

STUDI GIURIDICI IN RICORDO DI GIOVANNI BATTAGLINI

A CURA DI

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ESTRATTO



Jovene editore
2013

DIRITTI D'AUTORE RISERVATI

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ISBN 978-88-243-2245-4

JOVENE EDITORE

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Printed in Italy Stampato in Italia

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THE «DUAL STATE», INTERNATIONAL LAW AND THE UN:
A REPLY TO CHARLES LEBEN

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I. *Introduction*

1. *Object of writing*

Giovanni Battaglini's adherence to the factual concept of international persons – notably in his «*Il diritto internazionale come sistema di*

diritto comune» and earlier writings¹ – encourages me to dedicate to his memory my answer to the recent reappearance, in an English version, of Charles Leben's *critique* of the present writer's view of that concept. I refer to the English version of that eminent Colleague's article on *The State within the Meaning of International Law and the State within the Meaning of Municipal Law (On the Theory of the Dual Personality of the State)* that I find in Leben's recent book on the advancement of international law². The dialogue that my few answers might open could be made easier by the fact that at the present stage we both express ourselves in a language other than his French or my Italian.

II. *Main Divergencies*

2. *Respective essential premises: the notion of personnes morales; and the relationship of international law and interindividual (municipal and international) law*

Charles Leben's known and long-standing adherence to the main tenets of Kelsen's theory of law and State stands out by far – as will be shown further on – like the most fundamental premise dividing his view and mine of the State's international person. Only in some part the distance is reduced by the fact that I whole-mindedly share, as well as

¹ G. BATTAGLINI, *Il diritto internazionale come sistema di diritto comune*, Padova, 1999.

² C. LEBEN, *The Advancement of International Law*, Oxford, 2010, p. 219 ff. The original French edition of that article was included in A. GIARDINA and F. LATTANZI (eds.) *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, Napoli, 2004, vol. I, p. 131 ff. I like to quote here my Friend Charles Leben's thought (concluding the French as well as the English edition of his comments) that «being criticised is not, as Max Weber observed, an inevitability of scientific research but on the contrary its very purpose»: LEBEN, *The Advancement*, p. 254. This applies as well, of course, to the present *réplique* to Charles Leben's learned *critique*; with the addition of the expression of the present writer's deep gratitude for extending his attention to other works of the Italian School. Although my thinking has remained essentially unchanged, I must add, to the works mentioned by Professor LEBEN, G. ARANGIO-RUIZ, *La persona internazionale dello Stato*, Torino, 2008 (*infra*, para. 7 d)), where the distinction of the State's international person from the State of municipal law is more neatly set out.

Having learnt only recently of the interesting article by Professor M. FORTEAU, *L'Etat selon le droit international: une figure à géométrie variable*, *Revue gén. droit int. public*, 2007, p. 737 ff., I have not been able to take account of his interesting thoughts in the present writing. Considering that much of that author's attention is focused on attribution of conduct, I propose to deal with his views in the article I propose soon to complete on that subject.

Leben, that same Master's normative concept of the State in municipal law. I might add that it is precisely by sharing Kelsen's and Leben's normative concept of the State in municipal law that I rightly or wrongly feel able better to perceive the corporeal, factual nature of the State's international person. The contrast seems to me manifest.

Back to my eminent critic, what specifically divides us, with regard to the State's international person, are two interrelated premises. One premise is the concept of juristic persons, the French term *personnes morales* being in my view more consonant than *legal* persons with the nature of the entities in question³. The other premise is the issue, widely disregarded in contemporary teaching, manuals and encyclopaedias – but in my opinion increasingly relevant – of the relationship between international law and municipal law or, better (as I believe one should properly put it), the relationship between international law and interindividual law: the latter (broader) distinction inevitably following from the essentially different nature of inter-State and interindividual relations: another point briefly to be resumed further on⁴.

Terminology is not irrelevant for the purposes of this discussion. Unlike the French expression *personne morale*, that keenly marks the difference between juristic and natural persons, the English «*legal person*», generally preferred, conceals an ambiguity. It seems obvious that the natural person (*persona fisica*, *personne physique*) also qualifies – once endowed with juridical capacity – as a «*legal person*». The latter coincidence reduces, in my view, the immediacy of perception of the radical difference between the two classes of persons. Hence my preference, at least for the present purposes, for the admittedly uglier «*juristic person*» instead of the more general «*legal person*»⁵. Be it as it may, it seems better not to blur the difference between natural persons and juristic persons by adjectivizing both classes of persons as *legal*.

³ The Italian «*persona giuridica*» is only a little better than «*legal person*». Both terms are rendered ambiguous by the fact that «*persona fisica*» (the English «*natural person*») is vested with legal personality and in that sense is also a «*legal person*».

⁴ The said concept is more thoroughly studied, although still inadequately, in ARANGIO-RUIZ, *Dualism Revisited: International Law and Interindividual Law*, *Riv. dir. int.*, 2003, p. 909 ff., notably at pp. 988-996 with reference to various kinds of interindividual international law (993-994). See also para. 13*v*-*vi*) and notes 66 and 78, and para. 14*b* as well as para. 7 with note 16. *Adde*: A. NOLLKAEMPER and J. NIJMAN, *New Perspectives on the Divide Between National and International Law*, Oxford, 2007. See also note 76.

⁵ It will incidentally also be noted, to complete the picture, that the English expression «*natural person*» presents the advantage over the French and Italian «*personne physique*» and «*persona fisica*», of a greater precision.

III. *Law and Fact in the Juristic Person*

3. *The juridical and the factual concepts of juristic persons: a) Chief Justice Marshall's definition of a corporation; b) the widespread confusion of juristic persons with their substrata*

The difference between the two kinds of persons is indeed quite clear-cut.

a) In vesting a natural person with juridical capacity or personality, the law accomplishes only the *single* operation of endowing a human being with legal capacity, namely the capacity of rights and obligations, and in that sense of legal personality. In creating a juristic person (*personne morale*) the legal system performs instead two operations consisting respectively in erecting an artificial entity, on the one hand, and endowing it with legal capacity or personality, on the other hand. The fact that the two operations are frequently not distinguishable, in time or otherwise, one from the other, does not obliterate, together with the distinction, the essential difference between juristic and natural persons.

The difference resides indeed in the fact that while the natural person is merely the *given* target of the legal qualification (legal capacity or capacity of rights and duties), in the juristic person the target of the legal qualification – namely, personality – is *also* a creation of the law. To put the juristic person's concept with a well-known English language, authoritative *dictum*, «[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence»⁶.

Although it only mentions corporations, this definition applies *mutatis mutandis* to any private or public *personne morale*: from private associations and foundations to municipalities, counties, provinces, cantons and federated States; ultimately to the State itself, unitary or federal, as a *personne morale* in its own municipal law⁷. As I rightly or wrongly under-

⁶ Chief Justice Marshall of the US Supreme Court: from PH. L. BLUMBERG, *The Multinational Challenge to Corporation Law*, Oxford, 1993, p. 26.

⁷ With regard to the State itself (in national law), I share the view of those who think that the establishment of a human aggregation's governmental structure – and in that sense the birth of a State – is not to be envisaged, despite what *prima facie* one might think, as the pre- or meta-legal phenomenon envisaged by the theory that the law is just a product of the State's will, namely that there is no law, within a society, before that society is organized into a State. The State's organization takes shape within a legal community, not within a lawless aggregation of humans. Rather than just a *posterius* of the State's, the community's law precedes in a relevant part the State's organization. The formation of the basic «secondary» rules (in Hart's sense) is at most concomitant with the organisation. While not sharing Santi Ro-

stand it, Marshall's definition of corporations, as extended to the other artificial entities, is essentially shared not only by Kelsen but by the host of writers, from Savigny onwards, who profess a juridical, as opposed to factual or corporeal, notion of juristic persons.

b) One could leave the matter at Marshall's quoted *dictum* (as extended to the other private and public juristic persons) were it not for the widespread tendency of scholars to assume that in the case of juristic persons the personified entity is, as well as in the case of natural persons, a given, corporeal or even ideal entity, such entity being mostly identified in the so-called *substratum* of the juristic person. According to that arbitrary view, a private company would consist of the *substratum* represented by the corporation's members, agents and perhaps its name, purpose, assets. Similarly, the *substratum* of a municipality would be the city's inhabitants, the mayor, the municipal civil servants and the city's patrimony. Moving upward in the scale of public *personnes morales* one identifies, *mutatis* the many necessary *mutandis*, the Swiss cantons, the French *départements*, the Italian provinces and regions, the German *Länder*, and the member States of the United States of America, not with the relevant incorporeal juridical entity but with each entity's population, territory, organisation and assets. The juristic person of the United States of America in US municipal law (if any) would be identified, under the questionable concept in question, with the *substratum*, roughly consisting of the *ensemble* of the fifty member States' *substrata*, namely, people, territory and any assets⁸.

mano's notion that the society's factual organization is an integral part of the law, I believe that that eminent author is essentially right where he stresses the said concomitance: SANTI ROMANO, *L'ordinamento giuridico*, Firenze, 1951, esp. p. 46 ff.; ID., *L'ordre juridique*, Paris, 1975, p. 34 ff. My position remains the one I took in *Gli enti soggetti dell'ordinamento internazionale*, Milano, 1951, p. 98 ff., esp. pp. 100-109. Further developments in *L'Etat dans le sens du droit des gens et la notion du droit international*, Bologna, 1975 authorized *tirage à part* from *Oesterreichische Zeitschrift oeffentliches Recht*, vol. 26 (1975), also cited by Leben, *passim*. Romano noted, with regard to the relationship between the State and the law, that «[l']affirmation que la poule naît de l'œuf ne contredit pas celle que l'œuf naît de la poule» (pp. 34-35, note 1 of the Paris edition, pp. 47-48, note 33 *bis* of the Italian 1951 edition).

⁸ By all means, the presence of a more or less cohesive and organized group of individuals underlying the juristic person is an incontestable fact. Such a physical presence mostly precedes the very establishment of the artificial entity. Obvious instances are: a group of individuals getting together in order to set up a company, a single person establishing a foundation, or a *de facto* committee promoting the establishment, by legislation or other normative act, of a new municipality, a new province or a new member State of a federation. More importantly, elements such as these will normally continue to be present in the course of the legal person's life-span. As long as the juristic person is there, the underlying group dissolves, for any purposes of the incorporating legal order, into its individual members and agents. Much as it may serve the purpose of presenting the matter to first-year law students,

4. *Significant historical distinctions between the juristic person and its substratum: a) the admission of a State under the United States Constitution; b) juristic persons and substrata of the Confederate States in the course of the American Civil War; c) instances during the Second World War; d) and the proper concept of personnes morales*

Considering, however, that the confusion of juristic persons with their *substrata* seems to be more persistent than it deserves and rather widely professed (including by my eminent critic), it seems useful to go back – more thoroughly than I did in the past – to the very telling historical example represented by the vicissitudes of a number of the member States of the United States of America.

a) Apart from the 13 former colonies, by then States, which were the original members (and the founders) of the Union, almost all of 28 States acquired their membership in the Union, as *juridical* members, through manifestly *juridically* creative processes involving a more or less substantial part of each territory's population, on the one hand, and the United States Congress, on the other hand: the population's representatives petitioning for Union member State *status* and the Congress authorizing the steps through which a constitution could be submitted, first to the territory's population's approval, subsequently to be the object of examination and acceptance by Congress, the latter finally to enact an Enabling Act involving recognition of the territory as a Union's member State. In a number of cases the final congressional Act was preceded by the imposition of further conditions by Congress and their fulfilment by the territory, and in at least one case the President himself intervened. It was actually within that American constitutional process that the term «statehood» (clearly ambiguous and much abused with regard to James Crawford's alleged «creation of States in international law») has a full juridical significance⁹.

the notion that a corporation would consist of the «group of individuals» while the physical persons consists of a single individual, is a very poor approximation. It is not the group that acts or acquires rights or obligations under the law; and the «acts» of the corporation remain, under the relevant domestic law, the acts of one or more of the corporation's agents; in the eyes of the law they are not really «collective» acts. However useful it may be (for students) to speak of rights and obligations of a juristic person as a legal situation of a collective physical unit, the rights and obligations of a company or subdivision are legally converted into rights and obligations of individual members or agents through the operation of the latter's charter, statute or by-laws, which are an integral part – an «articulation» – of the relevant domestic system. After coexisting with the legal entity during the latter's life-span, the so-called *substratum* may even survive for some time – although no more as a legal unit – the corporation's or subdivision's liquidation, suppression or dismemberment.

