reality of non-state actors as active participants in the international legal order, as in the case of NGOs or members of international legal society as well as minority groups. Franck describes this situation as the triad of rights (that may also end up

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[622] *Id.* at 467.
[623] *Id.* at 468.
[624] *Id.*
[625] *Id.*

in conflict): group, state and individual, although it must be made clear that in his discussion of group rights, Franck is not so clear about whether he considers international civil society as identifiable with it. Nevertheless for Franck, it is a foregone conclusion in case of conflict: the individual has moral priority over everything else. This conclusion is followed to the hilt by Nijman, who in her reconstruction of the concept of ILP connects the "international community" to the individual in terms of responsibility. The international community as derivative of the existence of the individual has the duty to ensure the welfare of the individual, inasmuch as only the latter has the right to have rights, to be a legal person in the first-order sense. It is to the contemporary notion of the "international community" that we now turn to.

C. TOWARDS AN INCLUSIVE "INTERNATIONAL COMMUNITY"

The rise of non-state actors as active participants in international affairs would inevitably find formal recognition in one way or another in the very language of international law itself. Positive international law abounds with references to the idea of international community. While they do not give a uniform conception of what constitutes such a community, a trend that emerges in such references is that of a community not limited to an organization of states. Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) invokes it with respect to *jus cogens*, or a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[626]

A year later, the International Court of Justice, in a famous *obiter dictum* in the *Barcelona Traction* case, would speak of legal obligations of States towards "the international community as a whole,"[627] thereby apparently expanding the VCLT's notion of an international community beyond that composed solely by states.

A more recent multi-lateral treaty, the Rome Statute of the International Criminal Court, speaks of "the most serious crimes of concern to the international community as a whole"[628] – an inclusive language that is as well used in Art. 48 (1)(b) of the Draft Articles on State Responsibility; that is, "[a]ny State other than the injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if... the obligation breached is owed to the international community as a whole."[629] The Commentaries however stress a continuity between Art. 48 and the Court's ruling in the *Barcelona Traction* case, saying the Draft Articles recognize the "essential distinction" between obligations

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[626]UN Doc. A/CONF.39/27 (1969).

[627]Barcelona Traction, Light and Power Company (Belgium v. Spain), Judgment (1970) ICJ Reports 3.

[628]*See Preamble* and Art. 5 of the Rome Statue of the International Criminal Court, adopted and opened for signature 17 July1998, UN Doc. A/Conf/183/9 (1998). Art. 48 may still be treated as part of *lege ferenda*, or the progressive development of international law.

[629] While yet to be codified into a multilateral treaty, the Draft Articles may be treated as indicative of state practice or evidence of customary norm in international law.

owed to particular States and those owed to the international community as a whole.[630]

What seems clear is that as far as the components are concerned, the traditional notion of the international community as constituted solely by states is no longer adequate to describe the complexity of a globalized world. The debates surrounding the wording of Art. 48 of the Draft Articles on State Responsibility make this clear.

Edward Kwakwa argues that a great variety of non-state actors now help shape international law, and, of these non-state actors, are the non-governmental organizations, which have pushed for treaties that embody such communal interests as human rights, humanitarian law and the environment, and yes, global media.[631] "Non-state actors are likely to play increasingly important roles in much decision-making in the international community and in the formulation of international law, as governments increasingly lose control over the flow of technology, information, and financial transactions across their borders."[632]

Second, many publicists also support the idea of an expanded international community. Third, and most importantly, the idea of a community is precisely the one that "provides a sociological foundation... for international law" – one where there is a "minimum consensus of shared values."[633] "Globalization has underscored inter-dependence, one that ultimately must rest on common convictions."[634]

Paulus points to resolutions, declarations and decisions of the UN General Assembly and the UN Security Council, whose textual formulations are not in agreement as to what entities are covered by the term. Some refer only to a community of states while others seemed not to have referred exclusively to states.[635] While it is one thing to speak of non-state actors seeing increased participation in international law-making, it is quite another to speak of granting

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[630] THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (James Crawford, ed., 2002), at 278 *para.* 8 [hereinafter, II CRAWFORD, STATE RESPONSIBILITY]. In an earlier report, Crawford rejected suggestions that the article be rephrased so as to say that the obligation is owed to "the international community of States as a whole." Instead, he argued that "the international community includes entities in addition to States; for example the European Union, the International Committee of the Red Cross, the United Nations itself." *See* A/CN.4/517, *Fourth Report on State Responsibility*, 31 March 2000, para. 36.

[631] Edward Kwaka, *The International Community, International Law, and the United States: Three in One, Two Against One, or One and the Same?* in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 31 (Byers and Nolte, eds., 2003) [hereinafter, Kwaka].

[632] *Id.*

[633] Kwakwa, *supra* note 631 at 31.

[634] *Id.* at 34-35.

[635] I Paulus, *supra* note 10 at 29.

them legal personality, or legal status.[636] Nevertheless, it seems clear that an inclusive approach to the issue is now firmly established.

D. A SOCIAL PLURALIST'S VIEW: SURMOUNTING THE BINARY OPPOSITION

1. The Challenges of Liberal (and Natural Law) Un-Sociality

Indeed, as Chaplin remarks, borrowing from the legal philosopher Mary Ann Glendon, there is a missing dimension of "sociality" in much of liberal theorizing on rights, which has been decidedly individualistic in orientation. "Because contemporary liberalism lacks an adequate notion of 'sociality,'" says Chaplin, "liberal legal, constitutional, and political [theories] have proved unable to generate a convincing account of the reality and character of the legal rights of institutions."[637]

Liberal theorists tend to construe the phenomenon of institutional rights as merely derived from the rights of associating individuals rather than as having some independent foundation and status not finally reducible to individual rights.[638] "The empirical observation that many social institutions themselves do have positive legal rights is indisputable, yet liberal individualism seems unable to offer much beyond an implausible contractualist explanation of their origin and status."[639] For example, a corporation, according to the standard liberal view, should not be treated as imbued with social responsibility, inasmuch as it exists solely because of a convenient "legal fiction":

> Those who argue that corporations have a social responsibility...assume that corporations are capable of having social or moral obligations. This is a fundamental error. A corporation...is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a

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[636]For a full length discussion on the legal status of NGOs in international legal processes, *see* LINDBLOM, *supra* note 493 at 511-523.

[637] IV Jonathan P. Chaplin, *Towards a Social Pluralist Theory of Institutional Rights* 3 AVE MARIA L. REV. 147, 147 (2005), *citing* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991) [hereinafter, IV Chaplin, *Institutional Rights*].

[638] *Id.* at 147-148. An institution is defined from a clearly Dooyeweerdian perspective by Chaplin as "a broad category embracing most organized and relatively enduring social bodies, corporations, communities or associations— such as marriages, families, religious organizations, business corporations, trades unions, and voluntary associations." *Id.* at 149.

[639] *Id.* at 48. Well, even a natural law-based account like Nijman in the end also falls for the same individualistic approach, although this time, coming from a Stoic conception of the inherent sociability of humanity (that is, the *appetitus socialis*). A more detailed discussion of Nijman's view will be made in the succeeding sections.

> corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.[640]

a) An Illustration: The Case Against Multi-National Corporations (MNCs) for Human Rights Violations

Indeed, if a corporation is mere legal fiction, it does not make sense at all to hold it to account for human rights violations. The legal fiction of a corporation's personality does not give much of an argument for human rights claims, especially if the human rights violations happened a long time ago, in which case the usual legal device of "piercing the corporate veil" so that responsible officers may be held accountable cannot be resorted to. In such a case, there is only the corporation itself to run after. The truth is that corporations have long lives and can outlast the lives of its human founders. Indeed, the corporation is a putative legal fiction with real-life consequences.

For example, noted South African international legal scholar Jeremy Sarkin notes that today, African human rights litigants, borrowing from the lessons of World War II,[641] are increasingly turning to multinational corporations for reparations: "The individual bad actors are often dead, missing, beyond the jurisdictional reach of domestic courts, or unable to satisfy large damage claims. The immortality of the multinational corporate entity, its size, wealth and omnipresence in a variety of jurisdictions make it uniquely attractive as a defendant."[642]

The debate on whether corporations are liable for acts in connection with colonialism and apartheid is now over; today, the focus of inquiry is on how they may be held liable *vis-à-vis* their role and the manner in which they benefited during colonialism and apartheid.[643] For this he marshals four main arguments, each one building on the other. First, he refers to the "clear position from 1948," when the Universal Declaration of Human Rights (UNDHR) was adopted. This instrument demands that "every individual and every organ of society ... promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance".[644] Second, Sarkin argues that although "companies may not be in the habit of referring to themselves as 'organs of society,' they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration."[645] Third, he also cites the Professor

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[640] Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982), quoted in IV Chaplin, *Institutional Rights*, *supra* note 637 at 148 (fn. 6).

[641] That is the litigation launched by Jewish survivors of the *Shoa* against primarily German corporations. Jeremy Sarkin, *The Coming of Age of Claims for Reparations for Human Rights Violations in the South*, 1 SUR INT'L J OF HUM. RIGHTS 67, 69-70 (2004) [hereinafter, Sarkin].

[642] J.R. Paul 2001, *quoted* in *id.* at 70.

[643] *Id.* at 72.

[644] *Id.*

[645] *Id.*

Louis Henkin's interpretation of the UNDHR, emphasizing that: "Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all."[646]

Fourth, citing the International Court of Justice in the *Barcelona Traction* case, he argues that the legal personality of a transnational corporation is equal to that of a regular citizen.[647]

Hence the following questions: "Can decision makers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of responsibility?"[648]

Arguing that the unique role for states in securing some rights does not preclude duties for corporations with respect to other, related rights, it can now be said that the duties of states are not simply transferable to corporations, but the same human rights that create duties for states may impose the same or different duties upon corporate actors.[649] As Steven Ratner has observed: "Simply extending the state's duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations. Just as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interests."[650]

Hence the following conclusion by Sarkin about the responsibility of multinational corporations (MNCs) in regard to human rights violations can only be meaningful if it is based on something more satisfactory than a resort to the legal fiction of derivative legal personality as a basis for claims for indemnity and reparation:

> The role of multinational corporations in the perpetration of human rights abuses during the colonial and apartheid eras was considerable. Their role is under greater scrutiny now than at any other time in history. Part of the reason for this is that more and more norms and standards are being developed relating to the conduct of companies in respect of human rights. As this happens, so the role played by corporations in the past is being examined in much finer detail. Another reason for the increased scrutiny and calling to account is the fact there has been a growth of accountability mechanisms at both international and

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[646] *Id.*
[647] Sarkin, *supra* note 641 at 72.
[648] Sarkin, *supra* note 640 at 72.
[649] *Id.*
[650] *Id.* at 73.

> domestic levels. As this scrutiny intensifies, still more attention is being focused on these questions and, as more information emerges, the possibilities for redress expand.
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> [But because of a host of factors] which will stymie or limit such cases for some time to come, the political route for redress will become more important in the future. This will occur as the issues receive more international acceptance and more pressure is brought to bear by those who endured the brunt of colonial and apartheid human rights abuses.[651]

b) Explaining social pluralism: issues

As Chaplin argues, any social pluralist account of institutional rights must address three key issues against the liberal individualist view.[652]

First, it must challenge the pervasive individualist premise that institutions are merely contingent creations of the contracting wills or pooled rights of morally autonomous and self-constituting individuals, lacking any inherent properties of their own.[653]

Second, it must as well debunk two influential legal positivist assumptions: that institutions possess no original competence to make valid jural norms; and that institutional rights are ultimately legal "fictions" merely delegated or "conceded" by the state.[654]

Third, it must also address the individualist and legal positivist propositions whose cumulative influence still shapes much contemporary social, political, and legal thinking and decision-making, and continues to erect substantial barriers to the reception and of a social pluralist account of institutional rights.[655] Alternative conceptions approach the issue of institutional rights, notably of "intermediate structures" like civil society, from the theory of democratic participation. But a social pluralist account, according to Chaplin, "affirms the indispensable social, political, and legal significance of the multiple institutions subsisting in the space between the state and the individual."[656]

These issues are evident in contemporary international legal theory as we have so far discussed. It is here, I believe, where the radical implications of Dooyeweerd's pluralistic social ontology have much to offer for international legal theory and international law.