⁹ It must further be noted that the U.S. Congress also intervened, under the Constitution, in cases of separation of one State from another (Vermont, Kentucky, Tennessee, Maine

b) Not less remarkable are the vicissitudes undergone by the Confederate States in the course of the 1861–1865 Civil War: events illustrating even more egregiously, if possible, the distinction of law and fact and their interrelationship in the life of North American federated States. Indeed, the entities adhering to the rebel Confederation and waging the Civil War were not the respectively relevant juristic persons belonging – as dependent legal systems – to the Union created by the 1789 Federal Constitution. Rebels were the physical collective bodies underlying those legal orders, namely the *substrata* of the legitimate States' derivative legal systems. In the course of the conflict, the eleven States' legal orders remained «virtually» valid (though more or less ineffective) within the American Union's federal order. It was not those dependent legal orders, surely, that fought the Civil War.

c) Illustrations of the distinction between the legal person of a State in national law and the respective *substratum* possibly attaining international personality – or approaching the threshold thereof – can be found in the situations where a State has undergone a temporary dismemberment into two or more political aggregations. Problematic examples are the coexistence, in the course of the 2nd World War, of Vichy's France with France Libre and the rebel Fascist Republic (RSI) of Northern Italy with the King's government in the South, ultimately to be known as the only constitutionally legitimate government under Italian law.

It seems thus reasonable to conclude, in light of the above considered theoretical and historical data, as well as Marshall's definition of corporation, that private or public juristic persons are, as taught by Kelsen, just legal orders, such conclusion extending in particular to States from the viewpoint of their respective municipal legal orders.

IV. Staaten im Sinne des Völkerrechts *Identified*

5. *The nature of the States' international persons in light of the proper notion of juristic persons*

It is now in the light of (and in contrast with) the proper concept of legal persons (as opposed to their prevailing rudimental concept as corporeal entities «other than human beings», or as the so-called *substrata*)

and West Virginia). Exceptions to the summarily described constitutional process are not numerous and they all confirm (as well as the case of admission of the independent Texan republic) the exquisitely juridical essence of the federated member States' birth, accession, dismemberment and other vicissitudes.

that one should determine the nature of the entities – States and independent entities «other than States» – composing the constituency of international law: a matter closely cognate to the dualism/monism alternative.

Confining our discourse to States, international juridical realities offer a host of data proving that, although endowed with legal personality under international law, States are in no sense creatures of that law: not in any sense comparable either to the sense in which private or public juristic persons under municipal law are creations of the latter – in conformity with Chief Justice Marshall's *dictum* – or in the sense in which the State itself of national law is a creation of the national community's law¹⁰.

Indeed, as the present writer has shown in writings generously considered by Professor Leben, solid pieces of evidence demonstrate that from the standpoint of international law the States' international persons come into being *de facto*, cease *de facto* to exist, and *de facto* are modified in the course of their (*factual*) existence as international persons¹¹.

Kelsen's assertion – my adherence to his views at this point failing – that «the international legal order, by means of the principle of effectiveness, determines [...] the reason of validity of the national legal orders» is unacceptable as a proposition of positive – namely existing – international law. The truth is clearly expressed by Kelsen himself when, within the same passage, he states: «The historically first constitution is valid *because the coercive order exerted on its basis is efficacious as a whole*», namely, I add, as a fact from the standpoint of international law. What Kelsen calls the *principle* of effectiveness is not a legal principle. It is just a tautological rule, namely, no (juridical) rule¹². While confirming my

¹⁰ Cf. *supra*, note 7.

¹¹ Although I consider my seasoned 1951 work on the subject still valid (*supra*, note 7), the present writing contains a few not insignificant developments, precisions; and the corrections of some errors.

On the equally factual nature (from the standpoint of international law) of international persons «other than States», see ARANGIO-RUIZ, *Sulla dinamica della base sociale nel diritto internazionale*, Annali Univ. Camerino, Milano, 1954, p. 39 ff.

I leave out international organizations although they also are, in my view, primary persons as well States and the other persons «other than States» (*The Federal Analogy*, *European Journal of Int. Law*, 1997, pp. 15-18, and references therein).

¹² An egregious example of the factuality of a State's international person's birth is of course the establishment of Israel.

Equally factual was the cessation of the German Reich's international personality in 1945, following the taking over of Germany's government by the four occupying powers. I refer on this point to H. KELSEN, *The Status of Germany According to the Declaration of Berlin*, *American Journal Int. Law*, 1945; and ID., *Is a Peace Treaty with Germany Legally Possible and Politically Desirable?*, *American Political Science Review*, 1947, as well as to the

adherence to Hans Kelsen's (and Leben's) juridical concept of the State in so far as it refers to municipal law, I stress my dissent from both authors with regard to the State's international person.

There follows that the States' international persons are not creations of international law itself, and coincide not with the respectively relevant *personnes morales* of municipal law. They are instead the corporeal entities roughly coinciding with those juristic persons' *substrata*.

6. *The presence of international allegedly «State (or government)-making or unmaking norms» as a primum in facie (untenable) justification of the theory of the «Creation of States in International Law»*

While relying upon my dated studies considered by Charles Leben for the demonstration of the States' international persons corporeity and their distinction from the relevant municipal law *personnes morales*, I presently think, however, in light of contemporary realities and taking due account of more recent studies on the subject, that more attention must be given – also in order better to respond to Professor Leben's *critique* – to the fact that the setting up and other vicissitudes of States are frequently contemplated not just by international political instruments but also by international treaties and customary law (not to mention soft law instruments). James Crawford's well-known writings offer at a glance a rich *corpus* of international instruments of the said kind featuring not just in contemporary international relations but also in the more or less distant past.

One admits, therefore, that international norms set forth with increasing frequency rights and obligations relating to conduct that States should take with regard to the establishment, modification or dissolution of given or, for that matter, even all States. There are also norms binding States to adopt or not, or to maintain or not, a given regime or a given kind of regime¹³. The purpose of the said norms is obviously to favour or

works cited by T. TREVES, *Diritto internazionale, problemi fondamentali*, Milano, 2005, p. 79, note 69, esp. M. Giuliano's and A. Bernardini's essays. An opposite view is expressed by Ress (EPIL), cited in Treves' manual [as well as by a formidable host of contemporary German scholars accurately listed by GIULIANO, *La situazione attuale della Germania secondo il diritto internazionale*, 1949, pp. 4-5]. A significant work describing the regime established in occupied Germany, is M. VIRALLY's *L'administration internationale de l'Allemagne du 8 mai 1945 au 24 avril 1947*, Paris, 1948, *passim*. Virally was at the relevant time «Adjoint au Directeur des Services juridiques et de Législation du Gouvernement de la Zone française d'occupation».

¹³ Although it is focused on the problem of democracy in international organizations, E. STEIN's article (*International Integration and Democracy: No Love at First Sight, American*

hinder – such as by recognition or, respectively, non-recognition by other States – the creation, modification, dismemberment or dissolution of a given State, or the change or maintenance of a given *régime* or kind of *régime*, in one or more (but possibly even all) States. The last few decades have also witnessed a relative frequency of interventions of the «international community» – through merely political action, or on the ground of more or less strict norms, on the vicissitudes of States. Where interventions of such nature are not prompted by possibly unlawful attempts to secure influence or material advantages, they may well be among the positive consequences of the «humanization» of international law through the promotion and protection of human rights, the international prosecution of crime, and the favouring of the exercise of self-determination¹⁴. Another matter is, of course, the role of the more or less justified political or military pressure exercised by some States.

The presence of what one may roughly call «States or governments making or un-making rules» indicates that the establishment and the vicissitudes of States' international persons is increasingly *relevant* from the standpoint of international law. One cannot share entirely, therefore, the views expressed in the past by Kelsen and Perassi about the «indifference» of international law with regard to States' regimes, or the «liberty» of States with regard to their organization; ideas presently perhaps implicit in Hervé Ascensio's formula of «phénomène extérieur»¹⁵.

Journal Int. Law, 2001, p. 489 ff.), offers interesting data and thoughts with respect to the role of international law and organization in the development of democratic government at the national level (pp. 490, 493, 534). More directly the topic of democratic State government is dealt with by T.M. FRANCK, *The Emerging Right of Democratic Governance*, *American Journal Int. Law*, 1992, p. 46 ff. I believe, however, that any contribution of international law (by treaty or custom) to the democratization of the States' governments and in that sense to the States' organization, remains in the same realm of the so-called State or government-making norms as discussed in the present paragraph and para. 7.

¹⁴ On the impact of self-determination on States' regimes see G. PALMISANO, *Nazioni Unite e autodeterminazione interna, il principio alla luce degli strumenti rilevanti dell'ONU*, Milano, 1997, esp. p. 335 ff. and pp. 422-470.

¹⁵ I disagree with the cited scholars, where they speak of (or imply) «indifference» of international law to the formation or government of States (H. KELSEN, *The Communist Theory of Law*, London, 1955, pp. 169-170) or of a «freedom of organisation» enjoyed by States with regard to their structure (T. PERASSI, *Lezioni di diritto internazionale*, Roma, 1955, p. 102 ff.).

Apart from the fact that, as noted in the text, this does not seem to be quite true at the present time, the question is not whether or to what extent (surely still considerable) general international law is «indifferent» or to what extent (also considerable) States are, or remain, «free» to organize themselves as they please. As explained further on in the text, the question is: a) whether the real or supposed international State or government-making or un-making norms *juridically* attain the State's *constituencies* themselves namely, the target State's people

7. a) *Proper understanding of the impact of the said norms*; b) *lack of foundation of the theory of «States creation in international law»*; c) *Factuality of the State's international person and its confirmed distinction from the State's *personne morale* of municipal law*

Contrary, though, to the apparently prevailing understanding of the said norms – a tendency emerging also from the titles of some scholarly works – the treaty or customary rules in question do not perform any direct juridical function with respect to the affected States' constitutional events. They do so neither with regard to the setting up, modification or dissolution of a State nor with regard to the legitimation of a government or government-modification *vis-à-vis* the State's people (or, for that matter, any other peoples): not, surely, in any sense similar to the sense in which the rules of a domestic legal order relating to the comparable vicissitudes of juristic persons or other domestic law subdivisions – not to mention the State itself under domestic law – do perform a direct normative function *vis-à-vis* the membership, agents and/or beneficiaries of a juristic person or of the State itself. In other words, the international norms in question do not directly bring about – whatever their possible political (*i.e.* factual) impact on the behaviours of States, individuals or peoples – interindividual rights and duties legitimizing or de-legitimizing, according to the case, the target State (or government). They do not bring about, in other words, interindividual *constitutional* effects as was instead the case in the instances considered in paragraph 4.

This excludes any analogy between the role played by the allegedly «State-making» or «government-making» norms in question in the estab-

and possibly other peoples; and *b*) whether non-compliance with those norms has any *juridical* bearing upon the «target» States' *existence* as international persons and upon the consequences thereof. Subject to the qualifications following in the text, the setting up of a State or its regime may well be, though, *legally relevant*, from the viewpoint of international rules restricting, in the sense explained in the text, the liberty of States. This means not, however, as explained further on, that international law *creates* States or governments in any proper juridical sense, particularly in the sense of legitimising or delegitimising States or governments in the eyes of their own or other peoples.

Issue might also have respectfully to be taken with Morelli's opinion that the formative process of the State (*qua* international person) is «irrelevant» (*Nozioni di diritto internazionale*, 1968, Padova, p. 127). To the extent that the formative process of a State is the *object* of international norms (notably treaty rules or decisions of a competent international body) binding two or more (other) States, that process could be relevant in the sense of triggering obligations/rights situations as between the latter. However, Morelli's position could be envisaged as a correct one, if it were understood just in the sense that the *formative process of a State is of no consequence* for the purposes of the acquisition, by that State, of international juridical personality.

lishment of States or regimes, on the one hand, and the role played by norms of national law in the comparable vicissitudes of personified or not personified national subdivisions – and the State itself – on the other hand. Much of the confusion on the matter arises either from the ambiguity (or ambiguous use) of the term «relevance» in a technical sense, or, perhaps more frequently, from the widespread neglect, to say the least, of essential juridical features of *personnes morales* and their vicissitudes.

a) Restraining the discourse for brevity to the making and unmaking of States, two capital differences must be acknowledged that may partly explain Perassi's and Kelsen's above-cited drastically negative propositions as well as the untenable theory of an international law's State-creation role.

It will firstly be noted that, however strictly the relevant international rules may have been complied with by the States involved, a State set up or modified in disregard of the applicable international rules may nevertheless obtain the allegiance of its people (as well as the respect of other peoples), the possible reaction of the interested other States not bearing a *direct* juridical effect at the interindividual national level or levels. *Vice versa*, a State set up or modified in conformity with the relevant international rules may well be lawfully resisted or otherwise opposed – at the national level – by the people and possibly other peoples. The concerned States' possible reaction bears again *no direct interindividual juridical effect* at national level or levels, except, of course, in the eyes of our friends the constitutionalists. In other words, no direct effect on peoples – in terms of interindividual legal rights or obligations related to the legitimacy or illegitimacy of the event – derives from the applicable international rules and from compliance or noncompliance therewith. For such effects to occur there should come into operation not just international – namely, *inter-State* – legal rules. Only (international) *interindividual* rules ascribable to some kind of that universal (or regional) public law of men and women that the constitutionalists deem to exist, could perform a directly interindividual legitimation/delegitimation function comparable to the function performed by the rules governing, within any national legal system, the creation, modification or dissolution of legal persons or subdivisions, or of the State itself from the standpoint of its municipal law.

Indeed, rules such as the latter are assumed to exist by scholars reasoning under the influence of untenable federal analogies; and it is to those scholars that must be ascribed the arbitrary use, in a literal sense, of such a concept as that of international «State-making» or «un-making» norms. The fact remains that the rights and obligations – even when embodied in so-called «constitutional» treaties – remain an inter-State af-

fair just as well as any rights or obligations deriving from any other rule of international law.

b) Secondly, even at the level of strictly inter-State relations, the relevant events' conformity, or non-conformity with the international provisions in question is *not juridically decisive* of the legal condition of the State possibly at stake from the viewpoint of international law itself. No doubt, the given State's establishment or modification may be condemned as unlawful under those norms and possibly opposed by the other States concerned: this by any measures including, possibly, denial of recognition, refusal to establish or maintain diplomatic relations, or denied admission to international organizations. The target State will nevertheless be a State and an international person.

c) It must be acknowledged in conclusion, if one wants to envisage the matter with the necessary rigour, that – from the standpoint of interindividual, as well as inter-State, legal relations – the situation differs in quality so radically from the comparable situations involving national *personnes morales* or other juridical subdivisions, that to speak of the «creation» of States or the setting up of governments «*by*» (or «*through*») international law is nonsensical¹⁶.

¹⁶ The best way to clarify, to my critic Charles Leben, my position on *Staat im Sinne des Völkerrechts* is perhaps to compare it with the position expressed by K. MAREK, *Identity and Continuity of States in Public International Law*, Geneva, 1968, and by J. CRAWFORD, first in *The Criteria for Statehood in International Law, British Year Book of Int. Law*, 1975, *passim*, esp. p. 95, and later in *The Creation of States in International Law*, 1979, the latter author kindly (but not quite accurately) mentioning, in his 1975 article (p. 95) the position of the present writer regarding the States' international persons and Kelsen's relevant theories, as well as the «centralized» or «decentralized» nature of international law. I have taken up the cited authors' points in *Dualism* (note 4 *supra*), pp. 954-956 esp. in note 73 (notably at 955-956).

As explained in the text above, the allegedly international State-or-government-making norms make the birth and other vicissitudes of States legally *relevant* in the sense that they create rights/obligations relationships among the States concerned. However, unlike the allegedly similar rules of municipal law relating to juristic persons and other subdivisions, those rules do not operate directly, at the interindividual or inter-State level, a *legitimation or de-legitimation of the target State or government's birth, change or dissolution* (see sub-*paras a), b) and c)* of the present paragraph). The cited authors, and a considerable number of other scholars seem not to acknowledge this capital difference.

James Crawford's studies confirm, by a thorough analysis of international practice, that any entity large or small provided with some people, some government and (possibly but not indispensably) some territory, meets the requirements of international personality and in that sense of statehood (unless it is a church or an international organization): provided, of course, that it is not a structural dependency of another entity. Those very studies fail to demonstrate, however, that any of the evoked, allegedly State-making or unmaking norms determine: *a)* in addition to primary inter-State obligations and rights relating to such makings (or unmakings) and any possible «secondary» inter-State obligations and rights deriving from non-compliance therewith; *b)* the legitimation or delegitimation of the State's or government's creation, modification or un-making. The latter phenomenon occurs neither at the

Recalling the point made earlier, the setting up of legal persons of national law – and of the State itself under that law – is a juridical *event* (or *effect*) with regard to *both* the setting-up of the entity and its elevation to legal personality. The setting up of a State's international person is a juridically relevant *fact*, the only juridical *event* attached thereto by international law being the attribution to the (factual) entity of legal personality, namely, international rights and obligations, or the capacity thereof. The only tenable analogy applicable to the setting up of a State's international person is thus – *mutatis*, of course, most fundamental *mutandis* – the biological coming into existence of a human being as a juridical relevant fact (*fatto giuridico, fait juridique*) to which (national) law attaches the legal *event* or *effect* consisting in the acquisition of a legal personality by the individual. It is in that sense that I maintain that the setting up of States and governments is, from the standpoint of international law, a factual, not a legal event. The proper understanding of the so-called international State-making norms confirms the conclusion reached in para 5, *supra*.

d) Concerning more precisely the «dual» State concept, or the State's «dual meaning» – to which Charles Leben refers – I deem it useful to stress, in light of both his *critique* and a recent addition to my research, that I am not really suggesting two different concepts of the same thing. It is not a matter of two different concepts of the State. It is, rather, the distinction between the State of municipal law, on the one hand, and *that State's international person*, on the other hand, the *former* being the more familiar juristic person of municipal law, the *latter* being the former's corporeal, factual *substratum*. In so thinking I do not duplicate one and the same State, as one of my early reviewers seemed to fear in 1953¹⁷. I simply see two distinct and different entities operating and personified under two separate and different legal systems¹⁸.

interindividual nor at the inter-State level. Similar considerations apply to Marek's views of the vicissitudes of States affecting their continuity or identity from the standpoint of international law.

The ineptitude, so to speak, of international law to legitimise or delegitimise a State (or government) is merely a consequence, and also a cause, of the fact that international law is not the law of a legal community of mankind and, therefore, does not *create* States in the sense that national legal systems create legal subdivisions. Were I able, which I surely am not, to devote a work to the topic treated by James Crawford, I would entitle the book «The creation of States *and* International Law» or, perhaps better, «International Law *and* the Creation of States». The reasons are, I assume, obvious.

Further argumentation in ARANGIO-RUIZ, *Dualism Rev.*, *supra*, note 4, p. 910 ff.

¹⁷ M. MAZZIOTTI, *Riv. trim. dir. pub.*, 1953, p. 153 ss.

¹⁸ In other words, I do not duplicate anything, as well as E. FRAENKEL's, *The Dual State*, Oxford, 1941 did not duplicate the German Reich in the 1940s; and just as well as French

V. Comparative Tests

8. *The establishment and status of States' international persons from the standpoint of international law compared with: a) the admission of a new State into a federal State; b) the admission of a State to the United Nations; c) probative value of such analyses in support of the distinction of the States' international persons from the respectively relevant juristic persons of municipal law*

The factuality of international persons' establishment – and those persons' distinction from their respective municipal law juristic counterparts (*pace* my eminent French Colleague) – is confirmed by a comparison between the entry of a new State in the «international community», on the one hand, and, *a)* the admission of a new State to a federal union like the United States of America; and, *b)* the acquisition by a State of membership in the United Nations (or any other international organization)

a) Were an extraneous State applying for admission to the North American Union – for example, a seceding English speaking province of the Canadian Commonwealth (*absit iniuria*) – I venture to assume that the admission process would be based essentially – *mutatis mutandis* – upon the above-considered principles and provisions of the United States Constitution for a US Western (or Mid-Western) territory to acquire member State *status*¹⁹. The new State in question would become the 51st member of the North American federal State after the supreme institutions of the United States municipal legal system – Congress and the President – had satisfied themselves, on behalf of the American nation, that the candidate State's constitution was (following conceivable, possible adaptations) in conformity, or not in contrast, with the United States Constitution. As a result of such a summarily described process, the admitted entity would be endowed with a US member State's legal order constitutionally «derived» from the American federal legal order, its territory with its people being integrated with the United States territory and the people of the American nation as a part of that people. In other words, the new member State would become an additional public juristic person within the American legal system, at the side of the other federated States, its *substratum* becoming the *substratum* of the new

scholars quoted by Charles Leben do not duplicate the French State when distinguishing, within French law, the State *tout court* and l'«Etat administration». Further, hopefully clearer, developments in ARANGIO-RUIZ, *La persona* etc., *supra*, note 2.

¹⁹ Cf. *supra*, para. 4.

member State of the American Union, that *substratum* having automatically lost in the process the juridical personality it previously enjoyed under international law.

The new member State's legal order would become – once the process was completed – a partial legal order within the American nation's federal system. The constitutional process (possibly preceded by an annexation agreement between the applicant new State and the United States) leading to such outcome, did not involve, in principle (except for possible border issues with one or more of the existing member States), an active role of such States: either of their respective legal orders or (with the said, possible, exceptions) of the latter's *substrata*. In other words, the essential portion of the constitutional admission process is just and simply – with the said possible (for our present purposes) marginal exceptions – a matter involving the Constitution and the whole legal system of the American nation and its *substratum*. There is no such thing as an inter-State process, the admission of the new State bringing about, simply, the... fusion, so to speak, of the new federated State within the United States federal system, the fusion including, in the physical sphere, the integration of the new member State's population and territory with the population and territory of the United States. The same discourse would apply to any human aggregate joining a federal State as a new member State (or, for that matter, joining a unitary State as a new province, department or county).

b) Although it should be hardly necessary to say so, it better be said that nothing of the kind occurs when a State requests admission to the United Nations, or to any other intergovernmental organisation.

Once the UN General Assembly and the Security Council have created the conditions indicated in the Charter's Article 4, thus completing the admission procedure, the new member State enters the UN just in the same way as an additional State becomes a party to any multilateral treaty. The new UN member remains the sovereign it was before, its legal system remaining an original order – namely an «underived» legal system – as it was before. The latter legal order becomes not a partial, derivative legal system within the UN Charter. The Charter and the several internal legal orders of UN organs being not – despite the confusion characterising the relevant literature – the law of the legal community of mankind, or even of the *ensemble* of the peoples of the United Nations, far less of the United Nations' people, no such derivation occurs. The Charter explicitly involves not a «United Nations people» but just «peoples of the United Nations». The Charter's initial sentence honestly reads: «We, the peoples of the United Nations». Only the

imagination of a surprisingly and increasing number of writers could envisage any form of incorporation or annexation of the new member State's territory into an (inexistent) United Nations territory²⁰. In other words, the new member State joins just a treaty. It enters not a community. It becomes not a subject of such a «community's» legal system except by way of saying²¹.

c) To be sure, even less appropriately could an analogy be envisaged – much as this may be difficult to accept, or even grasp, by those I call, with respect, the «constitutionalists» – in the case where a State, an insurgent party, a movement such as OLP or any other relatively independent entity, appears on the scene of international relations and joins the «international community». No analogy is discernible in the phenomenon with the acquisition of membership in a federation, either from the side of the new State or from the side of the society of existing States.

At the former side the new State appears to the external world as a human aggregation whose legal system stands by itself in a... «space» of inter-State relations where each State's legal system is equally an original one not derived from an international law, wrongly confused with an imaginary legal community of mankind²². At the... receiving end – the «international community» – there is the coexistence of about two hundred human aggregations severally and separately constituted; each with its own people, territory and «original» legal system, discontinuous both with its siblings' municipal legal orders and international («inter-State») law.