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[651] *Id.* at 101-102.
[652] IV Chaplin, *Institutional Rights*, *supra* note 637 at 150.
[653] IV Chaplin, *Institutional Rights*, *supra* note 637 at 150.
[654] *Id.*
[655] *Id.*
[656] *Id.* at 148

E. THE DOOYEWEERDIAN CRITIQUE OF THE INDIVIDUAL V. COLLECTIVE OPPOSITION

From a social pluralist's view point, the traditional opposition of individual rights v. community rights highlighted by Koskenniemi's indeterminacy thesis simply fails to grasp the idea of various societal spheres with their respective competencies. Both are reductionist approaches, with their particular slant of doing justice to human relationships, so that in their scheme of things, there can be no principled balance between the individual and society.

Dooyeweerd argues that individualism absolutizes the inter-individual relations while universalism (or collectivism) absolutizes the communal bond. Yet in his pluralistic social ontology, communities and inter-linkages presuppose each other; indeed he shows that wherever such communal wholes exist, there also exist relationships between such communities (inter-communal relations) and between members of such communities (inter-individual relationships).[657] In his social ontology, there is no single communal whole that absorbs everything else, in contrast to the Aristotelean *polis* or the *Leviathan* state. The state is but one of many societal spheres with their respective areas of material competence. The same can be said of inter-individual relationships - these are coordinational relationships, not communal wholes. That is why Dooyeweerd assiduously argues against theories that conceive of society from its supposed basic elements, the allegedly elementary interrelations between human individuals, so that communities they form are merely legal fictions.[658]

Dooyeweerd argues that "the civil legal personality is only a specific component of the full legal subjectivity. "This latter claim is equally constituted by various internal legal relationships implied in the membership of various communities."[659] Moreover, for him, the "human I-ness" transcends every temporal societal relationship so that it is totally wrong to think of human beings as an organic member or part of any temporal social whole.[660] For this reason, he considers universalistic conceptions of society as more dangerous than individualistic ones, inasmuch as the former, in contrast to the latter, is "in principle a totalitarian ideology which implies a constant threat to human personality."[661] In any case, both approaches flatten societal relationships in distinct ways. Universalistic theories cannot conceive of communities distinct from the state; individualistic ones, on the other hand, cannot conceive of genuine communities distinct from individuals they take to be free and autonomous. As Clouser explains:

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[657] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 178.
[658] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 182.
[659] *Id.* at 280.
[660] *Id.*
[661] *Id.* at 196.

This controversy over where the social priority is to be placed does not merely result in vague differences in the attitudes of those on each side. It is not simply that in a court case a judge holding the individualist view would tend to lean toward favoring rights of the individual, while a judge who is a collectivist would tend to lean toward favoring the welfare of society. Such results, all by themselves, would be important enough and result in significant differences in the way cases are decided. The true significance of the two positions is even greater, however, in that each position *gives a particular slant to the very idea of justice which underlies not just judicial judgments but the way laws are written.*[662]

Clouser raises four important problems associated with the individualistic view of reality. *First*, if rights are conferred only upon individual persons, the question of public rights and public justice cannot be properly accounted for.[663] *Second*, while it does seem closer to the Christian, biblical view of a limited state, the individualistic theory, by granting rights only to individuals, ultimately disregards the state's public duties.[664] *Third*, the theory is unable to satisfactorily explain the state's relations to other communities other than propping up the fiction that other communities are individual persons, and then declaring that the internal nature of one community is off-limits to those of the others.[665] *Fourth*, not only is it unable to adequately account for the proper duties of the state, it likewise fails to adequately explain the limits of state power in matters related to its proper duties.[666]

On the other hand, while collectivism is able to harness arguments deriving legal rights from the public at large as organized by the state, its perspective however fails to account both for the individual and communities other than the state. In fact, it is more often the case that society is equated with the state. Hence, the collectivist view point has strong totalitarian tendencies.[667] Clouser argues:

Try as they will, collectivists cannot escape the consequences of their theory that rights are gifts the state bestows on individuals or communities as it sees fit, and which it can retract or change as it sees fit. This means that that the state is, in principle, unlimited in its legal competency. The very idea of justice will then be whatever the state wishes it to be. This allows for a totalitarian state which levels aspectual differences among social spheres, and thus utterly violates the sphere sovereignty of every other social community. Inevitably, this theory is then

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[662] CLOUSER, *supra* note 94 at 284.

[663] II ROY C. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEFS IN THEORIES 271 (1996 ed.) [hereinafter, II CLOUSER]. Here I am using the first edition of Clouser's book in regard to discussions which have not been incorporated anymore in the new edition.

[664] *Id.* at 277.

[665] *Id.*

[666] *Id.* at 281-282.

[667] II CLOUSER, *supra* note 663 at 276.

defended by viewing all other communities as parts of the state, which utterly obscures their distinctive [nature] and structural purposes.[668]

Transpose the discussion to the international stage and we will have the so-called "international community" absorbing into itself everything – from states, to individuals, to families, to churches, down to the neighborhood football club – into a single collectivity, in utter indifference to the differences in the natures of each sphere in question.

Indeed, from a reformational perspective, both theories are wrong, says Clouser, because individuals and social communities exist in a mutual correlation in which neither can exist without the other: *"neither is 'basic' to the other because neither was ever the source of the other, as both were created simultaneously by God."*[669] Addressing the individualistic conception that communities are fictional, Clouser argues that the proposition that there are no real social institutions but only individuals and their relationships is self-contradictory.[670] As he explains:

If it's granted that inter-individual relationships are real, then, how can it be denied that marriages, families, businesses, churches, schools, labor unions, political parties, etc., are also real? If the relations between individuals are real, then so are the communities instituted by them. Besides, the view that they are something over and above the individuals who are their members is supported by the fact that for all social communities except marriage, their identity persists even when their members change. In addition, we have seen that social communities function in all the aspects of experience and have differing qualifying functions determining their natures. So in all these respects they are the same as the other artifacts humans form and should be regarded as just as real as they are.[671]

An alternative pluralistic social ontology, according to Clouser, rejects the argument that there is a particular community higher than everything else.[672] For such a hierarchical view necessarily leads to the conclusion that human beings are merely cogs in the machine, or parts of a bigger whole (the *bete noire* of the true-blue individualist). Rather, in accordance with Doyeweerd's theory of societal sphere sovereignty, each type of community has a distinctive internal organization, a distinctive structural purpose determined by its founding and qualifying function, as well as its distinct authority.[673]

For Dooyeweerd, only a public legal community constituted by the state can provide full protection to the individual through the creation of a civil sphere

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[668] *Id.*
[669] I CLOUSER, *supra* note 94 at 282.
[670] *Id.* at 281.
[671] I CLOUSER, *supra* note 94 at 281.
[672] *Id.* at 280.
[673] *Id.* at 290.

of freedom, where the powers of private lords and social collectivities in undifferentiated spheres of authority are done away with.[674] As he explains:

In order to achieve this aim, the *public legal principle* of *freedom* and *equality* has to be pursued. It also forms the basis upon which civil legal private freedom and equality are to be attained. As long as it is possible for private lords and private social collectivities to exercise an exclusive and undifferentiated power over their subjects, there is no room for a truly *ius publicum* and for a truly *ius privatum*.

It is only the state, on the basis of its public legal power, that can open up to the individual a civil legal sphere of freedom, providing that person with a guarantee against the overexertion of power by specific private communities and also against an overexertion of the public legal power itself, as long as the public office bearers keep alive an awareness of the inner limits of their competence.[675]

For Dooyeweerd, the singular contribution of the French Revolution is the destruction of these undifferentiated communities and the recognition of the *rights of individuals as such*. A system of private law where individuals stand shoulder-to shoulder with one another can only happen in a *res publica*, a public legal community not possible under feudalism or tribal societies.[676]

The French Revolution made possible the creation of a system of public and private law. Yet Dooyeweerd is also critical of the humanistic individualism that informed the French Revolution, which led to the overextension of civil-legal and public-legal idea of freedom and equality, and denied the rights of private, non-state entities. The French revolution in the end would only pay attention to the individual and the state.[677]

1. The times are a-changing - but how or more accurately, why?

Because for the most part, international law has been dominated by the Westphalian model, it has been difficult for many international legal scholars to conceive of international law where the state is not the pre-eminent entity, to the exclusion of most every other entity. Yet, as Franck himself notes, what used to be an "anarchic rabble of states" has been replaced by a pluralistic society where "a variety of participants - not merely states, but also individuals, corporations, churches, regional and global organizations, bureaucrats and courts - now have a voice and interact."[678]

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[674] XII DOOYEWEERD, *Individual and the Community*, *supra* note 537 at 98.

[675] *Id.* [italics in the original].

[676] VI DOOYEWEERD, ROOTS, *supra* note 46 at 185.

[677] Id.

[678] I FRANCK, FAIRNESS, *supra* note 242 at 477.

From a reformational perspective, it is not enough to justify a widening participation of these various entities in international life by an appeal to democratic participation, without a strong ontological basis for inclusion.

If churches, corporations, civil society groups, regional and global organizations are mere legal fictions, democratic participation will not do as a convincing basis for their inclusion in international discourse. Neither will it do to simply say that in the end, it is the individuals who are the basic elements of society; if that is so, then, why include in the discourse in the very first place these other groups and communities that are increasingly making their presence felt in contemporary international law?

After all, if free and autonomous individuals are the ultimate measure of participation, then we can dispense with communities and institutions and simply make do with the same set of free and autonomous individuals, to recall Slaughter's proposal of the disaggregated state now reduced to the government officials who run its various offices.

A merely sociological approach, as that adopted by ICJ Judge Rosalyn Higgins, can only explain the fact of who are now participating in international discourse, and not why they should be allowed to take part in the discourse at all. Although she maintains that states are still the principal actors in the international realm, she however also argues that:

[T]here is room for another view: that it is not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values. Determinations will be made on those claims by various authoritative decision-makers - foreign office legal advisers, arbitral tribunals, courts.

Now, in this model, there are no "subjects" and "objects", but only participants. Individuals are participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the ILO), multinational corporations, and indeed private non-governmental groups.[679]

From the reformational standpoint, when Franck notes the different communities in which the "empowered self" of the individual can now join or leave at will, he is actually touching on a basic intuition about the reality of differentiated spheres. Unwittingly, he is pointing to the fact that the state is not

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[679] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (1994)

everything and that there are other real communities that exist outside of it in society. The state is finally seen apart from the state-building initiatives of the 18th and 19th centuries, when political theorists were fixated with civil society broadly conceived – the over-arching, all-inclusive *polis* of Aristotelian proportions.

However, this basic intuition he can only explain in terms of monadic and atomistic view of the individual. In the end, he does not really come up with anything substantially different from the standard liberal view of the individual v. state binary opposition. He can only shore up more arguments in support of the individualistic ethic, for the simple reason that his philosophical commitment – a secularistic natural law – is only able to confer legal personality on one entity: the individual.

This bias in international law for the individual is so strong that in the law on State Responsibility, as Crawford notes, "there has been... no development of penal consequences for States of breaches of [fundamental norms of international law]."[680]

As an example, he cites the fact that the award of punitive damages is not found in international law even when what is involved are serious breaches of obligations arising under peremptory norms. The rule, he says, remains that expressed by the Nuremberg Court in the trial of Nazi war criminals:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[681]

2. The devil in the details of Nijman's arguments.

We can as well see the difficulties of reducing international law to the rights of the individual in Nijman's work, by way of Carty's critique of it. In referring to Carty's critique, we also highlight the limitations of a vague collectivism that Carty's position entails.

Carty himself realizes the stark limitations of Nijman's highly individualistic approach, calling her full attention to the needs of the individual "excessive."[682] He points to a "missing" dimension in Nijman's analysis of international law, which he in fact calls its "very problem:" "how or why collective entities in international society construct themselves against one another."[683] Utilizing a postmodern theory of alienation of world politics, he says of Nijman's approach:

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[680] II CRAWFORD, STATE RESPONSIBILITY, *supra* note 630 at 243.

[681] *Id.* at 243, *quoting* International Military Tribunal for the Trial of the Major War Criminals, judgment of 1 October 1946, reprinted in 41 A.J.I.L 171, 221 (1947).

[682] Carty, *supra* note 602 at 550.