The persistent essentially inorganic condition of the inter-State society²³, surely not remedied by the creation of the United Nations²⁴, excludes – if one sets aside, as they deserve, imaginative literary trends, any possibility of a proper centralized admission procedure for new States. No such procedure can be identified either in the UN admission procedure (achieving at most a form of collective (declaratory) recognition, or in the sparse express or implied several acts of (declaratory) recognition by any number or even by all the existing States. Whatever the degree of

²⁰ Someone does speak of a territory of the Universal Postal Union: but that is just a literary image to indicate that the provisions of the treaty establishing the UPU and the rights and obligations deriving therefrom extend in space to the territories of all the UPU's member States.

²¹ See, instead, T. PERASSI, *L'ordinamento delle Nazioni Unite*, Padova, 1962.

²² See W. SCHIFFER, *The Legal Community of Mankind. A Critical Analysis of the Modern Concept of World Organization*, New York, 1954.

²³ *Infra*, para. 13 *i*).

²⁴ *Infra*, para. 13 *ii-vi*).

their importance for the new State to consolidate its presence and its relations with the existing States, collective or severally granted recognitions are hardly comparable, given also their merely declaratory value, to a form of organic «admission» to the inter-State society. The UN rather primitive admission procedure is hardly comparable to the federal system's.

It follows that far more clearly than in the latter case, the entry of a State into the «international community» achieves neither the merging of the new State's *substrata*, namely peoples and territories, with the existing States' *substrata*, nor the derivation of the new State's legal system from a universal international or interindividual-international legal system. None of the so-called elements of the new State's *substrata* merges with the peoples, the territories or the legal systems of the existing States, let alone into a legal community of mankind or any significant part thereof. It would thus be incongruous to think of the new State acquiring the features and the condition of a *public juristic person* within the «international community»: a community of States (or sovereign governments) not of human beings, the latter remaining objects of inter-State relations and norms even where they appear as subjects of the legal orders of international commissions or courts of human rights or of international criminal tribunals. Hence – *pace* my eminent French critic – the inevitability of the *distinction* between the juristic person of the State of municipal law, on the one hand, as a subject of national law, and the State's international person – the former's *substratum* – as a subject of the «law of nations».

Conclusively, the establishment of a State undergoes no process other than the mere acquisition of international legal personality (as above specified) *vis-à-vis* the existing membership of the «community» as just another *factual*, independent, or relatively independent, human aggregation.

VI. *The Factuality of International Persons' Impact on International Law*

9. *Added consistency to the dualist theory*

Having thus clarified, I hope, my position on international persons, it is hardly necessary for me to call my critic's attention to the fact (easily perceptible in works he has thoroughly considered) that the finding of the States' international persons' factuality and their distinction from the respectively relevant municipal *personnes morales*, proves to be anything

but an abstract, sterile exercise. On the contrary, that finding proves to be, in my immodest opinion, a fruitful scientific tool that explains – and is confirmed by – a number of features of international law. I confine myself here to the most important items.

Firstly, the finding in question brings a higher degree of consistency to an apparently dormant dualist doctrine, increasingly misunderstood or misrepresented in the contemporary literature²⁵. It eliminates the contradictory (express or implied) «publicistic» presentation of the members of international law's constituency as *personnes morales*, created by the law of a legal community of mankind, currently referred to by constitutionalist writers: not the same thing as the positive international law of our time.

It also helps to warn the excessively optimistic idea, entertained by an increasing number of internationalists (Denis Alland among them) who advocate the replacement of the (too «modest»?) denomination of «International Law» by a more appealing «*International Legal Order*», in the sense of Santi Romano's *ordinamento giuridico*²⁶. Within the magnifying framework of Santi Romano's general concept of law it would of course be easier to think of an international law's State-making role (*à la* Crawford) than of a passive acceptance of States as *faits accomplis*, or, to put with Hervé Ascensio, «phénomènes extérieurs» to international law. Furthermore, I doubt, for that matter, that Santi Romano himself viewed international law as an «ordinamento». I remember his manual's numerous editions as speaking merely of «*diritto internazionale*» not *ordinamento*; and «La Sapienza»'s able librarian assures me that my recollection is correct.

10. *Distinction of «statehood» and international personality*

Secondly, the factual concept of the States' international persons helps – or should help – reduce the currently increasing abuse of the questionable «statehood» concept: a concept brought about, I guess, by the above-mentioned idea of an international law's «States-creating»

²⁵ An important example is described in note 76, *infra*. A recent one is in M. SASSOLI, *L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international*, in *Revue gén. droit int. public*, 2002, p. 791 ff. On that Author's constitutional and administrative *couche*, see para. 13 *v*), *infra*.

²⁶ A concept that should imply the presence of customary or contractual (legislative) institutions that are still absent, despite questionable literary allegations, in a society of States optimistically elevated to the rank of a legal community of mankind.

function²⁷, and arbitrarily viewed by some writers as a synonym of international juridical personality. Those writers should consider, however, that although the denomination of «State» – or its features – may well be a condition to become a party to a treaty, or for admission to an inter-governmental organisation (although exceptions could be found or should be considered), international law had started taking its shape a few centuries before Westphalia: another point well stressed by the scholar to whose memory these pages are dedicated²⁸.

Moreover, and more importantly, the constituency of international law, rightly described in the just recalled book as exclusively or mostly composed of entities other than States, is in any case nowadays not confined to States. It includes entities whose features would surely not fit in the statehood concept²⁹. Insurgents, and liberation movements are the most obvious examples, not to mention failing States. An egregious example is of course the Catholic Church, which has existed for centuries – including the time when the Holy See was identified with the Roman Pope's person – as an international person distinct from the «Pontifical State» until September 1870; and from «Stato della Città del Vaticano» since 1929. It survived as an international person (and a power!) not only during the period (1870-1929) when it had become a guest of Italian territory, but also during that short period of Napoleonic seizure of the pontifical State that at one point had seemed to remove the main obstacle to Italian unification. I leave it to the believers in the State-creating abilities of international law to tell us whether the Vatican City is really endowed with statehood for the purposes of the Holy See's participation in the Postal Union or other temporal finalities. The Vatican's condition is surely not one of independence. The City is just a... temporal instrument or arm of the Roman Church, sovereignty – in the sense of both independence and territorial domain – belonging exclusively to the Holy See or the Church³⁰.

²⁷ *Supra*, paras. 4, 6 and 7.

²⁸ Much as one speaks of «statehood», causing not little confusion between the quality of State and the broader concept of international personality, the truth, as Giovanni Battaglini well stresses in his *Diritto internazionale come sistema di diritto comune, supra*, note 1, is that the State is only one among international persons, which over time have included an array of lay and ecclesiastical seigneurs, kings, cities.

²⁹ I also refer to the works cited *supra*, note 11.

³⁰ Although the Holy See's – or the Pope's – international personality presumably survived Napoleon Bonaparte's seizure of the pontifical State, I leave it to any curious reader to find the plausibly existing evidence. The nature of the Holy See's international personality is dealt with in works cited by Charles Leben.

11. *Attribution of conduct to international persons (for purposes of responsibility)*

Thirdly, the corporeity of the States' international persons and their distinction from their municipal law counterparts is a crucial *datum* for a proper approach to the attribution of conduct to international persons (I refer, for the present, only to primary persons). A proper factual notion of the persons in question casts serious doubt over the so-called normative (or juridical) theory of the attribution process as adopted since 1971 within the framework of the International Law Commission (ILC)'s work on State responsibility. As explicitly recognized by Klaus Kress – a persistent and active adherent to the dominant normative theory – that theory is not the last word; and he refers as an alternative to the position taken by the present writer in his second report (as Special Rapporteur) to the ILC, and elsewhere³¹. As the present writer has maintained since

³¹ Second Report on State Responsibility, UN Doc. A/CN.4/425, Addendum; and G. ARANGIO-RUIZ, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, *Mélanges Michel Virally*, Paris, 1991, p. 28 ff. A further *datum* proving the weakness of the normative theory of attribution relates to the organisation of States from the standpoint of general international law. Unlike national legal systems, which contain (interindividual) rules appointing physical persons empowered to act as agents of juristic persons or subdivisions, general international law contains no rules appointing individuals empowered to «will» and «act» on behalf of the State for the purposes of international (or, for that matter, national law itself): namely, for such purposes as treaty-making or liability for internationally unlawful acts. A State behaves, for international legal purposes, through any individuals factually connected with it and/or factually behaving and accepted as that State's organs within the national community.

In other words, those organic theories of the so-called volition and action of collective bodies, which are utterly inappropriate for juristic persons or subdivisions of national law, suit very well, on the contrary, the volition and the action of a State's international person. The comparison is made in ARANGIO-RUIZ, *Gli enti*, *supra*, note 7, pp. 121-173 and 319-371, esp. 343 ff., respectively; and further developed in *L'Etat*, *supra*, note 7, pp. 311-331. Roberto Ago's *Third Report*, para 117, esp. note 204, stresses that the State's organization is established not by international law.

In maintaining the views expressed in the cited works, and further developing them, I find substantial comfort in M. SPINEDI, *La responsabilità dello Stato per comportamenti di private contractors*, in M. SPINEDI, A. GIANELLI and M.L. ALAIMO (eds.), *La codificazione della responsabilità internazionale alla prova dei fatti*, Milano, 2006, pp. 67-103, esp. 85-92. See also ARANGIO-RUIZ, *La persona internazionale*, *supra*, note 2.

The attribution by the observer of individual wills or acts to a State as an international person, is thus merely a factual operation based upon merely factual elements, the latter elements including any norms of national law. As stressed further on, the attempts to «juridicize» international «imputation» in general or in some special instances are unconvincing. A keen description of attribution of «subjective» elements of a delict as fault and *dolus*, is that of G. PALMISANO, *Colpa dell'organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi*, *Com. Studi*, 1992, p. 670 ff.

1951 – lately in *La persona internazionale dello Stato*³² –, the determination of the States' international persons conduct is based, from the viewpoint of international law, on purely factual data, the entity's municipal law coming into the picture just as a part of the factual data reconstructing the entity's conduct in conformity with the above-cited, famous – and never seriously contradicted – *dictum* of the Permanent Court of International Justice (PCIJ) in various cases³³. In other words, the attribution of conduct for the purposes of international responsibility is normally, for judges or arbitrators, part of the *quaestio facti*, namely of the determination of the facts that trigger the international person's international responsibility.

Inappropriately applied to the determination of the conduct of juristic persons (*personnes morales*), the organic theories of the so-called «collective entities» (a concept wrongly extended to *personnes morales* themselves), find their most natural field of application in the determination of the behaviour of the States' international persons. Despite the fact that a number of rightly renowned scholars (Anzilotti and Starke *inter alios*) professed the view that attribution of conduct to States was a juridical operation based upon rules of international law (just as it was and is surely the case for *personnes morales*, State included, in municipal law), the practice preceding the 1970s – when the ILC first dealt with attribution (or, as it was then called, «imputation») – indicates a predominance of a factual approach to attribution of conduct for the purposes of international responsibility.

The normative theory – perhaps too hastily espoused and applied by the ILC – is also contradicted by a number of data that the present writer is collecting for a monographic work on the subject. Those data include, for example (even apart from the factual nature of the States' international persons), the absence of any mention of attribution (or, for that matter, «imputation») in the 1927 International Law Institute's Lausanne resolution on State responsibility; and Ago's own admission that the attribution of conduct to a State (in municipal law) and to that State's international person, do not necessarily coincide: the former, for instance, not «acting» while the latter is acting, or *vice versa*. Data such as these, however, are only the most banal as compared to the host of data in the same sense emerging from the study of the jurisprudence preceding and following the significant watershed of the nineteen seventies, including important decisions of the International Court of Justice (ICJ).

³² ARANGIO-RUIZ, *La persona internazionale*, *supra*, note 2, pp. 88-91.

³³ *Infra*, para. 14, note 76.