[683] *Id.*

> The strength and the weakness of Nijman's work is that she shows so graphically in her Interbellum chapter how the whole contemporary edifice of international law, the trend towards a so-called global constitutionalisation and the primacy of individual human rights, is based upon a demonisation of collective and community life in favour of an absolutisation of the autonomy of the individual person, whose sacral character lies precisely in the fact that it remains completely immune from scrutiny. This is how international law *misunderstands itself and thereby remains alienated from itself* at present.[684]

For Carty, the effort by self-styled Western liberal states to impose the regime of individual human rights all over the world is but a confirmation of the self-alienation experienced in the Hobbesian state being projected on the international stage; that is, these states "expect thereby to banish the sense of alienation completely from human experience."[685] Carty says Nijman does appear to recognize the lack of a collective sense in individualism when she appeals to Brunner's notion of communal personalism based on a Christian tradition and culture. He obviously prefers a secular notion of alienation as a better way of accounting for anarchy and disorder in international realm. So he concludes his review on this note:

> [O]ne needs to recover and guard a measure of, as it were, healthy estrangement to reduce the tension of the present crisis. International legal personality must somehow be reconceived so as to reflect an acceptable level of mutual distance and unknowing. This is where the concept must be systematically related to the contemporary philosophical debates about the nature and consequences of mutual recognition and misrecognition. This is known to have begun with Hegel's famous *master-slave death struggle* and it has still to find an end. Here it is a story to be continued.[686]

Recalling Buijs' description of the fear-driven Hobbesian state, we can agree to some extent with Carty's postmodern analysis of international relations but at the same time maintain that it does not fully grasp the necessity for a pluralistic social ontology that transcends the opposition between the individual and the state (or the community/collective).[687]

When he speaks of the "collective," it is not clear what he has in mind: is he referring to the state, or to the so-called "international community"? He himself takes for granted that such a collectivity exists, without providing an ontological justification for it. Clearly, he himself is bound to the same nominalistic ontology that bedevils liberal theorizing or in the case of Nijman, natural law theorizing. We can invoke here Dooyeweerd's criticism of Grotious' international law: "Even in HUGO GROTIUS, who externally follows the Aristotelian-Thomistic doctrine of the *appetitus socialis*, authority and obedience have no natural foundation. Both must be

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[684] Carty, *supra* note 602 at 550-551.
[685] *Id.* at 551
[686] *Id.* at 552.
[687] See I Buijs, *Concept of Sovereignty*, *supra* note 299 at 252.

construed *'more geometrico'* out of the simplest elements, the free and autonomous individuals."[688]

Dooyeweerd says on account of this nominalistic attitude, Grotius could not comprehend the distinction between inter-individual and communal law.[689] Because of Grotius' appropriation of the Stoic idea of humanity as a temporal community of all-inclusive character for his foundation of international law, he could not allow for a theoretical examination of the basic structures of individuality in society that determines the inner nature of the different types of relationships.[690]

This individualistic philosophy can also be seen in Grotius' four main principles in which he summarized natural law, conceived as legal principles that only apply to inter-individual relationships. Dooyeweerd says that in his prolegomena in *De Jure Belli ac Pacis*, Grotius interprets justice as something that cannot be understood in the jural sense, but only in the moral sense, so that for him, the distribution of benefits, in the sense of distributive justice, is not a jural obligation but only a moral obligation.[691] Dooyeweerd says more on Grotius (and other nominalists):

The mathematical science-ideal of Humanistic philosophy, as manifested in the nominalistic-individualistic doctrine of natural law from GROTIUS to ROUSSEAU, KANT and the young FICHTE explained these complicated jural analogies of number by imputing a mathematical meaning to them (the 'mos geometricus' in the humanistic doctrine of natural law!) In this way it tried to eliminate the complication of meaning in the jural arithmetical analogy and to construe the *state*, the *jural person* and the *legal order* out of their 'mathematical elements': the free and equal individuals (the construction of the social contract!).[692]

This Stoicism shows through as well in Nijman's natural law-idea of human beings as inherently social that is, she collapses all relations into inter-individual relations. Moreover, one of the limitations of an analysis of international legal personality from a Ricoeurian standpoint is that it cannot transcend the level of the inter-personal. It is wholly inadequate to deploy, for instance, in the analysis of non-state actors other than the individual. If an NGO is mere legal fiction, it is difficult to speak of "one's self as another" in relation to such a fictional entity. Surely, an NGO has a separate and distinct identity from its human members.

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[688] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 311.
[689] *Id.* at 359.
[690] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 169.
[691] *Id.* at 212.
[692] *Id.* at 167. [capitals and italics in the original].

Because Nijman has reduced everything to the level of the individual, even her description of the person-in-community is in the end viewed from an individualistic lens. We have no other measure than the individual in approaching the issue of community. Small wonder that what results in an international legal theory like this is a sharp and irreconcilable opposition of the individual against the community (in Nijman's terms defined by the singular presence of the state).

Yet Carty's own solution for the eclipse of community in Nijman's work does not really give us much help by way of any useful criteria for action: he calls for a "healthy estrangement" from our own communities so that we can appreciate better the communities of the Other. It is fine as far as it goes, until we realize that not only does it fail to do justice to non-state communities, it also does not do justice to the concerns of the individual.

F. A DOOYEWEERDIAN ALTERNATIVE: RADICAL SOCIAL ONTOLOGY

The radical implications of Dooyeweerd's social ontology (and by extension, his legal ontology) for international law maybe glimpsed in the following words by Skillen: "[d]ifferent social relationships have different characters, different kinds of law-making requirements, different foundations."[693]

Societal sphere sovereignty in this context means that each societal sphere has an intrinsic jural competence as an entity, community or institution. In other words, each has original legal personality. Now, this is a decidedly more radical theory of legal personality than what individualism or universalism can offer. Legal personality is not dependent on the grant of recognition by the state or any other institution. Legal personality springs from that particular sphere's jural competence, from the sovereignty it exercises in its own sphere or orbit.

If participation is the sole measure of theoretical efficacy, then Dooyeweerd's theory of societal sphere sovereignty should get high marks; after all, its recognition of legal personality for every other sphere independent of the state could not be more inclusive and participatory in nature.

In fact, we can say Dooyeweerd was much ahead of his time as far as theorizing on international legal personality is concerned: before there ever was any talk on such matters as democratic participation and legitimacy, he had been saying all along that we should grant "being," if we can put it that way, to other spheres of life, and not just to the state, or not just to the individual. His theory of diverse societal structures, which we have expounded on in § 2.3.4, point to the diversity in reality and its basic unity in the created order.

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[693] I Skillen, Calvinistic Political Theory, *supra* note 15 at 388.

This truly radical insight arising from the recognition that each of these spheres has original (or subjective) legal personality not dependent on a grant by the state or any other entity may prove to be controversial in international legal theory, where a debate continues to brew over just what the sources of law are, a debate compounded by the rise of non-state actors that now demand recognition as legitimate formers of law themselves. As the feminist scholars H. Charlesworth and C. Chinkin would argue:

> [T]he role of "international civil society" challenges state-centered international law... [S]tates are no longer the sole legitimate source of law-making and that ideas from other bodies should not be ignored when determining the international normative order... [We point to] "societal or populist" initiatives that respond to the failure of constitutional governments and international institutions to respond to particular events. International civil society thus acts without "any authorization, directy or indirectly, from government or the State." It is promoted as an expression of democracy where popular will is expressed by concerned citizens, and constituting a truly "universal law."[694]

It can safely be said that this thinking current among international legal scholars is not at all original.

1. An integrative vision for civil society

The truth is that there has been a long tradition of thought on associational plurality in reformational philosophy. The reality of the structured world is basic to reformational philosophy. Indeed, a key concern for reformational philosophy has been the dynamics of different associational spheres comprising various non-governmental, or non-political institutions, such as churches, neighborhood associations, social clubs, business, families – that is, how these diversity of institutions, communities and relations or "mediating structures" can support a viable public life and what the state can do to advance this as a matter of public interest.

An important contribution to this task is an analysis of pluralisms in society developed by Mouw and Griffioen, which draws insights from reformational philosophy, in particular, the idea of sphere sovereignty in relation to the given-ness of the diversity of institutions, communities and relations in society or "mediating structures." Such mediating structures are important for a Christian, specifically reformational, political theory: As the two philosophers say, associational diversity provides citizens with a kind of protection that extends far beyond the political arena, with a buffer zone that shields them from a totalitarian statism."[695]

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[694] H. CHARLESWORTH & C. CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST PERSPECTIVE 89 (2000).

[695] RICHARD MOUW & SANDER GRIFFIOEN, PLURALISMS AND HORIZONS: AN ESSAY IN CHRISTIAN PUBLIC PHILOSOPHY 121 (1993). [hereinafter, MOUW & GRIFFIOEN].

In fact, more than that, for the Christian, "the existence of a plurality of mediating structures has intrinsic value, that associational diversity is in some significant sense an expression of the very nature of things... "[696] that is, "that God has a strong vested interest in a pluralistic structuring of the patterns of human interaction."[697]

They thus speak of three irreducible categories of plurality that play an important role in public life and social order: structural (or associational) plurality - already referred to many times in the preceding discussions - directional plurality, and contextual plurality.

Associational pluralism, as its name indicates, is about the diversity of communities, associations, groups or relations in society.[698] Directional pluralism refers to the plurality of visions of the good life, or of the dominant end.[699] Contextual pluralism, meanwhile, is made up of differing cultural contexts.[700] Moreover, each of these pluralisms can be described as either descriptive or normative.[701] The former is used when highlighting the significance of a specific pluralism. The latter is used to mean advocating a given plurality as a good state of affairs.[702]

Mouw and Griffioen speak of a need for "integrative visions"[703] in their Western context where the impersonality and disjointedness of public life dominates - *of connecting a plurality of spheres of interaction that are important to the issue of a proper ordering of society.* The articulation of contextual differences, of course, play an important part in imagining the particularities or the dynamics of how such spheres of interaction can be connected to one another in the public realm so that they don't end up becoming "tight little islands."[704]

2. Civil society: between the broad and the narrow senses

Buijs locates civil society in the broader context of what is fundamentally important to societies in terms of the values that they allow to guide or animate their way of life.[705] He calls the re-emergence of the forgotten concept of civil society as the re-discovery of the "moral horizon."[706] Until the 18th century, political theorists, all standing in the tradition of Aristotelian metaphysics,

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[696] *Id.*
[697] *Id.* at 122.
[698] *Id.* at 16.
[699] MOUW & GRIFFIOEN, *supra* note 695 at 16.
[700] *Id.*
[701] MOUW & GRIFFIOEN, *supra* note 695 at 16.
[702] *Id.* at 17.
[703] *Id.* at 110.
[704] *Id.* at 112.
[705] II Govert Buijs, *The Promise of Civil Society*, a paper presented at the International Association for the Promotion of Christian Higher Education (IAPCHE) conference, Moscow, Russia August 20 - 23 2005 (on file with the author) [hereinafter, II Buijs, *Civil Society*].
[706] *Id.* at 2.

conceived of civil society in terms of an all-embracing political order, of the *polis*. Hegel was the first to make a clean break of it by positing a new space between the sphere of the private and the state where civil society lies. Henceforth, it has been largely a range of variations on a common theme – of civil society that is neither governmental nor private although the reach of it aims may well straddle both worlds. Civil society according to the present social formation points to a wide range of actions, (not private or family-related though it may stay quite close to the private or family-level, nor political, though it may be politically-oriented, nor economical, though it may be directed toward economic actors), that people, individually but most often together, undertake in order to care for or heighten the quality of (each) others life or of the world.[707]

This speaks of civil society in a narrow sense, of a part of society, namely the free initiatives and associations of people organized around a rediscovered "moral horizon."[708]

But civil society in a broad sense "is a society which maintains public-institutional space for the realization of care-values."[709] In both cases, there is new consciousness arising from notions of care that reject the agonistic ethos in society (value), a consciousness that seeks expression in the public sphere (space), as well as distinguishes itself from either the state or the private sphere (opposition). Civil society is then viewed in two senses that point to three aspects: space, values, and oppositions.[710]

Care-values are "those values that express the intention of mutually and if necessary asymmetrically recognizing, preserving and promoting the specific dignity and integrity of other human beings and even broader: other partners in being, like animals and the environment."[711]

Here the Christian notion of *agape* plays an important historical role as root of a civil society centered around care. Meanwhile, agonistic values are those that express the intention to win a game, contest or struggle, in which the outcomes are perceived as a zero-sum game; they are very much oriented toward the desired results, and in Nietzschean fashion, frame the relationships between the various partners in being as essentially power-relationships, interpreting human behavior accordingly, even when certain types of interaction between the partners show the situation to the contrary. It is therefore distrustful of the notion of *caritas*.

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[707] *Id.* at 3.
[708] *Id.*
[709] *Id.*
[710] *Id.* at 3-5.
[711] II Buijs, *supra* note 705 at 3-5.

Adopting the Christian notion of *caritas*, Buijs presents his own definition civil society as "a network of mutual promises, which emerges *where over against a sovereign power, people – recognizing each other as free and equal – make a mutual promise to pursue other standards than those that are embodied in the sovereign power, in particular standards of care, and where they find an institutional form to embody this promise.*"[712]

In the broad sense, *civil societies* are those that are characterized by a publicly recognized plurality of social spheres, which not only is just regarded as a matter of fact but is affirmed positively. Care values are publicly represented and institutionally "incarnated" in hospitals, nurseries, orphanages, but also in action committees, and mass organizations.[713] Here, there is a high "moralization" of social life, such that all spheres have to articulate and legitimate themselves in moral terms: politics in terms of human rights and justice, economics in terms of individual creativity and social responsibility, media in terms of controlling power and exposing abuses etc.[714]

"The picture here", Buijs says, "is that of a public sphere in which a friendly competition and friendly struggle takes place between different care-values: freedom and personal creativity, equality and the mutual recognition of rights, solidarity and compassion, sustainability. All have their public institutional representation and all are somehow 'porous' in regard to the moral pull of other values, which prevents a radicalization and absolutization of one value. Which of these value-complexes are relatively dominant in a certain day and age is rather contingent and changes through time, often back and forth."[715] From this analytical schema then, we can say that international civil society in the broad sense is one that is willing to grant space to associational pluralities – that network of free initiatives and associations of people organized around a rediscovered "moral horizon", alongside sovereign states, inter-state and trans-national organizations. We will return to this topic later in our discussion of Dooyeweerd's inter-communal legal order.

G. A RADICAL LEGAL ONTOLOGY

Dooyeweerd's social ontology is also his legal ontology; that is, his theory of the sources of law springs from his theory of societal sphere sovereignty, of the structural principles that arise from the integrity of different societal spheres. These structural principles that govern each of the different societal spheres and relationships in Dooyeweerd's social ontology, ground an original competence to produce law; in other words, their spheres of competence are properly speaking, the sources of law. These associational spheres, to borrow from Chaplin, "have the

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[712] *Id.* at 21-22 [italics in the original].
[713] *Id.* at 11
[714] *Id.*
[715] *Id.* at 11-12.

power to establish valid legal norms within their own spheres." [716] As Dooyeweerd expounds on his theory of the sources of law:

> All law displaying the typical individuality structure of a particular community of inter-individual or inter-communal relationship, in principle falls within the material-jural sphere of competence of such a societal orbit, and is only formally connected (in its genetic form) with spheres of competence of other societal orbits.[717]

As he argues, societal structural principles rooted in the creational order – norms that delimit the bounds of the differentiated spheres – "lie at the basis of every formation of positive law and [it is only these principles that make the latter] possible."[718] For Dooyeweerd, a source of law is any jural form in which material, divine, jural principles are positivized by the competent lawmaking organs of a jural community or a sphere of legal relationship into binding positive law within that community or relationship.[719]

Dooyeweerd's observation that, inasmuch as the various spheres in society are inter-twined in various structural interlacements – their original spheres of competence bind and limit one another – applies as well to the international legal order. The limitations of this study does not permit us to provide a full or at least, an extended elaboration of how his theory of the sources of law impacts on our understanding of international law. For now, I will confine myself to a brief discussion of the role of enkapsis on law-formation. As indicated earlier, there is a mutual interrelationship of different sources of law requiring an investigation of the external relationship and connection of the sources of law which in their internal spheres are sovereign. This guideline is anchored in his theory of enkapsis, or the mutual intertwinement of differently-qualified societal spheres and relationships. Positivised laws found in the various spheres of competence, are interlinked with one another in complex ways by way of enkapsis. According to Dooyweerd, insight into the nature of enkapsis,

> ... appears to be of fundamental importance for the theory of human society because, in current conceptions, the difference in principle between sphere sovereignty and autonomy is consistently misunderstood... [720]

This insight, according to Dooyeweerd, has a fundamental bearing on any theory of the sources of law "because it is only by making a sharp distinction between the internal sphere sovereignty of radically different societal structures (such as for example, state, church, and business organization) and the autonomy

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[716] IV Chaplin, Institutional Rights, *supra* note at 149-150.

[717] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 669.

[718] *Id.*

[719] I Skillen, Calvinistic Political Theory, *supra* note 15 at 421.

[720] VIII HERMAN DOOYEWEERD, THE COLLECTED WORKS: ENCYCLOPEDIA OF THE SCIENCE OF LAW SERIES A, VOL 8 310 (Robert N. Knudsen, trans. & Alan M. Cameron eds., 2002). [hereinafter, VIII DOOYEWEERD, ENCYLOPEDIA].

of parts of one and the same societal whole (such as, for example, municipality and province within the state) can proper jural insight be obtained into the mutual relationship of the original material spheres of competence with respect to *the* area of law formation."[721]

Its elaboration is beyond the scope of this essay but the public nature of the international legal order is an important insight from Dooyeweerd, the significance of which has been confirmed since the second half of the 20th century by first, the developing international law on state responsibility and second, the growing consensus among states of the need to conceive of international law as imbued by considerations of public interest.

Of course, non-political spheres exist on the international plane, but as in the case of non-political spheres in the national or municipal level, such spheres become inter-twined in some way with the international legal order. This is another important insight extending from the first, because generally, a sharp divide is made between private and public international law by most accounts of international law.[722]

Hence, we have a commercial treaty between two states that may contain provisions borrowed from civil law and public law as one example. In fact, a commercial treaty, if it is shown that its provisions conflict with peremptory norms of international law according to Art. 53 of the Vienna Convention on the Law of Treaties may be invalidated, in whole or in part. Another example is the intertwinement of human rights law and international trade law. Some transnational corporations now include in their corporate policies human rights standards. This is an example of a non-political sphere intersecting with the sphere of public interest.

A third example: "crimes against humanity" and "genocide" are a communal concern of the international legal order; hence, under international law, any State has a duty to prosecute perpetrators found within its territory even if the crimes were committed elsewhere, as these crimes are subject to universal jurisdiction; or, if it is not possible to do so, the State has an alternative obligation to extradite the perpetrators to the next available state. Here, international law finds interlacements with municipal law through the principle of universal jurisdiction. Indeed, many more examples can be drawn from contemporary international law to illustrate this point.

H. JURISPRUDENTIAL POSSIBILITIES

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[721] VIII DOOYEWEERD, ENCYLOPEDIA, *supra* note 715 at 310.

[722] *See* also a feminist critique of the public-private divide in the international legal order, C. Chinkin, *A Critique of the Public/Private Dimension* 10 EJIL 388-395 (1999).

An alternative jurisprudence in international law should therefore recognize the significance of associational plurality in international public life. At times, international judges have realized this basic insight, although not in the exact terms in which Dooyeweerd would put it.

This can be seen in one of the cases Franck points to as exemplars of thinking on group rights in international law under the old League of Nations regime: *The Greco-Bulgarian 'Communities'* dispute.[723] Recall that here, PCIJ judges granted rights to both communities and individuals under the *1919 Convention Between Greece and Bulgaria Respecting Reciprocal Emigration* the agreement, which had obligated both parties to facilitate the right of their subjects who belong to racial, religious or linguistic minorities to emigrate freely to their respective territories, allowing them to take with them personal and community property, and to be compensated for immovables. Under the terms of the agreement, immovables like churches, schools, convents, hospitals and cultural foundations were compensable.

The PCIJ here recognized the right of communities to be compensated for the loss of such immovables, agreeing that the community as a distinct legal entity, separate from its individual members, thus carefully balancing the recognition of rights of both individuals of minority groups as well as communities into which such minority groups have been constituted. This was over the objections of Bulgaria that inasmuch as communities were "legal fictions" that, unlike individuals, cannot bear any rights, claims by Greek churches and monasteries seeking compensation for properties they cannot take with them to Greece should not be countenanced by the court.

A contemporary case decided by the European Commission of Human Rights and its court in 1997 – *Canea Catholic Church v. Greece* – echoes the ruling in the older case (ironically, this time, it was Greece that denied legal personality to a church right in its own soil). The following summary explains what the case is all about:

The application was brought by a bishop belonging to the church. The Commission found in its report that the applicant was acting only as the representative of the Catholic Church of the Virgin Mary in Canea. Accordingly, it considered that the application should be treated as having been submitted by the church itself. The church claimed that refusals on the part of the Canea Court of First Instance (CFI) and the Court of Cassation to recognise the church as a legal person with capacity to bring or defend legal proceedings violated, *inter alia*, Article 6 of the Convention. In short, it was argued that the applicant church, like all other churches existing in Greece before the Civil Code entered into force, had legal personality "*sui generis*". The government argued that the church had not ipso facto acquired legal personality because it had not complied wit relevant national legislation, which offered a sufficient number of possibilities for organising its

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[723] *See* § 4.3.1.2.

activities through the setting up of a separate, independent legal entities such as associations or religious foundations. The Court noted that the legal personality of the Greek Catholic Church and of parish churches had never before been called into question by administrative authorities or courts. The Court of Cassation's ruling that the applicant church had no capacity to take legal proceedings had imposed on it a real restriction preventing it then and for the future from having any dispute relating to its property rights determined by the courts. The Court concluded that such a limitation impaired the very substance of the church's right to a court and therefore constituted a breach of Article 6(1) of the Convention.[724]

Both cases highlight problems that resort to legal method (that is, invoking legal fiction) does not properly address. If much of contemporary thinking in international legal theory is to be applied, these churches do not stand a chance of defending their rights in court. If legal personality is a mere grant of the state, derivative of the powers to legislate of the state, then churches are at the mercy of the state. Churches become no more than a creation of the state itself. Moreover, if churches are no more than free and autonomous individuals coming together to form a religious community, then they cannot really have any legal standing on their own terms, apart from the standing to sue of their supposedly basic elements - their members. The only explanatory device available is precisely a resort to legal fiction (whose logical end is that the church as an institution or a community is also fictional).

We will now turn to a reformational perspective on the contemporary notion of "international community"

I. FROM INTERNATIONAL COMMUNITY TO INTER-COMMUNAL LEGAL ORDER

Earlier we have noted a general trend of inclusive character with regard to the definition of the "international community". While there is no agreement as to the exact components of such a community, there seems to be an emergent consensus that it now embraces entities other than states.

Yet as Nicholas Tsagorias has aptly explained, the concept of an international community is a "constructive abstraction"[725] - one that is packed with a "powerful and privileged meaning"[726] such that it "establishes the international community as a legal agent that is personified empirically in relevant decisions and actions."[727]

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[724]LINDBLOM, *supra* note 493 249-250, citing *Canea Catholic Church v. Greece*, 16 December 1997

[725]Nicholas Tsagorias, *The Will of the Community As a Normative Source of International Law*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 102 (Ige F. Dekker & Wouter G. Werner eds., 2004).

[726] *Id.*, at 100.

[727] *Id.*.

Paulus notes how the distinction made between international society and international community echoes the thought of the German sociologist Ferdinand Tönnies. In fact, he shows just how "popular" it is "international legal writing." Indeed, it is taken for granted that the distinctions made by the German sociologist between *Gessellschaft* and *Gemeinschaft*, apply to the international legal order. The former corresponds to society or association (mechanical solidarity) while the latter to community (organic solidarity).[728]

1. The Problem of the "International Community"

This uncritical appropriation of Tönnies' thesis glosses over what Dooyeweerd says, is his romanticist tendencies: in his pessimistic theory, modernity leads to *Gessellschaft*, into a societal differentiation (if not decline) marked by contractual relations, at the expense of an organic unity of the *Gemeinschaft*, for him the true community.[729]

As Dooyeweerd notes, Tönnies employs the terms *Gemeinschaft* and *Gesellschaft* to sharply contrast an essential "social organism," where an individual arises spontaneously as in an ingrown organic process, from the mechanical aggregate of transitory social ties and relations, which the German sociologist viewed as artificial products of human arbitrariness.[730] For, in modern life, according to Tönnies, there are only residues of the true *Gemeinschaft* in family life, in the State, in the Church, in the trade-unions etc.; *Gemeinschaft* is now officially over, and we are now beyond hope as modernity had ushered us into the unstoppable march of *Gesellschaft*, with its prospect of the dissolution and decline of human culture.[731]

If we therefore follow the logical conclusion to Tönnies' theory, in the highly differentiated international legal order as we have today, the building of an organicist "international community" is impossible, given that from the German sociologist's romantic philosophy of history, the differentiation that inevitably takes place in the process of modernization leads to eventual breakdown of community, of *Gemeinschaft*.