12. *Domestic Jurisdiction*

Fourthly, the perception of the States' international persons' nature helps better to understand the domestic jurisdiction reservations (like those of para. 8 of Article 15 of the Covenant and para. 7 of Article 2 of the Charter) as limitations that are really implied in the said persons' sovereign-independence.

Considering, on the one hand, the lack of a demonstration of the existence of *matières* reserved to States, either because of their mere nature or because they are not covered by international obligations – and, on the other hand, the constantly broadening *ratione materiae* scope of international regulation and the consequent extension of the area of obligations imposed on governments – it is hardly credible that the limitation in question is intended to protect States from obligation, namely, to protect their liberty. Even if such an understanding could have been plausible when the reservation was first introduced in the Covenant (at a time when the area covered by international obligations was considerably less extended than at present), it is hardly of any use nowadays when the area of liberty is much more restricted. I am not convinced by a recent contribution supporting the dominant view on the subject³⁴.

It stands to reason that the States' main concern is likely to be not so much to be able to get rid of claims having no basis in existing regulation, or to avoid or thwart the creation of further restrictions of their liberty by treaty or custom. It seems more rational, especially in view of the proliferation of intergovernmental organisations, that States seek protection of their sovereignty-independence, even more than their liberty. Every State would actually be naturally inclined to resist, in order to protect its sovereign independence, any conceivable (and not infrequently attempted) extraneous intrusion into its *domain* – on the part of international organs or of other States – by claiming direct action *vis-à-vis* its institutions, its officials or its nationals or residents: to resist, in particular, international organs' attempts to exert supranational power where only international action is envisaged by existing law.

There is actually significant evidence in international practice that such preoccupation arose at the time of the League of Nations and had become even more evident at the time when paragraph 7 of Article 2 of the Charter was formulated³⁵. My main work on *domaine réservé* con-

³⁴ R. KOLB, *Du domaine réservé, réflexions sur la théorie de la compétence nationale*, *Revue gén. droit int. public*, 2006, p. 598 ff.

³⁵ G. ARANGIO-RUIZ, *Le domaine réservé, Cours général de droit international public*, *Recueil*, 1990-VI; Id. *The Plea of Domestic Jurisdiction before the International Court of*

tains abundant illustrations showing the different evocation of sovereignty-independence and sovereignty-liberty in the practice of both the League of Nations³⁶ and the United Nations³⁷. That same book explains that the *Nationality Decrees* case would not have been so poorly handled by the Court³⁸ if all concerned had reckoned with the said difference. Although it was unquestionable that France was right in claiming that the grant of French nationality was a matter of domestic legislation or administration reserved to France – only France being manifestly entitled to grant French nationality – the United Kingdom could just as well have alleged that, by treaty or otherwise, specific grants of nationality by French authorities violated a French obligation toward the United Kingdom. That the obvious solution (instead of the Court's poor escape of «conclusion provisoire»), was not reached, it was perhaps a consequence of the fact that one of the oral pleadings had been so long that some of the judges had fallen fast asleep³⁹.

A significant *démenti* of any concept of domestic jurisdiction based upon the equation *domaine réservé* = *matières non liées* is the statement by the US Secretary of State Foster Dulles effectively explaining the gist of paragraph 7 of Article 2 by the proposition that UN organs should confine themselves to *dealing with governments*. The implication was that the UN was to deal with the States' establishments' apexes and not directly with a State's people as a whole or any given organs, individuals or officials. Foster Dulles was clearly thinking neither of *matières* naturally reserved nor of *matières* not covered by obligations. He was concerned simply with *how* UN organs should act, namely through governments, not about *what* they should deal with. In other words, Article 2.7 was meant to protect the States' sovereignty by prohibiting as a rule (failing proper conditions) the kind of direct authoritative interference which is typical of a federal power. I also refer my generous critic Professor Kolb⁴⁰ to the review of the cases in which the present «world» Court (the ICJ) dealt with pleas of domestic jurisdiction. They all show the incongruity of the maxim «domaine réservé/matières non liées». I assume, of course, that the cited author is at least as aware as I am of the distinction between international obligations, namely restrictions of States' *liberty*,

Justice: Substance or Procedure?, in LOWE and FITZMAURICE (eds.), *Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings*, Cambridge, 1996.

³⁶ ARANGIO-RUIZ, *Le domaine réservé*, p. 282 ff., esp. pp. 295-297.

³⁷ *Ivi*, p. 352 ff., esp. pp. 353 and 354 ff.

³⁸ *Ivi*, p. 173-184.

³⁹ *Ivi*, p. 179.

⁴⁰ KOLB, *supra*, note 34.

on the one hand, and limitations of sovereignty, namely of *independence*, on the other hand. Although it is inherent in the very existence of international law, the distinction seems not to be universally understood⁴¹. I wish that Professor Kolb had cared less, in his interesting article, about the present writer's alleged «grande puissance de pensée», and a little more on the substance of that *pensée*; and even more about the rich evidence upon which it was based. It might thus have occurred to him how weak, in light of the cases discussed in the book he quoted from, was the very superficial *critique* he adhered to. I refer particularly to the *Nationality Decrees* case and to the League's and the UN's practices' distinction between restrictions of liberty and restrictions of independence.

⁴¹ An egregious example of disregard for the distinction is that of P. GAETA, *On What Conditions Can a State be Held Responsible for Genocide?*, *European Journal Int. Law*, 2007. After noting in the text that «treaties in contemporary international law can be construed more liberally than in the past when the dogma of State *sovereignty* was a dominant feature [...] in the international community» and that «[n]owadays the application of the principle of restrictive interpretation, *whereby limitations of State sovereignty* cannot be presumed or inferred by implications (*in dubio mitius*) is subject to other more liberal principles and criteria», the cited author evokes in support, the PCIJ's Advisory Opinion on the *Interpretation of Art. 3, para. 2 of the treaty of Lausanne*, Series B, n. 12, p. 25 (footnote 31). Reference is also made by her to D. ANZILOTTI, *Corso di diritto internazionale*, S.I., 1915, p. 103; to A. VERDROSS and B. SIMMA, *Universelles Völkerrecht*³, Berlin, 1984, p. 493; and A. CASSESE, *International Law*², Oxford, 2005, pp. 178-179.

Intrigued, especially by the reference to Anzilotti, I tried to check. The cited PCIJ Adv. Op., pp. 25-26, speaks only of obligations and once of undertakings, no mention of sovereignty being made. Not finding the cited ANZILOTTI's *Corso*, I looked instead at Anzilotti's extensively elaborate dissenting opinion on the Austro-German Customs Union, *Rivista dir. int.*, 1931, pp. 522-534, where he lucidly and repeatedly stresses the distinction between international *obligations* and *limitations of independence*: and concludes in the sense of compatibility of the Austro-German Custom union with the former State's *independence*. I refer in particular to para. 3, esp. sub-para 4 and 5 and para. 9, last sub-para. (pp. 529-530). Regarding VERDROSS's, *Universelles Völkerrecht*, p. 493, mention is made there of *Einschränkungen staatlichen Freiheit*, sovereignty again unmentioned.

The only support of the curious proposition seems to come from Cassese, above cited book, where the author repeatedly speaks, indifferently (pp. 138-139), of subjection to obligation and limitations of sovereignty as if they were the same thing. This disregard for the distinction – a capital one – reminds me of my Friend Cassese's sarcasm at what he considered to be Gaetano Morelli's and Giorgio Ballardore Pallieri's opposing lucubrations about the question whether arbitral decisions were juridical *acts* or *facts*: apparently a distinction that made him... impatient. I find it hard to believe, though, that he was equally impatient at the distinction between international obligations and restrictions of sovereignty.

Be that all as it may, if all States' obligations purported restrictions of sovereignty, the philosopher cited (*infra*, note 67), would be correct in fabulating that sovereignty is just a «superstition». Anyway, considering the increase in number of international obligations in the course of the last century, not a single sovereign State would survive; nor, for that matter, international law.

The cited author's writing leads me to wonder whether a correct understanding of *domaine réservé's* real purpose, is actually not implicit – *à bien regarder* – in the very idea expressed in his *résumé*. I refer to the passage where he speaks of «la protection de *certaines matières étroitement liées* à [la] *souveraineté* [des Etats]». Indeed, is there a *matière* more «étroitement liée» to a State's sovereignty-independence than that exclusivity of the State's power relationship with its organs and its nationals, that represents the core of sovereignty-independence? The *matière réservée* is just, as stated in the *résumé*, the condition of sovereignty with its implications. In that sense domestic jurisdiction is a vertical limit intended to the protection of sovereignty rather than a (horizontal) limit *ratione materiae* – in the sense of subject-matter – envisaged instead by the above-mentioned superficial doctrine preferred by Professor Kolb.

A perfect example is the area of nationality. The more international rules restrict the States' liberty to grant their nationality, the more frequent are likely to be occasions for domestic jurisdiction to be evoked in order to preserve the unquestionable exclusivity of the States' power to grant or deny their respective nationalities⁴².

13. *International organization(s): the UN*

Mention at this point cannot be avoided of international organization, notably the United Nations (UN): another subject on which the present writer is unable to share the constitutionalists' – presumably also Charles Leben's – views.

i) The factuality of the States' international persons seems to be, at one and the same time, an effect and a consequence of the lack of integration of mankind in a universal legal community. And the lack of such integration is a major obstacle not just to the establishment of a world government, but even to the setting up of effective inter-State unions.

Of course, the States' international persons could hypothetically even all merge, someday, into a federation that, while substituting mere autonomy for their independence, would place above them a central government and embrace national legal orders, peoples and territories within the framework of a universal constitutional system. Within such a system, the States' international persons would forfeit their international personality and become *personnes morales* under the universal, supranational system.

⁴² Domestic Jurisdiction is better understood by G. BATTAGLINI, *Diritti umani e autotutela e interventi armati*, *Annali dell'Università di Ferrara*, 2000, p. 15 ff.

Short, though, of such an immeasurably distant portentous development, the States' international persons only establish among themselves international organisations that are hardly endowable, by mere treaties, with adequate governmental authority: a difficulty that seems to be inadequately reckoned with – if at all – by the dominant doctrine of international organization⁴³.

Of course, the prevalent doctrinal view is that inter-State compacts establishing organizations such as the UN are suitable instruments to create legal supra-subordination relationships amongst the participants: mainly, between the international organisation on the one hand, and the member units (with their respective constituencies), on the other hand. The majority of scholars place actually the whole law of international organisation – encompassing both the constituent instrument and its organs' internal law – within the framework of their imaginary all-embracing global legal system, allegedly undergoing a centralisation process. Hence the dominant doctrine's resort to the questionable transposition, into international law, of the public, constitutional corporate body's model of municipal law. The Covenant and the Charter are thus envisaged as constitutions of an ambiguously conceived, but equally imaginary, universal community of mankind.

Much as it may be tempting, the municipal law model is not transposable into a society such as that of factual States' international persons, governed by a legal system rightly envisaged by Th. E. Holland as «private law writ large», particularly with the above proviso of the lack, under or above such «private» law, of any of those «public» law rules that are placed by Hart in the category of «secondary» norms. Within a national legal system, the creation (by private or public initiative) of organisations other than the all-embracing organisation of the State, is naturally subject both to the *control* and, more importantly, to the exercise by the central government of an *enabling role* with regard to the creation of intermediate institutions. This model, however, fails to materialise in international law, where the prevailing constitutional principle seems to be the equality of the States' international persons – and the non-subordination of such entities to any authority.

⁴³ As international organisation was only at its inception in 1899 and 1905, we miss the more significant views that Triepel and Anzilotti could have expressed over that phenomenon, particularly the impact of instruments like the League's Covenant or the United Nations Charter upon the constituency and the structure of the international system. Inevitably, the subject has come largely, though not totally, under the spell of the tendentially publicistic concept of international law. The present writer immodestly believes that his works on the topic may help fill in the gap of the dualist theory in that respect.

Considering, however, that the present writer's works on international organisation are familiar to Professor Charles Leben, who recalls some of them, the present author refrains from extending much further his reply to the eminent French Colleague's *critique*. He confines himself to adding to the referred works a few considerations⁴⁴.

ii) In believing that supranational organisations cannot be set up by mere inter-State compacts, I draw substantial comfort from the position taken by Judge Fitzmaurice when, in the context of the ICJ's treatment of the question that opened the way to Namibia's independence, he rejected the «Organised World Community Argument» resorted to by one of the pleaders as an alleged juridical ground of continuity from the Covenant to the Charter for the purposes of a – so to speak – *ope legis* succession of the UN to the League in the functions relating to the Covenant's Mandates system⁴⁵. In Sir Gerald's keen language:

«the [pleader's reasoning] had no [...] basis [in the Organised World Community Argument] because the *so-called organized world community* is not a separate juridical entity with a *personality over and above*, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression. In the days of the League *there was not (a) the organized world community, (b) the League*. There was simply the League, *apart from which no organized world community would have existed*. The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are reabsorbed on the extinction of one international organization, and then automatically and without special arrangement, given out to, or taken over by a new one, *is quite illusory*»⁴⁶.

While subscribing to the statement that an organised international community as a separate juridical entity *with a personality over and above* was lacking both at the time of the Covenant and of the Charter, the present writer maintains, with respect for Sir Gerald's thought, that the lack of «an organized world community [...] as a sort of permanent separate

⁴⁴ See LEBEN, *supra*, note 1, pp. 219-229. I recall: *Rapporti contrattuali fra Stati ed organizzazione internazionale: per una teoria dualista delle unioni di Stati*, Arch. Giur. Filippo Serafini, 1950, p. 38 ff., esp. p. 57 and pp. 73-77; *Reflections on the Problem of Organisation in integrated and Non Integrated Societies*, Rivista dir. int., 1961, pp. 585-603; *The Federal Analogy and the UN Charter Interpretation*, European Journal Int. Law, 1997, p. 1 ff, pp. 12-18 and pp. 27-28; *The Normative Role of the General Assembly of the UN and the Declaration of Principles of Friendly Relations*, Recueil, 1972-III, p. 419 ff., esp. 629 ff.

⁴⁵ I refer to the opinion expressed by Sir Gerald in the course of the case *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), p. 220 ff..

⁴⁶ Cited Opinion, p. 241.

residual source or repository of powers and functions» or as «a separate juridical entity with a personality over and above», excludes *not just* the automatic succession of a new international organisation to a previous one but also – and mainly – the fitness of bald treaties like the Covenant or the Charter to create, in addition to the reciprocal contracting parties rights and obligations among themselves, any power of the organisation «over and above» the participants, and the latter's subordination thereto. The reason seems to be that in so far could an inter-State compact create an entity «over and above» the contracting parties, as the latter had acted – this is precisely the impact of the States' international persons' factual sovereignty – in the juridical capacity of organs of a universal legal community of mankind (or of States) conceivable «as a sort of permanent source or repository of powers and functions». Of course, the peoples – were they really involved – could create the juridical entity over and above the States: but the States themselves – the sovereign States *alone* – could not do so, just as well as they could not, alone, create, by treaty, *ipso facto* a federation.

Embodied as it was in the peace treaties of the first world war, the Covenant had come into being outside of any involvement of peoples, let alone mankind. In the different S. Francisco situation, the founders of the UN, though well aware of the essentiality of their peoples, were unable to do anything more than just mentioning them (as «the peoples» – and in the plural). It is just that element – a popular presence in the form of Fitzmaurice' «organised world community [over and above]» – that was inevitably lacking at S. Francisco as the indispensable source of the (specific) legitimisation of the contracting governments – the Charter's *only* authors – to set up the UN as an «over and above [States]» organisation. The mere inter-State compact signed at S. Francisco could not alter the typical structure of the international system more than a merely inter-State compact like the so-called EU «*constitutional* treaty» – had it not been rejected – could have created a really constitutional European fabric⁴⁷. There again the constitutionalists – Fitzmaurice surprisingly with them – seem to ignore that the transposition of the public corporate body model of municipal law is inconsistent with international law's inorganic, purely inter-State «private» law nature: a private law – better repeat it – not surmounted by a public law or, for that matter, by any principle of organisation of the society of States (or of mankind)⁴⁸.

⁴⁷ I refer here to Tommaso Padoa Schioppa's article cited *infra*, sub-para *vi*) of the present paragraph, and note 68.

⁴⁸ The view authoritatively professed by G. MORELLI, *Stati e individui nelle organizzazioni internazionali*, *Rivista dir. int.*, 1957, p. 3 ff., p. 8, with regard to the impact of treaties

As Alberto Miele rightly put it:

«Nonostante talune apparenze, nonostante la facile e corrente analogia tra lo Stato federale e le Nazioni Unite (apparentemente dirette verso l'integrazione giuridica del pianeta e quindi verso un governo mondiale) la realtà della Comunità internazionale appare – oggi come ieri – molto diversa. “Incommensurabili differenze” dividono la comunità orizzontale retta dal diritto internazionale, dalla società verticale, retta dal diritto costituzionale. I rapporti fra i soggetti internazionali sono paritari (come la Carta stessa afferma) per cui le forze che agiscono nella Comunità internazionale seguono ritmi ben diversi dalle correnti ascensionali (i c.d. “poteri impliciti”) propri di ogni forma – anche primitiva – di società integrata. Manca – tra l'Organizzazione e gli Stati membri – la relazione di disegualianza, su cui fondare la correlazione fondamentale “potere-soggezione”»⁴⁹.

The essential point – surely implied by the quoted author – was the lack, in the contracting parties, of the specific creating power emanating from a world legal community worthy of the name.

iii) Confining my discourse to the UN, it is precisely because of the lack of a proper foundation that the Charter remains within the realm of ordinary, bald treaty law. Neither the rules directly setting forth the members' rights and obligations, nor the rules contemplating the establishment and functioning of organs and the latter's task to address decisions or recommendations, bring about an alteration of the international system's inorganic private law structure. In establishing or joining the UN the States' international persons remain the sovereign factual entities they normally are, in exclusive control, in principle, of their respective structures, peoples and territories⁵⁰. The Charter rules in question introduce no prodigies: neither an alteration of the members' condition of «sovereign equality» among themselves (under general international law) nor a relinquishment of their independence to the organisation. Prodigies are accomplished neither in the sense of placing the organisation «over and above» the members, their territories or their peoples, nor in the sense of placing given members (such as the permanent members of

does not affect, in my view, the present writer's position. Morelli rightly states that in view of the absence of objective limits «qualsiasi effetto giuridico può conseguirsi mediante [le norme pattizie], *nell'ambito dei soggetti partecipi all'accordo*» (emphasis added). Considering that neither the League nor the UN has been a party to the Covenant, respectively, the Charter, my position is not in contrast with Morelli's opinion.

⁴⁹ A. MIELE, *Introduction*, in PICCHIO FORLATI (ed.), *Le Nazioni Unite*, Torino, 1998, pp. 4-5.

⁵⁰ Cf. *supra*, paras. 8 (b) and 12.

the Security Council) «over and above» other members. In other words, the relations governed by the Charter are by no means «hierarchized» as they are in any municipal law organization⁵¹. No such transformations are envisaged, let alone directly affected – by instruments like the Charter, except in the wishful thinking of the constitutionalists⁵². Any prevalence of given UN members other than in the voting procedure in the Security Council, is just a matter of a factual hegemony of those powers over others. Hegemony is a historical, factual state of affairs not legitimised by international law any more than war is so legitimised⁵³. The structure of the international system seems not to be altered.

In a Hague Academy lecture of the late 1960s, Leo Gross, a rightly renowned authority on the Charter, keenly observed that «the United Nations is not like the United States *even in its infancy*». He added, though, in a vein of optimism: «[t]he possibility, of course, cannot be ex-

⁵¹ Even a federal or confederal compact is *per se* inadequate to effect the metamorphosis of the participants from the factual condition of States' international persons – namely, sovereign aggregations – into legal subdivisions and *personnes morales* within a federal order, turning at the same time the peoples and the territories involved into portions of the people and territory of the federal State, all to be subject to the latter's authority. Although provided for in the treaty, such metamorphoses are only effected by the *operation* of the *contractually agreed federal constitution*, even where the treaty embodies the latter's draft. In so believing I find support in T. PERASSI, *Confederazione di Stati e Stato federale, Profili giuridici*. 1910, p. 40 ff., esp. p. 43. A significant reference to the EU so-called “constitutional” treaty is mentioned in subparagraph *vi) infra* and note 68.

⁵² The Charter was not seen as a constitution of the international community, for example, by J.L. BRIERLY, *The Law of Nations*, Oxford, 1989, p. 46: «The League of Nations was the first experiment [for States] to work together for common ends [...] and we know that it did not succeed. We are making a second attempt with the United Nations, and hitherto this too has disappointed our hopes». Three pages before (p. 43) Brierly quoted Hobbes famous *dictum* where Kings and persons of sovereign authority are described as «in the state and posture of gladiators [...], which is a posture of war» (*Leviathan*, Chapter 13).

According to Dag Hammarskjöld, Secretary General: «the United Nations is not an institution set apart and *above the governments* and to be judged as such. It offers a meeting place, and a moral impetus, an institutional framework for the cooperation of those Governments in programs of common benefit» (*UN Press Release SG/406* of 17 November 1954 – emphasis added). Another example (among many) of an express denial of any structural change in the relations among UN member States is in R. AGO, *L'organizzazione internazionale dalla Società delle Nazioni alle Nazioni Unite, La comunità internazionale*, 1950, p. 21 ff. Giovanni Battaglini sounds well aware of the UN Charter's limitations in his *Lineamenti della controversia per le Falklands o Malvinas*, in L. PICCHIO FORLATI and F. LEITA (eds.), *Crisi Falkland-Malvinas e organizzazione internazionale*, Padova, 1985, p. 260 ff.

Strikingly different views on international organisation are instead those expressed, for example within the framework of his well-known federalistic concept of international law, by G. SCELLE, *Quelques réflexions sur l'abolition de la compétence de guerre*, *Revue gén. droit int. public*, 1954, p. 5 ff.

⁵³ ARANGIO-RUIZ, *The Normative Role* etc., *supra*, note 46, p. 132 ff., esp. 138-142.

cluded that after a century, and as Mr Justice Holmes said, much sweat and blood – not to mention Winston Churchill’s tears – the United Nations will acquire the degree of integration which will make the *comparison* with the federation of the United States *more tenable*⁵⁴.

A look at the UN as they are after about three quarters of Leo Gross’ «century», a tenable comparison with the United States Constitution’s «infancy» appears to have been, with all respect, a daring overstatement.

iv) Indeed, a fundamental element of any genuine constitutional union among States is the direct availability of armed forces to the central authority in order to face external or internal violence. The founders seem to have thought about that: but the Charter’s provisions they optimistically or otherwise adopted in that respect (Articles 43 ff.) have remained a dead letter since the outset; surely not just because of the East-West Cold War. The chances of their early implementation are as scarce as an early creation of a world government⁵⁵. Hence the prediction «that the most serious crises are met by States outside of the UN framework»⁵⁶.

After a beginning where the inevitable reliance on the members’ forces seemed to be viewed as an acceptable *pis-aller* (as in the 1950 Korean and the 1956 Suez crises) under a perceptible Security Council control, the history of UN collective security operations marks a relatively constant degeneration from «collective» to «unilateral» action by single or associated powers, particularly by the United States, hardly subjected to adequate control by the Security Council: a trend that culminates in the 2002 formulation by the United States President Bush, of *The National Security Strategy of the United States of America* – the theory of «pre-emptive» self-defence – confirmed in 2006 and slightly re-dimensioned in 2010⁵⁷. It was actually within the framework of the policy defined in the said document(s) that the leaders of two of the most solid and respectable democracies resorted to the series of *mesquin* tactics and lies, masterfully denounced by the regretted Thomas Franck, in order to

⁵⁴ L. GROSS, *The International Court of Justice and the United Nations, Recueil*, 1967-I, p. 403 (emphasis added); *Id.*, *Selected Essays on International Law and Organisation*, New York, 1993, p. 460.

⁵⁵ Even in the supposedly «integrating» – European context, the «Defense Community» never came into being.

⁵⁶ PICCHIO FORLATI, *supra*, note 49, pp. 52, 53.