Yet there is a greater problem that must be identified in the notion of an "international community" from the perspective of reformational philosophy: it erases what Dooyeweerd calls the "transcendental correlativity" between communal and inter-individual or inter-communal relationships since in the end, it

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[728] II Andreas L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 42, 60 (Ige F. Dekker & Wouter G. Werner eds., 2004).

[729] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 184-189.

[730] *Id.* at 184.

[731] *Id.* at 185.

reduces all organized communities which do not correspond to the romantic idea of *Gemeinschaft* to mere contractual relations.[732]

In § 2.3.4.1, we saw that Dooyeweerd makes a distinction between communities and social relationships. Communities are made up of people bound together into a social unity, regardless of the degree of intensity of the communal bond.[733] Meanwhile, social relationships, or what D.F.M. Strauss calls "coordinational relations,"[734] are relationships where people coexist either in cooperation with or in opposition to each other[735].

Communities and interlinkages presuppose each other, inasmuch as wherever such communal wholes exist, there will also exist relationships between such communities (inter-communal relations) and between members of such communities (inter-individual relationships). [736] Yet Dooyeweerd stresses that the two distinct communal wholes are not united into a single whole; neither do the inter-individual relationships merge into one. An important implication derived from these coordinational relations, according to the Dooyeweerd, is that human beings can never be fully held or defined by either his position as a member of the community or his status as an individual person. Otherwise we either absolutize the communal bond (resulting in collectivism or universalism) or the inter-individual relations (resulting in individualism) .[737]

A failure to make this distinction leads to a conflation of the communal and the social. Such conflation in fact is what we find in the notion of an "international community". As it were, Tönnies' *Gemeinschaft* is a "thick" account of communal life, where members are deemed parts of the larger whole. If applied into the international setting, this would mean that states, non-state actors, individuals, the chess and football clubs, the Church of England, the *barangay* (the smallest political unit in the Philippines), down to the friendship between Jack and Jill, are absorbed as mere parts of the larger whole called the "international community."

Here, there is a clear hierarchy of authority, so that the members of the institutional community cannot simply opt out of the relations. It is the result of

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[732] *Id.* at 186.

[733] *Id.* at 177.

[734] As Strauss says, coordinational relations neither have a permanent authority structure nor a solidary unitary character but concern social interaction normally related to the phenomena of friendship, partnership, fellowship mate, pal, peer and the freedom we have to associate with an accountable freedom of choice. In other words, they are inter-relations of equal footing between communities and social collectivities, or analogous to Dooyeweerd's conception of the inter-individual and the inter-communal. I STRAUSS, SOCIAL THEORY, *supra* note 179 at 260-262.

[735] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97at 74.

[736]III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 178.

[737] *Id.* at 183. I will return to this discussion in the section below dealing with Dooyeweerd's notion of an "inter-communal legal order".

more than a consensus; in fact, it can be said that legal compulsion is involved. The parts cannot exist without the larger whole.

For the most part, international legal scholars seem unaware of these distinctions so that "international community" becomes a magic word that is repeatedly invoked whenever an international event of crisis proportions takes place.

Tsagorias, for instance, argues that community need not mean pure and total conformity. Only community expectations determine which acts constitute infractions and what constitutes proper corrective action. It is also need not mean a centralized, institutionalized mode of decision-making and action, although it may be part of community organization. "Such less formal and institutionalized modes are however based on members' informal and tacit consent even if they appear to be individualistic in the external manifestations. [738] In other words, community is built on a communal will[739] according to which there is a certain internal and normative identification by members of an aggregation whose will embodies the content of the referent environments.[740] Indeed, from a Dooyeweerdian perspective, contemporary discussions on the international community misses out on the true character of relations among states. We will now turn to what Dooyeweerd says about such relations.

2. Dooyeweerd's inter-communal legal order

Dooyeweerd's writings on international law are few and far between. As already noted in the first chapter of this chapter, in his massive three-volume work *New Critique*, he only makes scattered references to the idea of an international legal order and international law and its justification and analysis, and always in the context of his general theoretical construction of societal structures. In discussing his concept of an international legal order, which he calls an "inter-communal legal order" in relation to the United Nations, we return as well to Chaplin's proposal to take the monopoly of coercion away from the state's inner structural principle

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[738] Tsagorias, *supra* note 725 at 116.

[739] But *see* Gezina H.J. Van Der Molen, *Norm and Practice in International Society*, in 6 HIGHR EDUC. & RES. IN THE NETHER. 11 (1962) [hereinafter, I Van Der Molen, *Norm and Practice*]. in her 1962 valedictory address as professor of the theory of international relations at the Vrije Universiteit te Amsterdam, Prof. Gezina J.H. Van Der Molen expressed opposition to the positivistic idea of the conception of the will of the community as the essence of law. She argued that the essence of international law should be founded on justice:

> The international society can only acquire a more adequate juridical structure if:
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> a. the fundamental principles of international law are abided by;
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> b. this law of nations is expanded in consultation with those to whom it applied and adapted to the demands of the age;
>
> c. justice is accepted as the norm for the existing law and the law yet to be developed;
>
> d. an important and appropriate function is attributed to the rule of law in the community of nations.

[740] Tsagorias, *supra* note 725 at 114.

(thus side-stepping or allowing the expansion of its territorial bounds). On this point we will see that Chaplin's proposal could only be undertaken at great cost to Dooyeweerd's social ontology (and by clear implication, to his legal ontology as well).

Dooyeweerd's theory of international law and international legal order – succinctly if perhaps cryptically summarized in a few sentences of the *New Critique*– immediately provides us with the answer to the Chaplin's proposal:

> ... Here we meet with an indubitable *correlative type of enkapsis*. It makes no sense to assume that the rise of inter-national relations between [and among] States is irreversibly founded [on] the rise of the separate body politic. And the reverse assumption is equally meaningless. The truth is that the structure of the body politic has always been realized in a plurality of States, so that the rise of the latter implied their international political relations and *vice versa*. The idea of a *civitas maxima*, a world-State embracing all nations without exemption, has up till now been of a speculative character.
>
> From the juridical point of view this state of affairs implies that any attempt to construe the validity of the international public order from the constitutional law of the separate States or vice versa contains an intrinsic contradiction. Kelsen's opinion that from a scientific viewpoint these alternative constructions are of equal validity is incompatible both with the inner nature of the State and with that of the international political relations. The *hypothesis* of the sovereignty of the constitutional legal order of the State, as the ultimate origin of the validity of international law, is tantamount to the fundamental denial of international law as an inter-communal legal order. And the reverse *hypothesis* results in the denial of the inner communal character of the Constitutional State-law, which is the very presupposition of international public law as an inter-communal legal order.[741] (italics in the original)

At this point, we can be certain that Dooyeweerd rejects the idea of an all-embracing "civitas maxima" – "a world-State embracing all nations without exemption"[742] – as an historically supported proposition; in fact, he says it is a matter that has not gone beyond the sphere of the speculative, and we might add, the existence of the United Nations notwithstanding. This is a conclusion that needs elaboration.

I will argue that Chaplin's proposal is in fact, a *civitas maxima* in disguise and that it does not hold up to an examination of the elements of the international legal order according to Dooyeweerd's understanding of it.

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[741] That is, under the subheading: "The correlative type of enkapsis in the inter-structural intertwinements of the state with the international political relationships. International law and State-law". III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 661.Interestingly enough, Chaplin does not refer to this passage in his essay in question.

[742]III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 661.

Indeed, when he speaks of international (public) law, Dooyeweerd refers to it as an "inter-communal legal order."[743] Hence, Dooyeweerd rejects the idea that international law could arise from a single state (or "the single body politic"[744]). A corollary to this is that according to Dooyeweerd, international law could not be the basis of constitutional law and its validity and neither is constitutional law the basis of international law and its validity. To subscribe to the idea that constitutional law and its validity is based on international law, according to him, is "tantamount to the fundamental denial of international law as an inter-communal legal order."

Meanwhile, to subscribe to the idea that international law and its validity is based on constitutional law, says Dooyeweerd, is "the denial of the inner communal character of the Constitutional State-law, which is the very presupposition of international public law as an inter-communal legal order." From his brief description of the international legal order the following inter-related propositions can then be reconstructed:

First, the inner communal character of the "Constitutional State-law" is the very presupposition of international law as an inter-communal legal order.

Second, such an inner communal character of the state finds full realization in a plurality of States, so that the rise of the latter implied their international political relations and *vice versa*. This means that without a plurality of states, there can be no international law.

Third, the relations obtaining in this inter-communal legal order (that is, international law) illustrate a "correlative type of enkapsis", which in the end –our *fourth* proposition – runs counter to the idea of a *civitas maxima* – an all-embracing World-State.

Recall that Dooyeweerd differentiates between communal relations and social relations as transcendental categories. On the one hand, there are communal relations, which bind people together as members of a whole. On the other hand, there are social relations – they be of cooperation, complementation, indifference or hostility – that make it possible for people to coexist in society.[745] These relations are only possible in correlative enkapsis.[746] Social relationships are interlinkages between individuals, communities, or communities and individuals. Dooyeweerd identifies two types of social relationships: the inter-individual and inter-communal. It is interesting to note that Dooyeweerd provides an identical function for both inter-individual and inter-communal relations:

> By inter-individual or inter-communal relationships I mean such in which

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[743] *Id.*
[744] *Id.*
[745] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 70-78
[746] *Id.*

> individual persons or communities function in coordination without being united into a solidary whole. Such relationships may show the character of mutual neutrality, of approachment, free cooperation or antagonism, competition or contest.[747]

The state, as a differentiated public, legal community, unites its subjects in a more or less permanent way as members of the same social whole (the public, legal community). States are communities in their own right. Yet states, in their historical formation, also engage in relations among one another. Dooyeweerd says states are intertwined in enkaptic inter-communal relations, in which communities interact in friendly cooperation, mutual competition or enmity. Yet they do not bind their peoples into a social whole or part-whole relations as these relations are by mutual consent, in the nature of a voluntary association. Moreover, there are no relations of authority and subordination in these relations, although certain groups and classes can exert a powerful influence through these interlinkages.

3. Wolfgang Friedman and correlative enkapsis

Wolfgang Friedman, in his 1964 book *The Changing Status of International Law*, faults the inadequacy of international conceived only along the lines of co-existence and instead argues for an international law of cooperation "expressed in the growing structure of international organisations and the pursuit of common human interests."[748]

As it were, the law of "co-existence"[749] which governs "essentially diplomatic inter-state relations" concerned itself with chiefly with the "regulation of the rules of mutual respect for national sovereignty."[750] But the "developing"[751] international cooperative law of international organizations, he says, could not be accounted for in the "static" approach to international law.[752] Applying a sociological perspective, Friedman roots the phenomenon of increasing "factual interdependence"[753] among states these changes in both the structure and the scope of international law.[754] These are seen in "horizontal"[755] as well as "vertical"[756] developments in the international sphere.

As to the former, Friedman counts the "proliferation of sovereignties"[757] arising from the process of decolonization following the end of the Second World

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[747] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21at 117.

[748] WOLFGANG FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW vii (1964) [hereinafter, FRIEDMAN].

[749] *Id.*

[750] FRIEDMAN, *supra* note 748 at vii.

[751] *Id.* at 64.

[752] *Id.* at 58-59.

[753] *Id.* at 64.

[754] *Id.* at 61, 214.

[755] *Id.* at 64.

[756] *Id.*

[757] *Id.* at 214.