⁵⁷ See M. ARCARI, *Legittima difesa e (in)azione del Consiglio di sicurezza della Nazioni Unite*, in A. LANCIOTTI and A. TANZI (eds.), *Uso della forza e legittima difesa nel diritto internazionale contemporaneo*, Napoli, 2012, pp. 69-74. As stressed by the author, the issue of «compétence de la compétence» under Article 51 was particularly stressed in the *Falklands* case (p. 55).

justify their premeditated aggression against Iraq on the pretext of the presence, in that country, of mass destruction weapons that were demonstrably inexistent⁵⁸. A host of international legal scholars⁵⁹ severely condemned, together with the breach of the Charter and general international law, the lack of any Security Council reaction to the aggression – a lack enhanced by the absence of any condemnation in the General Assembly of Bush's, Blair's (and accomplices') ruthless crime against peace and humanity. While a condemning joint declaration was issued by Russia, France and Germany, the only UN sign about that dramatic set of breaches of international law was a painfully reticent admission by Secretary-General Kofi Annan that a breach of the prohibition of the use of force had occurred⁶⁰. Vain reactions had come from the Troika of the Non-Aligned Movement against the United States President's announcement of the imminent military attack on Iraq⁶¹; later, when the action was in progress, from the League of Arab States requesting that the Arab Group at the UN call for an urgent meeting of the Security Council, with a view to the adoption of a decision to halt the aggression⁶². To my knowledge, no such call came about.

v) Prior and after the aggression against Iraq, the UN Security system proved to be inactive or inefficient in a number of other occasions that would have demanded intervention under Chapter VII. The crises in the Balkans and the Nato bombing on Yugoslavia⁶³, Al Qaeda's ter-

⁵⁸ T.M. FRANCK, *What Happens Now? The United Nations After Iraq*, *American Journal Int. Law*, 2003, p. 607 ff., esp. pp. 610-614. No one did better to describe in detail the premeditation and the gravity of the two leaders' and their advisers' crime; and to praise the few who clearly and openly resisted. The latter notably included the deputy legal adviser of the British Foreign Office: a worthy successor of the members of that legal department who had expressed themselves against the UK's and France's Suez intervention in 1956.

One must sadly mention, on the contrary, Berlusconi's servile, vainly masked adherence to the criminal action: he sent soldiers to fight in manifest breach of the Italian Constitution's Article 11, under an alleged questionable "non-belligerency" posture.

On the impact of Bush's and Blair's aggression see particularly P. PICONE, *La guerra contro l'Iraq e la degenerazione dell'unilateralismo*, *Rivista dir. int.*, 2003, pp. 329-393, esp. pp. 380-384; and ARCARI, *supra*, note 57, pp. 37-79.

⁵⁹ Particularly, to my knowledge, in Belgium and Italy.

⁶⁰ The weakness of the UN's reaction could not be better described than by the Secretary-General's reluctance, in the course of a BBC interview (16 Sept. 2004), to admit the action's patent illegality. The interviewer had to reiterate his question («was it illegal?») before Kofi Annan assented.

⁶¹ UN Gen. Ass. and Sec. Council, Doc A/58/68 and Doc. S/2003/357.

⁶² UN Sec. Council, Doc. S/2003/365.

⁶³ See E. SCISO (ed.), *L'intervento in Kosovo*, Milano, 2001. In that book, the use of force is severely condemned, in particular (together with the UN's inaction) by Professors Sciso, Palmisano, Marchisio and Pistoia.

rorism, the problems raised by the Arab revolutions have been or are still left in the hands of more or less arbitrary action by the Nato alliance or by single States or groups of States, the UN having little or nothing to say. Most egregious is the long-lasting, shameless failure of the UN system to intervene in the chronic Arab-Israeli conflict, in particular with regard to the implementation of resolution 242, the endless unilaterally decided settlements in Palestinian territory and the Wall construction condemned by an ICJ Advisory Opinion: inaction hardly attenuated by the General Assembly's votes in favour of Palestine becoming a non-Member Observer State⁶⁴.

The Security Council record after 1990 seems to be frequently questionable not only under the Charter's rules or principles but also, as rightly stressed by Paolo Picone, under important and even imperative rules of general international law⁶⁵.

While repeatedly failing to accomplish its statutory peace preservation tasks, the Council seems to prefer to act as a legislator or a judge without any attempt to justify its action except by questionably evoking threats or breaches of the peace that would only justify police action. In particular, it devotes preferably its attention to the – legally questionable – establishment of *ad hoc* international criminal tribunals. Much as the

⁶⁴ A. BERNARDINI, (O)NU *non deviate o Nato (e oltre): diritto o forza*, Teramo, 2002, speaks of the Security Council's failures as a sign of a «deviated» United Nations.

Considering, though, that the dramatic failures of the organisation in the proper maintenance of peace and security find their ultimate origin in the S. Francisco document itself, one wonders whether the deviation did not occur in the minds of the leaders to whose statesmanship, according, for instance, to BRIERLY, *supra*, note 52, pp. 45-46, incumbend the (admittedly tremendously hard) task to establish, if not a real world constitution, at least a less imperfect world organisation.

Incidentally, I fail to see in what sense Aldo Bernardini should have been «embarrassed» (PICONE, *supra*, note 58, p. 391 note 157), for adopting a more severe view than the stand taken by me with regard to the Security Council's peace and security (rather than judicial or legislative) functions (Picone's note, p. 155).

I still maintain the view that the Security Council's function remains, under existing Charter law, just the maintenance of peace and security – in full respect of general international law – and does not extend to the Council's action as a judge or as a law-maker. Regarding Paolo Picone's suggested remedy to the Council's failures, I am not convinced that any real verticalization of international law occurs whenever any State or States unilaterally resort to force («*uti universi*») against violations of *erga omnes* obligations. Those States operate illegally unless they act in demonstrable self-defence (Article 51) or on Security Council authorization under Chapter VII: and in either case under the effective monitoring of the Security Council. When the law is breached, the scholars' task should be, in my view, to assert and re-assert illegalities rather than exert their ingenuity in order to put questionable legal mantles over the law's violations.

⁶⁵ PICONE, *supra*, note 58.

latter bodies' activity may be morally and politically a positive one, the Council's practice in question denotes an inevitably selective judicial policy not compatible with a proper understanding of the fundamental principles of criminal law. The suspicion seems not to arise in the minds of the leaders of the Council's permanent members that a true and just international criminal law should be more appropriately and less selectively applied by a universally accepted ICC not subject to any control by the Security Council. It seems ironical that so much praise should be expressed by scholars for international criminal law and its implementation as to raise it to the level of a «couche [of international law] constituée du droit constitutionnel et administratif de la communauté composée des six milliards d'êtres humains»⁶⁶.

vi) So, the UN's record is hardly of a nature to justify the arbitrary, overemphasized fabulation, by political scientists, of a constitutional nature of the Charter or of the whole international law, accompanied by the assertion that State sovereignty is an overcome superstition⁶⁷. The arguments supporting the UN Charter's constitutionality appear rather otiose to any European witnessing with discomfort the inability of the EU member States to attain with the required urgency that really constitutional stage that so far has manifested itself only in the abortive, although utterly inadequate, allegedly «*constitutional treaty*». Pertinently Tommaso Padoa Schioppa referred to that «*treaty*» as «*Il cammello di Giscard*»⁶⁸.

In conclusion – due to the persistent members' sovereign independence – the UN remains and seems bound to remain no more than the (undoubtedly) useful instrument of multilateral diplomacy – and a meeting place for the member governments – as defined since the outset by Secretary General Dag Hammarskjöld⁶⁹. In that capacity, the UN has made most remarkable contributions to the advancement of international law (especially through the General Assembly and its subsidiary or *ad*

⁶⁶ SASSOLI, *supra*, note 25, pp. 791-792. I am not convinced by his «deux couches» theory (*infra*, para. 14 b)).

⁶⁷ With regard to the latter point, I confine myself to a reference to L. FERRAJOLI, *La sovranità nel mondo moderno, nascita e crisi dello Stato nazionale*, Roma, 2004. I find far more persuasive – not without reservations with regard to the concept's factual or legal nature – the opinions expressed by M. BETTATI, R. DE BOTTINI, R.-J. DUPUY, P. ISOART, J. RIDEAU, J.P. SORTAIS, J. TOUSCOZ and A.H. ZARB in R.J. DUPUY (eds.), *La souveraineté au XXème siècle*, Paris, 1971. Sovereignty (and I mean external sovereignty) is a factual situation of independence (however relative that situation may be); and it is surely not the object of an *octroi* by international law. On the distinction between limitations of freedom and limitation of sovereignty, cf. *supra*, para. 12, with note 41.

⁶⁸ *Corriere della Sera*, June 19, 2003.

⁶⁹ *Supra*, note 52.

hoc organs) in innumerable areas. Main examples are Human Rights, Self-Determination, Decolonisation, Codification of various fields of the law, etc. Despite any such advancements, however, no progress is perceptible in the direction of any federal or even confederal development – namely, of a constitutionalization trend – that would justify the recognition in the Charter of anything more than the constituent instrument of a strictly inter-State organisation, let alone the constitution of the society of States or of the universal community of mankind. The advancements achieved by States, in the above mentioned areas, through the UN or by UN recommended treaties or domestic legislation, consist mostly of what I call the (problematic) interindividual international law (para. 2 *supra* with note 4, and further references therein).

VII. *Conclusive Remarks*

14. *Summing up main divergencies*

I hope that the above pages contain a not too inadequate, if not exhaustive, answer to Charles Leben's welcome and stimulating *critique*. I hope, particularly, that in the preceding paragraphs I have made clear the impact of the States' international persons' factual nature (and their distinction from the respective municipal law *personnes morales*), upon a number of important issues of international law, including particularly the nature of the UN Charter.

As noted earlier, however, Charles Leben's views and mine differ for reasons that reside far beyond the concept of *personnes morales*, or even the State's uniqueness or duality – and even farther, of course, from the question of the nature of «State contracts». One essential divide resides in the fact that while Charles Leben belongs to the widespreading (and dominant) class of scholars I denominate «constitutionalists», I subscribed, and find nowadays even more reasons to subscribe – to Holland's *dictum* that «[t]he Law of Nations is *but private law writ large*»⁷⁰, and in the once well-known Heinrich Triepel's and Dionisio Anzilotti's

⁷⁰ T.E. HOLLAND, *Studies in International Law*, 1898, p. 152. He further explains: «It is an application to political communities of those legal ideas which were originally applied to the relations of individuals. Its leading distinctions are therefore naturally *those with which private law has long ago rendered us familiar*» (emphasis added). As noted in para. 13 *i*), however, it is, to be sure, a “private” law not surmounted or supported by a normative structure of public law.

I deem it useful to recall, although my view is less pessimistic, Vincenzo ARANGIO-RUIZ's (my father) opinion recalled in *Dualism Rev.* (note 4 *supra*), notes 96 (page 968) and 143 (page 999).

theory of the relationship between international law and municipal law: except for substituting, interindividual law for municipal law: the latter numerous legal orders being the main but not the only species of interindividual law⁷¹.

The comparison of my critic's position and mine calls for some specifications.

a) It is of course not for me to find (let alone tell) where the roots reside of Charles Leben's conception of international law. I only venture to guess – with all respect and subject to correction – that they can be traced to three factors. One factor is that the French internationalists are, so to speak, «recruited» by law faculties through the system that Paul Reuter once described to me. It is the «agrégation de droit public»: a system that while ensuring, no doubt, a broader and deeper vision of law in general to the teachers and their students (a decisive advantage, for example, over the Italian, perhaps too specific, recruiting system in force at my youth, in which the teaching of international law was perhaps exceedingly «specialized» and isolated), places the latter discipline too decisively, I submit, within the framework of the public law family, at the side of constitutional, administrative and related branches of (municipal) law. Hence, presumably, a certain *penchant* of French internationalists for a publicistic view of *droit des gens*. A second factor, not unrelated to the first, is the perceptibly considerable influence exercised on French internationalists by George Scelle's federalistic vision of international law in his masterly *Précis de Droit des Gens*⁷² and, more generally, by that Master's publicistic approach to international law⁷³. A third factor, also related to the other two, is, presumably, the impact exercised on the outlook of most internationalists (but perhaps particularly on Charles Leben's) by the impressive development of the *ratione materiae* scope of international regulation. Although he wisely warns his readers that a «clearer theoretical understanding of what constitutes true advancement in international law» (such understanding including particularly, I believe, a [proper] theory of what I call the States' international persons) «should give pause to both those who argue that hardly any progress has

⁷¹ *Infra*, sub-para. b) of the present paragraph; and *Dualism Revisited*, *supra* note 4, pp. 988-993, paras. 34 b)-36.