War, one in which the decolonized non-Western states passed from being mere objects of international law to being new subjects of international law themselves.[758]

As to the latter, Friedman refers to the expansion of international law "from state to public and private groupings, as participants in the international law process."[759] A third development in international law is the growing list of topics it now covers, especially in social and economic areas that call for varying approaches, from universal to regional, to localized "reordering of international law."[760]

Friedman's work is a reaction to Hans Morgantheu's conception of international law as simply a law of co-existence among sovereign states, whose principal preoccupation is the protection of their respective national interests.[761]

Morgantheu, a German Jewish émigré, is often referred to in the literature as the founder of the realist school of international relations in the United States.[762] I sketch here a general outline of Friedman's work to show how Dooyeweerd's theory of enkapsis could serve as a powerful explanatory tool for understanding relations among different actors in international law.

Communities and inter-communal relations presuppose each other. They are correlative and without them human society cannot exist. Dooyeweerd therefore calls them transcendental categories, and the correlation between communal relations and inter-communal and inter-individual relationships is the most important.[763] "There is a strict correlation between communal and inter-communal... relationships," says Dooyeweerd. "This is to say that in the temporal order, every communal relation has a counterpart in inter-communal... relationships, and conversely... "[764] Indeed, Dooyeweerd stresses that no societal structure exists all by itself. Its typical structure is only displayed in an interlacement with other structures by way of enkapsis. What exactly is an enkapsis? It is the "complicated manner in which the simple individuality-structures are interlaced with each other by the cosmic order of time and through which they are united, in part, within complex structural totalities."[765].

Dooyeweerd says that generally, it is only in inter-structural intertwinements with other individuality-structures where any single structure of individuality is realized. According to him, both the sphere sovereignty of modal

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[758] *Id.* at 64

[759] *Id.*

[760] *Id.* at 10-13, 176-181.

[761] KALSBEEK, *supra* note 19 at 58-59.

[762] See for example, Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations, in* THE ROLE OF LAW IN INTERNATIONAL RELATIONS 17-34 (Michel Byers ed. 2000).

[763] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 58-59.

[764] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 176.

[765] VIII DOOYEWEERD, ENCYLOPEDIA, *supra* note 213 at 216.

aspect as well as the sphere sovereignty of structural types of individuality only reveal themselves in an interstructural enkaptic coherence, frustrating any attempt to absolutize them.[766] But "[a] lack of insight into the principle difference between social relation of [enkapsis] and the social whole-part relation," he warns, "leads to a universalistic view of society."[767]

In the case of the inter-communal legal order of states, Dooyeweerd specifically identifies what kind of enkapsis is involved: correlative enkapsis. Correlative enkapsis is one where the interlacement has a reciprocal character. It is a definition that echoes the nature of inter-communal relations. Kalsbeek notes that in inter-communal relations, "the respective mutual needs and interests must be properly coordinated if these numerous societal interlinkages are to function smoothly."[768]

"Correlative enkapsis assumes greater significance with the increasing differentiation and division of labor in society," says Doyeweerd. "This in turn leads to an increasing mutual dependence of communities."[769] In the technology-dominated globalized world of the present, Dooyeweerd's words should not be difficult to understand.

a) Correlative Enkapsis as Reciprocity and the Possibility of International Law

We shall now turn to the dynamics of correlative enkapsis in the international legal order as Dooyeweerd envisions it to be. If the international legal order is characterized by correlative enkapsis, what does it entail specifically?

Dooyeweerd strongly defends the possibility of international law when he discusses the state's monopoly of the power of the sword within its territorial area in relation to Hegelian thought. He notes that Hegel's claims that a nation proves its right to exist in war and that history reveals a "higher justice" has some truth in it, inasmuch as in Dooyeweerd's view, "the state ought to obey the historico-political norm to actualize and maintain the typical foundation of its legal existence [as the public-legal community of government and people] as an independent power."[770] However, he says that Hegel, in "dangerously" confusing might with right and arguing that the comity of nations is nothing but a contest won by the "law of the strongest", also wrongfully denied the validity of international law.[771]

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[766] *Id.* at 627.

[767] *Id.*

[768] KALSBEEK, *supra* note 19 at 255.

[769] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 68.

[770] VI DOOYEWEERD, ROOTS, *supra* note 46 at 89.

[771] VI DOOYEWEERD, ROOTS, *supra* note 46 at 89. We can perhaps point to a contemporary representative of Hegel, the American legal theorist Myres S. McDougal, who conflates international law with the State's foreign policy and denies the normative character of the system of rules that makes up international law; *that is, what the American State's foreign policy says, is international law. See* M.S. MCDOUGAL

International law is possible because state power is subject to the norm of public justice. As Koyzis notes, the genius of Dooyeweerd's political philosophy is that it can account for both power (might) and justice (right) as "indispensable and complementary elements in understanding the nature of the state of the governing authority within the state."[772] Indeed, they are integral aspects of the state, expressed in its founding and qualifying functions.

Hence, if correlative enkapsis is to work as it should, might and right must also go together in the inter-communal relations between and among states. The states forming the international legal order have a common duty to observe and uphold the norm of public justice in their individual and collective acts. What they must not violate as individual states within their own spheres, they must not violate as well as a collectivity.

The protection given to the differentiation of spheres on the national level must also be observed in the international level as they integrate themselves into an international legal order through correlative enkapsis, which is characterized by mutual interdependence and reciprocity.

b) National Interest v. International Interest

Reciprocity and interdependence in the international legal order, for Dooyeweerd, also means that no state ought to absolutize its own interests at the expense of its relations with the other States. In saying this, Dooyeweerd is mindful that the State's external relations are qualitatively different from its internal relations. "The rules of private inter-individual legal intercourse does not suffice here,"[773] he says. Why so? In the first place, he says, there is the reality of unequal positions of power among states. In the second place, the primary interests involved in international relations are "of a characteristically public societal nature."[774]

But national interest, all too often, is used as an excuse for national selfishness. In fact, what happens in such a case is that a naturalistic theory of *raison d'Etat* – in the sense of an unlimited and egoistic pursuit of national interests – elevates the "sacred egotism" of states to a kind of natural law (or natural justification) in international relations.[775]

History bears this out, says Dooyeweerd as he points to the whole history of inter-state relations beginning with the 1648 Peace of Westphalia and until the

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AND F.R. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961). Alas, his views remain influential in contemporary American foreign policy.

[772] II Koyzis, *Political Theory*, *supra* note 463 at 11.

[773] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 474.

[774] *Id.*

[775] *Id.* at 476.

Second World War. Dooyeweerd refers to what he had originally written in the *WdW*, which we quote *in toto* here:

> So long as the pluralistic modern system of States continues to exist, there is no other peaceful settlement of disputes about the interests of the States than mutual consultation under the guidance of an international public juridical idea of inter-communal relationship. Conflicting interests should be harmonized on the basis of each other's vital interests as each State's well-understood own interests. Added to this the members of the League of Nations should take effective action to prevent or stop wars as means of settling disputes. Recent experience, however, has been deeply disappointing, as far as the application of the Covenant of the League of Nations is concerned. It has become clear how precarious is the international juridical position of weak States, if the old imperialistic spirit is allowed to persist in the international policy of the Big powers.[776]

But, as Dooyeweerd reminds us, "[t]he internal vital law of the body politic is not a law of nature but bears a normative character."[777] Such a normative character springs from the guiding hand of public justice. Might exercised all by its own, apart from right is nothing but an "absolutely selfish international policy of the strong hand with an appeal to its vital interests."[778] (We can well say he might as well have been writing about the present state of affairs in international relations!)

Dooyeweerd does not deny that a conflict between "might" and "right" is possible in international politics. For while in the case of the state, its internal structural principle does not display a dialectical relation between its founding and leading functions, in the case of external relations among states, the situation is different.[779]

Internal policy that works well within the state, or at least, is within its power to implement with some control, cannot readily apply to inter-state relations. "For in this case the different states have external inter-communal societal relations to each other of a very different kind, which implies neither the internal communal structure of the state, nor that of private inter-individual relations."[780]

For this reason, Dooyeweerd criticizes Kant for reducing inter-state relations to the level of the individual (that is, treating states as individuals). Kant's idea of law, he says, was exclusively focused on civil legal intercourse.[781] True,

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[776] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 476.

[777] *Id.*

[778] *Id.*

[779] *Id.* at 474

[780] *Id.*

[781] Dooyeweerd here refers to his treatise *Norm en Feit. Een critische beschouwing naar aanleiding van het geschrift van Mr. Rozemond over Kant en de Volkenbond*, where he gives and extended treatment of the issue. The treatise was published in 1932 in the legal review *Themis*, no. 2 at 1-60. *See* III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 474 (fn.1).

there are international private relations for which the states must provide international legal arrangements[782] but these do not approximate the "essentially public interests" involved in inter-State relations. For in the latter situation, we must consider that states are first and foremost, bodies politic made up of the respective public legal communities they consist of. An individualistic natural law view such as that which Kant propounds clearly cannot adequately account for it.

In the end, the "public" as embodied in the inter-communal legal order is the network of public legal communities imbued with public interest. One state cannot simply resort to *raison d'etat* as justification in breaching its responsibilities to this larger network, where such breach evidently will have an effect on the other public legal communities. The "love of country", he says, must be balanced with the "love for others."

Indeed, no State can claim that its foreign policy is determined solely by its own interests. States must realize that "the vital interests of the nations are in a great many ways mutually interwoven."[783] After all, in international legal relations, "the internal public juridical structure of the individual body politic is necessarily correlated with that of the other States in public juridical, inter-communal relations."[784] And so patriotism, or love of country, cannot be the ultimate measure of all. Patriotism must be checked by love for the neighbor, by which it is meant that the international legal order is also subject to the moral law. Says Dooyeweerd:

> [T]he love of a particular country cannot fulfill the moral commandment in the international moral relations between States without its counter-weight in international love of one's neighbor among the nations. Any absolutization of patriotism leads to a blind chauvinism, which lacks the true moral sense of love. It is an absolutely un-Christian thought that the commandment of temporal societal love of one's fellowmen is not valid in international intercourse between the nations organized in States."[785]

Public justice requires the sort of normative statecraft where one state, no matter how powerful it is, must harmonize its own interests with the interests of others, no matter how weak these other states are. Public justice requires that the various public legal communities come together and agree on how they can address such a common issue in the best way possible - that is, together.

J. RE-IMAGINING THE UNITED NATIONS

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[782] As in the case, in my view, of conflicts of law in what is called the realm of private international law.As a specific example, we can point to the problem of child custody cases between warring parents of different nationalities, a problem that various states have sought to address through the Hague Convention on Child Abduction.

[783] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 474.

[784] *Id.*

[785] *Id.*

Where does the United Nations find its place in correlative enkapsis? Dooyeweerd is not clear on this point. What Dooyeweerd does not tell us is whether the UN arises from the nodal point of correlative enkapsis among States or whether as an institution, it stands apart from such enkapsis. Chaplin argues that the UN springs from a structural principle, hence, it belongs to the realm of the societal structural principles.

Yet, from Dooyeweerd's description of correlative enkapsis, it can be inferred that the UN is the product of mutual relations among states, that is, the structural interlacements that result from correlative enkapsis. If it is, then it can be said that correlative enkapsis does lead to the positivation of a radical type societal structure like the UN. Also, Dooyeweerd says "all of these types of [enkaptic] structural intertwining find their nexus in the different social forms in which these idionimies [individuality-structures] are realized. If the social forms are abstracted from their internal structural characteristics and absolutized, the natural differences between various [structures] in society are leveled."[786] From this discussion, it would appear that the UN is a social form arising from the correlative enkapsis of States.

1. UN as an "International Community"?

The UN, says Dooyeweerd, is indeed susceptible to such notions of an "all-enclusive society embracing all human societal relationships in a supreme unit," considering its seemingly far-reaching goals: achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character, promoting and encouraging respect for human rights and for fundamental freedoms for all, without regard to race, sex, language, or religion, as well as harmonizing the actions of nations in the attainment of common ends.[787]

Dooyeweerd maintains that both the state and the UN belong to the same radical-type; that is, they are the result of human form-giving that are jurally-qualified. However he also differentiates them from each other. The UN, he says, is only a voluntary association of individual States. Indeed its internal structure is qualified by an international public legal function and founded on an historical international organization of power.[788]

Yet it lacks the institutional character of the State, nor does it have any independent monopolistic armed forces and a territory so that it cannot exercise real governmental authority over the States which are its members.[789]

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[786] VII DOOYEWEERD, THEORY OF SOCIAL INSTITUTIONS, *supra* note 97 at 68.

[787] III DOOYEWEERD, NEW CRITIQUE III, *supra* note 21 at 600.