⁷² G. SCELLE, *La Doctrine de Duguit et les Fondements du Droit des Gens*, *Archives de Philosophie du Droit et de Sociologie Juridique*, 1932, Paris; *Id*, *Précis de Droit des Gens*, Paris 1932-1934.

⁷³ An egregious example is G. SCELLE, *Quelques réflexions sur l'abolition de la compétence de guerre*, *Revue gén. droit int. public*, 1954, pp. 5 ff. (cited and discussed also by SCHIFFERS, *The Legal Community of Mankind*, 1954, p. 260 ff.).

been made, and to those who are overly fanciful about progress»⁷⁴. Also in light of my eminent Friend's warning, I am unable to dismiss the impression that the internationalists I rightly or wrongly classify as «constitutionalists» are perhaps, in general, somewhat «overly fanciful» when they interpret the said developments as signs of a current... demise of the States' sovereignty and as steps in the direction of a publicistic tendency of international law to centralization. As rightly or wrongly I see it, the horizontal extension of international regulation to new subject-matters does not really bring about any verticalization of the existing inter-State system. I refer again to the concept of domestic jurisdiction briefly recalled⁷⁵.

For due respect, and for the sake of brevity, I dare not pursue any further the analysis of Professor Leben's views about a proper, balanced evaluation of the present stage of international law that would avoid both the extremes he prudently warns against. I confine myself briefly to indicate, for the purposes of the argument about the notion of the State's international persons (and the impact thereof for the proper understanding of the current stage of international law) my own position as it stands on the ground of dated works well-known to Professor Leben (adding perhaps a few additions or corrections).

b) As earlier pointed out, the present writer studied under the Italian school's Masters (Morelli, Perassi, Ago) adhering to, and developing, Triepel's and Anzilotti's dualist/pluralist outlook of the relationship among legal systems, notably international law and the several municipal systems: a relationship the treatment of which, regrettably, is becoming increasingly out of fashion in the recent literature⁷⁶. After initially trying

⁷⁴ Ch. LEBEN, *The Advancement*, *supra*, note 2, introduction.

⁷⁵ *Supra*, paras. 12, 13 (ii-vi) and subpara. (b) in the present paragraph.

⁷⁶ Remarkable exceptions are C. SANTULLI, *Le statut international de l'ordre juridique étatique: étude du traitement du droit interne par le droit international*, Paris, 2001, and NIJMAN and NOLLKAEMPER (eds.), *New Perspectives on the Divide Between National and International Law*, Oxford, 2007. A thorough study of the matter (esp., but not exclusively, with regard to the status of national law in international law) remains SANTULLI's impressive work.

As the present (dualist) writer sees it, while the status of international law in municipal law ultimately depends in principle upon the express or implied constitutional and/or legislative and jurisprudential choices of each one of the single municipal systems, the *status* of municipal law from the standpoint of international law and international tribunals, remains essentially that expressed in the following unequivocal (although frequently ignored, misunderstood or misrepresented) terms by the Permanent Court of International Justice (PCIJ) in 1926: «It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th 1920. This, however, does not appear to be the case. From the stand point of International Law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in

simply to strengthen that theory – in vain, according to my American reviewer Joseph L. Kunz, the benevolent fustigator of dualists – with the

the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to *interpret the Polish law as such*; but there is nothing to prevent the Court giving judgment on the *question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention*» (Case of *Certain German Interests in Polish Upper Silesia*, judgment of 25 May 1926, p. 19, emphasis added). The same view was expressed in *Serbian Loans* (A, 20-21).

Confirmed by subsequent pronouncements of the same PCIJ and by its successor, the ICJ, this well-known dictum is not infrequently viewed with disfavour by writers who fail to see, under the spell of monist theories, that whenever some consideration of the municipal law of a State appears to be necessary in order to determine the conduct of that State for international legal purposes, that law is not called upon by the international tribunal to exercise a *normative* function with respect to the international issue or dispute it is called to decide, the latter issue or dispute remaining subject exclusively to international law. In other words, the consideration of the municipal law – even where it is improperly termed «application» – remains a part of the *quaestio facti*, the *quaestio iuris* to be dealt with by the tribunal under international law and the principle *iura novit curia*. It is essentially this point that K. MAREK misunderstands or neglects (*inter alia*) in her well-known *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour Permanente de Justice Internationale*, *Revue générale de droit int. public*, 1962, p. 260 ff. Manifestly biased and erroneously argued, the latter article is thoroughly discussed by the present writer in *Dualism*, *supra*, note 4, para. 9, p. 931 ff., esp. note 39, pp. 932-935.

It is surprising that the entry on *International Law and Domestic (Municipal) Law* in the 2012 edition of the Max Planck *Encyclopaedia of Public International Law* (EPIL) does so little justice to the Hague Courts' position and its theoretical and practical significance (not without a hint at some undemonstrated influence – on the practically *unanimous* above-cited 1926 judgment – of such renowned authorities as Judges Huber and Anzilotti). Conversely, the cited entry highlights the very questionable Marek critique (in the entry's paras 9, and 28-40). The same entry refers, in para. 22, to Sir Gerald Fitzmaurice statement (really a *boutade*) that «the entire monist-dualist controversy is unreal, artificial and totally beside the point» (at 71 of his 1957 Hague Academy lectures) and reports Sir Gerald's view that there was no «common field in which the two legal orders under discussion both simultaneously have their sphere of activity» (*ibidem*), concluding that Sir Gerald's «appeal» has «struck a responsive chord even among modern writers outside the sphere of the common law». The entry mentions in that respect, in the same para. 22, a [Mosler's 1957] odd suggestion that «Instead of maintaining the dogmatic controversy [those modern writers] consider it more important to contribute to a solid foundation of international law as a legal order». Unless I am mistaken, Sir Gerald Fitzmaurice – whose view on dualism/monism is thoroughly discussed in *Dualism* (*supra*, note 4), para. 27, p. 975 ff., was really, as obvious in the very passage quoted in the EPIL entry (namely, *The General Principles of International Law*, *Recueil*, 1957-II, p. 71 (verbatim also reported in *Dualism*, p. 975), a *quite firm dualist*. That is the meaning of his contention that for international law and municipal law to be in a relationship of *coordination* or *subordination* [in either case a monistic relationship] they should be «applicable in the same field – that is to the same set of relations and transactions». As recalled in *Dualism*, pp. 957-958, Sir Gerald's (ultra) dualistic stand is stressed by him further on, where he shows his reluctance to depart from Kelsen (in note 1 of his page 79). For the picture to be less incomplete, *Dualism* (*supra*, note 4) also addresses the positions on the topic held by Oppenheim (1910) and Eisemann, quoted at pages 937-939 and 928 (note 31) respectively, while a

1951 work on international persons⁷⁷, I was led by further reading to deepen the scope of my study to what I thought should be a completion of the original dualist/pluralist doctrine. I tried to give adequate account – within the dualist framework – of the most significant developments undergone by international law after World War II. Considering that Triepel's and Anzilotti's had naturally not touched significantly upon such developments, I attempted to broaden the scope of the dualist/pluralist theory to the area of international organization, human rights and international criminal law. On the first matter, I extended the contractual concept of international organizations to the Charter, distinguishing, within the UN, the internal legal orders of UN bodies from the purely inter-State rules of the Charter, the former orders belonging, in my view, to what I call interindividual international law, evidently different, in constituency and structure, from the «private» nature of the Charter's strictly inter-State norms. As I see it, the law of human rights and international criminal law (together with the respectively relevant institutions) belong entirely, as well as Dekker's *Droit privé des peuples* and *lex mercatoria*, to the said interindividual international law, where the word international is used of course not as a synonym of inter-State⁷⁸.

15. *Different visions on the role of international law (in view of Thomas Lorimer's «ultimate solution»)*

I realize, on the other hand, and I believe my eminent Colleague will agree, that our divergencies go even further, beyond the specific question of the nature of the States' international persons and even its impact on the dualism/monism alternative and the various above-considered issues.

critical review is also addressed to Kelsen's positions, Jennings-Watts's and Partsch's, The essential points on Fitzmaurice's stand are dealt with above in the present note.

Considering the increasingly scarce attention and frequent misrepresentation of the dualist theory in the contemporary literature, *Dualism* also contains (paras 7-8, pp. 928-931), a reminder of H. Triepel's and D. Anzilotti's original formulations of that theory, including the list (note 36, p. 931) of the former author's accurately identified typologies of the international properly understood impact on municipal law. The same article explains the untenability of the monist theory (paras 5-6, pp. 918-927).

Kunz's *critique* of the present write's dualism is in the *American Journal of International Law*, 1957, p. 849, and (on *Gli Enti* and *Rapporti Contrattuali*) in *Oesterreichische Zeitschrift f. öff. Recht*, 1955, p. 105: about which see *Dualism Rev.* (note 4 *supra*), 910, 912.

It is regrettable that the above reviewed EPIL article on the subject should have appeared in an encyclopaedia produced in Heinrich Triepel's country.

⁷⁷ I refer to Charles Leben's own references to my works.

⁷⁸ Compare SASSOLI, *supra*, notes 25 and 66; *adde* references to interindividual international law in para. 2 with note 4.

Those divergencies relate to the role that international law – today’s international law – can be trusted to play in favouring, or even determining, the progress of the world toward the establishment of that integrated legal community on which mankind’s peace and prosperity ultimately depend. About that role, our views fundamentally differ.

My eminent French Colleague seems to believe, together with a host of «constitutionalists», that international law, thanks particularly to what he rightly sees as the post World War II «advancements», can be relied upon to turn itself, in the more or less long run, into an integrated, hopefully democratic, world federation or confederation.

On the contrary, the present writer, while confident that the post Second World War era has marked significant, though not entirely unquestionable, advancements of international law in some very important areas, remains unable to believe, mainly in light of the persistent factual nature of the States’ international persons and their persistent sovereignty’s impact, that it is not reasonable to expect that international law possesses the means to metamorphose into the legal community of mankind. The attainment of the latter ultimate end and the existence of international law are, in his view, reciprocally exclusive. More... drastic – I dare say (technically) «revolutionary» – steps should be taken by the world’s statesmen in order to break up the vicious circle alluded to in the opening sub-paragraph *i*) of para. 13.

This pessimistic view is not unrelated to the origin of international law as vividly illustrated by Giovanni Battaglini in the rich pages of his above-cited book⁷⁹. To put it bluntly, just as international law stemmed not from a decentralisation of the *civitas maxima* more or less effectively headed by Emperors and Popes, the birth of a world State, in any more or less distant future, would be not the result of a simple centralisation of international law itself⁸⁰. I am unable to believe, in other words, that the above-mentioned advancements, particularly the UN Charter, have introduced the constitutional developments that would supply international law with, so to speak, those «public law» features, the persistent lack of which justifies Thomas Erskine Holland’s above-mentioned *dictum* as I understand it⁸¹.

There is, though – I like to believe – one point of agreement between Charles Leben and the present writer: that a world federal union

⁷⁹ G. BATTAGLINI, *Il diritto internazionale come sistema di diritto comune*, *supra*, note 1, pp. 5-15, 75 ff. and 135-152.

⁸⁰ ARANGIO-RUIZ, *L’Etat supra*, note 7, esp. pp. 337-348.

⁸¹ *Supra*, para. 13 *i*) and note 70.

is in any case the inevitable ultimate destiny of the human kind. Charles Leben's philosophical culture – far superior to mine – could surely help in exploring James Lorimer's thought about what the latter scholar called the «ultimate solution»⁸². Within that «solution», no «dual States» should survive.

⁸²J. LORIMER, *The Institutes of the Law of Nations, a Treatise on the Juridical Relations of Separate political Communities*, Edinburgh, 1884; and ID., *Principes de Droit international*, French transl. by E. NYS, Bruxelles, 1885.