[788] *Id.*

[789] *Id.* It must be noted that at the time of this writing, the UN was barely ten years old. Since then, beginning with the Korean War, it has organized in various ways joint military and police forces from

Dooyeweerd says that the UN's established purposes and means cannot define its inner nature, that is, the inner structural principle that limits its integrating task in regard to international relations in the non-political spheres of society. The inner nature of this integrating function must be directed by the jurally qualified principle of international public interest.

The integrating function of the UN "displays a promoting and supporting political character and not the compulsory trait of a governmental State regulation, which eventually can impose an ordering deemed necessary from the viewpoint of public interest though the binding force of such a measure cannot exceed the inner boundaries of the State's competence."[790]

2. Chaplin's proposal: collapsing the social into the communal

It can now be seen that notions of correlative enkapsis and the inter-communal order presuppose the existence of a plurality of states, and not a single, all-encompassing international state. In the theory of enkapsis as applied to the inter-communal legal order, states function in coordination without being absorbed in a solidary whole.

In the first place, we cannot begin to speak of an inter-communal order if everything has been absorbed into a single international state! In such a situation, what obtains is an intra-communal relation. Gezina Van Der Molen argues that the dissolution of the state-based system of international law would mean its very own collapse. While spurning state absolutism and advocating recognition for individuals as actors in international law, Van Der Molen explains that dissolving the states into a world state would mean the end of international law, paradoxically adding that paving the way for individuals as the only true subjects of international law would do more harm than good to the cause of freedom and we quote her at length to stress this point:

International law-community can only consist of independent states subjecting themselves voluntarily to the sovereignty of law. If these states were to dissolve into one great world-state, compulsory unity should take the place if voluntary unity. Uniform rules would have to be imposed; they would have to supersede state institutions, which are founded on the peculiar character of the nations, their way of living and their religion, Instead of freedom an unbearable compulsion would be laid on nations and individuals.

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various member-States to address international conflict situations, with varying effectiveness. At present, the UN maintains multi-national military and police forces to various areas of conflict, either as an exercise of collective self-defense or in pursuance of peace-keeping missions. *See* STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW, 252-287(1996).

[790] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21 at 601.

If there is to be a world government the choice is either a central power deeply intervening in the domestic life of each state, which cannot have but a leveling influence and which can easily degenerate into world tyranny; or a weak central organ which cannot prevent world chaos.

Not much good can be expected of a reform of international law by which it is dissolved into a world law of which individuals are the only subjects. In this way the freedom and welfare of the individual will be all the more threatened. How difficult has it been so far for minorities to get a hearing for their just claims at the international forum. Who is going to stand up for the oppressed and persecuted if there is no state to vindicate their rights internationally? They will be an easy prey to the central world-government, the views and ideologies of which may be forced upon them, whereas they have merely their unimportant individual personalities to defend themselves lawfully against it.[791]

The idea of an international state is exactly what Dooyeweerd says it is: a structure where its relationship with its constituent parts – the vanished member-states – can only be described as *intra-communal*. And once such an idea becomes a realization, the danger of totalitarianism becomes very real, because the original relation of enkapsis gives way to a part-whole relation, where the international state lords it over its constituent parts.

Recall that in an enkapsis, states retain their internal structural principle as communities in their own right, subject only to the requirement of public justice, which the association of states in the international legal order is also bound to observe. So the relation among States can properly be called inter-communal.

In contrast, Chaplin's proposal will mean a radical transformation of individual states into one international state, one super-community – *the civitas maxima*. This is quite apart from his contention that Dooyeweerd has mistakenly placed the state's monopoly on power as part and parcel from the very beginning of creational norms.

Such an issue is irrelevant to Dooyeweerd's conception of the international legal order as characterized by correlative enkapsis. The UN cannot therefore be conceived of as an immature state as Chaplin proposes. The objection to the idea of a single international state is deeply rooted in the very idea of a differentiated social order as Dooyeweerd envisions it.

The grand ontological reconstruction project for the state that Chaplin proposes cannot be carried out without doing much violence to Dooyeweerd's idea of the inter-communal legal order. Alas, it is an insurmountable philosophical hurdle. The project will have to erase the distinctions that Dooyeweerd makes

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[791] Gehiza H. J. Van Der Molen, *Inaugural Address: Subjecten Van Volkerecht*, 40-41 March 25, 1949, Monograph, with a comprehensive summary in English.

between inter-communal and intra-communal relations, as well as the whole idea of correlative enkapsis. In the end that plurality of States on which Dooyeweerd builds his theory of international law will be collapsed into a single international state.

The truth is, Dooyeweerd warns against interpreting the "integrating tendencies" in both the inter-individual and inter-communal relationships as a process of socialization where the inevitable end result is the formation of an entirely new community that absorbs the constituent parts into a larger whole.[792]

The problem, according to him, is that in this case, the normative structural principles that mandate the positivation of a differentiated social order is set aside, resulting in an "overestimation of the integrating role of the national and international political communities."[793] Indeed, as a voluntary integrative association, the UN needs to mature so as to effectively discharge its task of assuring public justice in the international level. Yet making the system work effectively does not mean the abolition or the withering away of the present plurality of states to pave the way for a single, international state.

And so to repeat, what Chaplin envisions would result into a conflation of the inter-communal into the intra-communal.

K. INTERNATIONAL CIVIL SOCIETY AND THE INTERNATIONAL COMMUNAL LEGAL ORDER

It is clear that Dooyeweerd's inter-communal legal order, by definition is state-based. Does this mean that in his system of international law, all the others then, are excluded from the discourse - non-state actors, for instance? Does not this contradict the clear implication of his theory of societal sphere sovereignty that posits that all societal spheres, from the state to the various associations, stand on the same ground? If we say that the radical insight we can glimpse from his social ontology is that all entities have original legal personality, how does this cohere with an inter-communal legal order that is for all intents and purposes, a state-based affair, strictly-speaking?

I can only provide a most tentative answer that needs to be developed further. I believe there is no contradiction here. Dooyeweerd proffers the concept of an inter-communal legal order as necessary implication of his theory of the state as a jurally-qualified institution. The inter-communal legal order therefore refers to that jurally-qualified order where the states are of necessity the principal actors.

What is in the state that assigns to it such a special role? Dooyeweerd's answer is that the state, as a jurally-qualified institution, is tasked to pursue public

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[792] III DOOYEWEERD, NEW CRITIQUE, *supra* note 21 at 602.
[793] *Id.*

justice. In the international level, this calls for that network of states working together to pursue public justice, the inter-communal legal order.

Yet at the same time, we must not also lose sight of what his theory of societal sphere sovereignty says; when we consider closely what societal sphere sovereignty means, we can also say that the state is not everything; or better yet, the state cannot do everything, precisely because it was never meant to do everything.

But because of all the societal structures in their full diversity, the state is jurally-qualified as a public legal community, it has a special role to play, in fact, a lead role to play, in public life. In dispensing this role, it needs the help of other associational spheres, that, though not jurally-qualified, contribute towards the deepening of the state's performance of its task of public justice.

We can borrow Buijs' notion of the civil society and say that the inter-communal legal order, if it must play the role of an international civil society in the broad sense, should allow civil society in a narrow sense – that network of free initiatives and associations of people organized around a rediscovered "moral horizon" – to support it and deepen its understanding and its pursuit of the task of public justice. As it were, civil society in the narrow sense, is ethically-qualified. Various associational spheres, as in the case of NGOs, are not founded on the monopolistic exercise of the power of the sword as the state is, and therefore could not be jurally qualified, yet they help towards the deepening of the state's appreciation of its task to render public justice.

Even in contemporary discussions in international legal theory, there is a recognition that states, for all the talk about cosmopolitanism that abounds, are not about to go away. As Malanczuk says, while increasing global interdependence and the emergence of new players has put to question the role of the state in international affairs, it remains the case that "international law is still *predominantly* made and implemented by states":

> International organizations are to a large extent dependent upon these territorial entities and the willingness of their governments to support them. Only states can be members of the United Nations, only states are entitled to call upon the UN Security Council if there is a threat to international peace and security, only states may appear in contentious proceedings before the International Court of Justice, and only states can present a claim on behalf of a national who has been injured by a state, if there is no treaty to the contrary. The individual has no rights in this respect under customary international law and is dependent on the political discretion of the home state as to whether or not to present the claim. In other

words, the international legal system is *primarily* geared towards the international community of states, represented by governments.[794]

After all, we cannot talk of a European Union or of the Association of South East Asian Nations – or of the Organization of African Union for that matter – without the states that comprise them. States are the organizing members of the Asian Development and the World Bank. International and trans-national organizations have states as their backbone.

But the NGOs, in Buijs' terms, represent "care values" – freedom, equality, humanity and the like – that somehow mirror the state's own task though these are usually achieved in quite another way (that is, without the state's power of coercion. Of course, the state can as well provide support to the work of these associational spheres, as when it opens legislation allowing the active participation of these spheres in public life).

Buijs calls this the necessity of the "transmodal appeal".[795] In other words, following Dooyeweerd's theory of societal sphere sovereignty to its logical conclusion, we can now say that differentiation also calls for an interdependence between the civil society in a broad sense and civil society in a narrow sense. This all come together in an integrative vision of associational plurality that is at the center of reformational thought on the diversity of relationships, institutions and communities.

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[794] MALANCZUK, *supra* note 251 at 2.

[795] E-mail from Govert Buijs to the author, (May 22, 2007 2:04:02 PM CETZ) (on file with author). He explains in part what he means by this:

> And then your other question: does care belong to the ethical aspect? I have been asking that question myself quite often. You will have noted that I have related the notion of "care" rather closely to the Christian notion of love (agape). In an article in the Christian Encyclopedia in the [1950s] Dooyeweerd wrote about "justice" and made a distinction there between justice and the juridical. Let [me] try to translate him:
>
> > 'However, justice gives a **deepened** expression of the modal meaning of the legal order, because it discloses the anticipatroy meaning-moments of the legal aspect, in which the legal order starts to reveal its inner conhesion with morality and (mediated by faith) its relatedness to the central religious love-command, where the divine command of justice finds its 'fulfillment'.'
>
> Here you see that Dooyeweerd treats both justice and love as a transmodal dynamics, a transmodal appeal. I treat "care," chosen because as a concept it is both viable in modern debates and has deep biblical overtones, very much in the same manner, for it is a blending of justice and love. But it has to receive modally and institutionally differentiated expressions. In a social and political context I will relate it to peace, individual freedom, equality before the law, social solidarity.

L. CONCLUSION

Nominalism pervades much of the discourse in international law. This is seen in the irreconcilable tug-of-war between the individual and the community that characterizes much of liberal theorizing on international law. The state is conceived in terms of either the all-encompassing whole or of something identifiable only through its supposed basic elements: the individuals who make up the social contract. The rise of non-state actors in international law has led to what scholars call the "rights triad" of the individual, the state, and the group. In any case, nominalism of the liberal and the natural law kind puts a stress on the individual as having the primacy of moral rights. Here, original international legal personality is accorded the individual while only a derivative international legal personality is given to institutions and communities. In this light, the so-called "international community" is made to serve the interest of the individual, inasmuch as such community is seen as merely as derivative of the existence of the individual, and therefore, has the duty to ensure the welfare of the individual.

But a tension between the individual and the international community is inescapable, since the idea of a "community" by itself, implies a bigger whole to which its parts must submit. The individual, along with other entities such as voluntary associations, the state, NGOs, churches, etc. are absorbed into the "community."

From a social pluralist's view point, the traditional opposition between individual rights v. community rights simply fails to grasp the idea of various societal spheres with their respective competencies. Both are reductionist approaches, with their particular slant to doing justice to human relationships, so that in their scheme of things, there can be no principled balance between the individual and society.

In Dooyeweerd's social ontology, there is no single communal whole that absorbs everything else. The state is just one of many societal spheres with their respective areas of material competence. The same can be said of inter-individual relationships – these are coordinational relationships, not communal wholes.

His stress on the diversity of relationships, institutions and communities apart from the individual underscore a key concern for the integrity of associational spheres and pluralities. We have demonstrated that such a social ontology has radical implications for the notion of international legal personality, as well as for law-formation in the international sphere.

There is a tendency in international legal theory to collapse this distinction between the communal and the coordinational – and this is demonstrated in the debates about the shape and nature of the so-called "international community." From a reformational perspective however, the relations among states properly belongs to the realm of the social, and this is underlined by Dooyeweerd's concept of the inter-communal legal order founded on the correlative enkapsis of states.

In the case of the United Nations, it can be viewed also as a result of such an enkapsis, although it does not encompass the inter-communal legal order itself. We have also shown that the grand ontological reconstruction project for the state that Chaplin proposes cannot be carried out without doing much violence to Dooyeweerd's idea of the inter-communal legal order, inasmuch as it erase the distinctions that Dooyeweerd makes between inter-communal and intra-communal relations, as well as the whole idea of correlative enkapsis.

The logical result of Chaplin's proposal is that that plurality of states on which Dooyeweerd builds his theory of international law will be transformed into a single international state. As has been indicated, Dooyeweerd warns against interpreting the "integrating tendencies" in both the inter-individual and inter-communal relationships as a process of socialization where the inevitable end is the formation of an entirely new community that absorbs the constituent parts into a larger whole

Finally, we have likewise shown that Dooyeweerd's notion of an inter-communal legal order does not deny non-state actors their place in the international law. The inter-communal legal order only underscores the fact that in the scheme of things, states are jurally-qualified as public legal communities and therefore they have a special role to play, in fact, a lead role to play, in public life. In dispensing this role, states need the help of other associational spheres that though not jurally-qualified, contribute towards the deepening of the states' performance of their task of public justice. Indeed, while NGOs, churches and other non-state actors are not founded on the monopolistic exercise of the power of the sword as the state is, and therefore could not be jurally qualified, yet they help towards the deepening of the state's appreciation of its task to render public justice through what Buijs has termed as "transmodal appeal."

V. A POSTSCRIPT: IN SEARCH OF (PUBLIC) INTERNATIONAL LAW

The jurists are still searching for their concept of law.[796]

The chaotic and the bloody world around us is the rule of law.[797]

A. SUMMING IT ALL UP

How do we resolve the tension between sovereignty and community in international law from a social pluralist perspective? In this study, we have

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[796] The German philosopher Immanuel Kant, as quoted by Herman Dooyeweerd, *in* VIII DOOYEWEERD, ENCYLOPEDIA, *supra* note 213 at 89.

[797] The last line in Miéville's book, MIÉVILLE, *supra* note 1 at 319 [italics in the original].

presented a critique both of individualistic and collectivist accounts of international law from the standpoint of reformational philosophy – one based on Dooyeweerd's theory of societal sphere sovereignty.

A Dooyeweerdian critique of international law proceeds from a fundamental conviction of unity in diversity of created reality; it is a unity of diversity premised upon the proper, internal limits set for different spheres of existence in a differentiated society; in other words, societal sphere sovereignty, or sovereignty of spheres in their own orbit. This social pluralistic approach looks at the state as only one of many different spheres in society, with its own normative sphere of competence.

It differentiates the state from other entities, communities and relations in society by looking at its historical and qualifying functions. It rejects absolute sovereignty and places limits on the powers of the state from its own nature as a public legal community organized through a monopoly of the sword over a defined territory, guided by norms of public justice. As a normative view, it sets itself apart from theories of the state without the state-idea, which is prevalent in international legal theory.

The constant deferral in international law from a definitive description of what a state is (e.g. Koskenniemi, Crawford, Werner) could only be symptomatic of the failure in social and political theory to grasp the nature of the state is, or its inner structural principle.

Moreover, much of theorizing on the state has been influenced by a philosophical movement that either exalts the state as the only political reality or treats it as a legal fiction of the social contract between among purportedly free and autonomous individuals. International legal theory takes it for granted that there is an opposition between the individual and the state, to the exclusion of all other non-state actors.

This nominalistic approach has so dominated international law that for the most part, the state has been seen as the only source of legal standing and legal personality in the international arena.

International legal theory thus confronts us with a nominalism of the state as the only true sovereign and a nominalism of individuals as the basic elements of the international legal order. This is seen for instance in the work of Anna Marie Slaughter on the disaggregated state, where one form of nominalism (the state as the ultimate measure of political reality) gives way to another form of nominalism (the individuals as the basic elements of society).

Indeed, for as long as theorists continue to reject the normative structural principle of the state and insist on a purportedly empirical examination of the state founded on a certain untheorized theory of the state without a state-idea, calls for and prophecies about the eventual demise of the state will persist.

We have shown that a rejection of the normative view of the state has led thinkers into an unsatisfactory strategy of (1) devising external limits to the powers of the state and (2) stressing the primacy of the individual over all else to curtail abuse of state power.

The first strategy cannot fully account for the state's public and private duties while the second strategy fails to do justice to the proper exercise of the same duties as well as to the existence of other non-state entities. This in fact leads to an irresolvable conflict between the state and the individual, inasmuch as it fails to properly recognize their respective competencies, as well as the existence of other spheres in society.

Neither of the two strategies can properly account for the rise of non-state actors in international legal discourse, other than resorting to notions of democratic participation and legitimacy that in the first place do not provide a convincing ontological justification for why non-state actors should be granted the right to democratic participation and the power to ascribe legitimacy to international legal processes.

The reformational social ontology argues that the traditional opposition between individual rights v. community rights involves particular slants to doing justice to human relationships, so that in the end no principled balance between the individual and society (or state) can in reality be reached.

The individual does not disappear in Dooyeweerdian social ontology. In fact he argues that human I-ness transcends all the relationships and communities human beings find themselves in. In terms of his social ontology, the human being is not qualified by any of the modal aspects. It is therefore grievously wrong to treat the human being as part of an organic whole. Yet the protection of the rights of the individual is inseparable from the development of a differentiated societal order where the state establishes a public legal community.

Human beings are called to positivize rights. The historical development of states shows that the individual *qua* individual only came to be, side by side with such development. Dooyeweerd accords this achievement to the French Revolution, which made possible the protection of the individual through the creation of a civil sphere of freedom, where the powers of private lords and social collectivities in undifferentiated spheres of authority are done away with. At the same time, Dooyeweerd warns against the overextension of the civil-legal and public-legal idea of freedom and equality that the individualistic tradition the French Revolution has spawned. His social pluralistic approach demands that private, non-state entities also be recognized as having original legal personality and possesing subjective rights.

Dooyeweerd's insistence that we carefully consider the diversity of relationships, institutions and communities apart from the individual has radical

implications for the notion of international legal personality, as well as for international law-formation founded on his theory of enkapsis.

A Dooyeweerdian critique of international law stresses a rigorous analysis of various communities and relationships that mark human existence. This leads to a truly radical view of international legal personality, for the most part limited to the state, and in emergent legal theorizing, ascribed to the individual as the only source of original subjective legal personality.

In thinking exemplified by such scholars as Franck and Nijman, original subjective international legal personality solely belongs to the individual; meanwhile, institutions and communities such as the state are conferred a merely derivative legal personality (if it the state is not already treated as mere legal fiction).

Both Franck and Nijman consider the role of non-state actors in international legal discourse; the former, in terms of democratic participation and legitimacy, the latter, in terms of the "international community" as serving the interest of the individual; such community, considering that it is derivative of the existence of the individual, has the duty to ensure the welfare of the individual. Since everything is viewed from the perspective of the individual, there can be no real consideration for what other entities, communities and relationships might require.

A tension between the individual and the international community is inevitable, because the idea of a "community" itself seems to call for a larger whole to which its parts must submit. The "community" absorbs the individual, along with other entities such as voluntary associations, the state, NGOs, churches, etc. In fact, contemporary international legal theory misconceives of the distinction between the communal and the coordinational that reformational philosophy insists we must make, if we wish to avoid totalitarianism.

From a reformational perspective the relations among states properly belongs to the realm of the social (or coordinational) and this is underlined by Dooyeweerd's concept of the inter-communal legal order founded on the correlative enkapsis of states. The concept of enkapsis is at the heart of our critique of Chaplin's revisionist project; his proposal cannot be implemented without doing much violence to Dooyeweerd's idea of the inter-communal legal order, which is about *inter-communal* and not about *intra-communal relations*.

We must avoid interpreting the "integrating tendencies" in both the inter-individual and inter-communal relationships as a process of socialization where the inevitable end is the formation of an entirely new community that absorbs the constituent parts into a larger whole. That seems to be the unavoidable if unintended end of Chaplin's proposal to take away the state's founding function to the variable side of reality.

The inter-communal legal order made up of states as Dooyeweerd envisions it should not be taken to mean the exclusion of non-state actors from international legal discourse. The inter-communal legal order highlights the fact that states are jurally-qualified as public legal communities and have a lead role to play, in public life.

Only states have the monopoly of sword power over a territory, integrating within such territory a public legal community, with norms of public justice as a guide. This distinguishes the state from other entities. But states cannot do everything. They were not meant to do so. Hence the inter-communal legal order needs the help of other associational spheres that though not jurally-qualified, are indispensable in the deepening of the states' performance of their task of public justice.

Dooyeweerd's theory of societal sphere sovereignty argues that each type of community has a distinctive internal organization, a distinctive structural purpose determined by its founding and qualifying function, as well as its distinct authority. Enkapsis makes it possible for these different types of relationships, communities and entities to co-exist and enrich one another.

B. NOTES TOWARDS A FURTHER EXPLORATION

The Marxist scholar China Miéville complains about the general lack of theorizing on what makes international law "law", saying that for the most part there has been no coherent attempt (at least, until he wrote his book) to account for why in international relations, international law has to take the very form it now exhibits - what Miéville calls the "legal form."

I am not sure whether my modest effort to describe Dooyeweerd's social and political philosophy as applied to international law meets Miéville's challenge.

But we do know that Dooyeweerd has sketched for us the basic outlines of international law as coordinational law in his concept of the inter-communal legal order[798] and, knowing from the profound implications of Dooyeweerd's over-all theory of law, the description "coordinational law" could come across as deceptively simple.

The key that unlocks for us the significance of his theory of international law is his insistence that it is *public* in nature; that is, that international law presupposes the *body politic* (and hence, rejects what is called "the private law"

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[798]By the way, our philosopher has as well written a powerful critique of the work of Miéville's intellectual model, the Russian Marxist thinker E.B. Pashukanis, which space constraints however forbade us from discussing in this study. *See* III DOOYEWEERD, NEW CRITIQUE, *supra* note 21 at 455-459 (where Dooyeweed discusses the import of Pashukanis' work, with the ideas of Marx and Engels as a background).

analogy, which seems to be popular these days, along with its corollary, cosmopolitanism).

While in some way, this view echoes the traditional definition of public international law as the relations between and among states, it does more than that. For one, it alerts us to the reality that we are dealing here not just with our particular body politic but with those of others as well.

Well, if international law is said to be a "system", there must be some fundamental basis for saying so – a justification in terms of Dooyeweerd's material principles – and not a mere resort to legal method. In other words, why should we consider relations among states as something that is primarily public in nature? And what do we mean by public?

These questions are highly relevant to contemporary discussions on the international *ordre* public at a time when differentiation and fragmentation vie for equal space with the ever- expanding (or is it shrinking?) global commons.

The International Law Commission study group chaired by Martti Koskenniemi deals with the phenomenon of fragmentation, or "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice,"[799] in other words "functional differentiation."

This phenomenon both has an institutional aspect as well as a legal one, and opens itself to conflicts both in the structures and systems of institutional authority as well as in the structures and systems of legal norms, rules and principles.[800]

In other words, what we need is a framework for understanding these developments as having a public character. As I already said, recourse to legal method will not be enough. What is the relationship for instance, between environmental law and human rights law? Or trade law and human rights law for that matter?

It is here where Dooyeweerd's general notion of enkapsis is worth exploring in relation to his theory of societal sphere sovereignty governed by material principles unique and inherent to each particular sphere of existence.

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[799]Jorg Friedrichs, The *Neomedieval Renaissance: Global Governance and International Law in the New Medieval Ages in* GOVERNANCE AND INTERNATIONAL LEGAL THEORY 29-30 (Ige F. Dekker & Wouter G. Werner, eds., 2004).

[800]FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION 11 (Martti Koskenniemi, ed., 2007). *See* also UN Doc. A/CN.4L.682 Apr. 13, 2006.

Hence the question: does Dooyeweerd's system provide us with a framework for understanding the public nature of the international legal order, one that is able to account for recent transformations in the international sphere, namely, the (re)turn to the public?

Or are we willing to concede to Miéville that *this* chaotic and the bloody world of ours *is the rule of law*? I believe Dooyeweerd's social and political philosophy points us to the right direction.

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