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Speaking the State: Collective Personality, Legal Subjecthood and the Creation of States in International Law

Tom Sparks

Abstract

States, their nature, and their creation, have rightly been the subjects of much study in recent years. States are the primary actors of the international legal system, and are its authors. In their system-compliant, system-constitutive and extra-legal actions they exercise immense power, with the ability vastly to change the conditions of life for individuals both within and outside their territories. Questions surrounding whether entities of various kinds qualify as "States" include some of international law's bitterest disputes – such as the status of Kosovo, Nagorno-Karabakh, and SADR – as well as some of its most intriguing questions – such as the correct status to be accorded to the European Union, multinational corporations, and "failed States". Yet it is far from clear that States, as collective entities, are truly capable of exercising legal personality at all.

This article will focus on the question of whether States are capable of exercising international personhood for the purposes of subjecthood. In the course of answering that question a secondary question will also be explored: how States are created. Insight into these questions can be gained from sociology and linguistics. States, it is argued, are social constructions, created in their social reality by declarations – linguistic acts with a double (world-word and word-world) direction of fit. As such, it is argued that the creation of plenary statehood is regulated primarily by language rules, rather than legal norms.

Keywords: creation of States; international legal personality; personhood; collectivities; self-determination; linguistics; legal theory

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Table of Contents

I. Introduction ... 3

A. Starting points ... 7

II. A Vocabulary of Statehood: Beetles in Boxes ... 11

A. Internal and External Perspectives ... 12

B. State as Polity: the Internal Perspective ... 14

C. State as Person: the External Perspective ... 17

(i) What is an Actor? ... 21

(ii) Can Collectives Think? ... 27

(iii) State as Person ... 34

III. Beetles to Butterflies: the transformation of Polity to Person ... 35

A. Is the State(Polity) always a State(Person)? ... 36

B. Can a State(Person) be created as a result of an act internal to a State(Polity)? ... 39

C. Can a State(Polity) be transformed into a State(Person) by means of an international process? ... 42

(i) International Politics or International Law? ... 44

IV. Conclusion ... 52

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Speaking the State: Collective Personality, Legal Subjecthood and the Creation of States in International Law

Tom Sparks

I. Introduction

One of the most complex and controversial questions for the modern international lawyer to answer must surely be "what is a State?"[1] Although the true significance of this question has been hidden beneath a veil of the easy familiarity felt with the concept both by scientific and lay accounts of international law and international affairs more broadly, the incommensurabilities in the various accounts of statehood are not merely theoretical questions which exist only in the province of international jurisprudence, troubling no one except those who choose to wrestle with them,[2] but are the subject of numerous international disputes – such as the status of Kosovo, Nagorno-Karabakh and SADR. The inability of international law to define the State should trouble international lawyers for an additional reason, however. While the practical consequences of the lack of an understanding of statehood speak of a system whose rules cannot be effectively applied in a number of circumstances, the macro

1 As d'Aspremont has recently reminded us, international lawyers continue to disagree fundamentally on the answer to this question: Jean d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (2014) 29 Connecticut Journal of International Law 201.

2 Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947); John Dugard, *Recognition and the United Nations* (Grotius Publications Limited 1987); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Jorri Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press 1996); Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998–99) 37 Colombia Journal of Transnational Law 403; Hans Kelsen, *General Theory of Law and the State* (Anders Wedberg tr, Lawbook Exchange 1999); David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002); Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004); James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006); Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2010–11) 39 Denver Journal of International Law and Policy 209; d'Aspremont (n 1).

consequence is a lack of understanding of *subjecthood*. In turn, that lack of understanding speaks of a system which is insecure in its normative foundations, and lacks one of the most basic tenets of a legal system at all: it must know to whom it applies.[3] Surely there can be no other legal system which, as international law cannot, is unable to describe either *who* or *what* its subjects are.[4]

It may be objected that international law does indeed know who its subjects are; that it has a practical, day-to-day understanding of the entities which it regulates and to whom it ascribes that complex of plenary rights and duties which is commonly referred to as *statehood*. And to an extent, that is undoubtedly true. Thus it can be said that there are a number of international actors which appear to fall squarely within the ambit of international legal subjecthood. Examples might include Austria, Indonesia and Brazil. These are clearly States, and no argumentation or justification is considered necessary to make that assessment.[5] Other entities, though, cannot be so easily categorised. Kosovo, Nagorno-Karabakh, Palestine, Somalia, the European Union, Royal Dutch Shell and many others provide diverse problems for the international legal taxonomist. Which entities should be full and which only partial subjects of international law? Which factors should be considered relevant in drawing distinctions between them and, significantly, what points of equivalence exist upon which one can draw?

Even the uncontroversial examples provide significant definitional difficulties, however. When one speaks of "Austria" in the context of international law, for example, to what does one refer? Is the subject of international law the Government of Austria? Is it, perhaps, the population? Or the legal system? In practice the subjecthood of Austria is understood as vesting in another idea, connected to yet distinct from all three: the Austrian *State*. But the idea of the State is in equal measure mundane and incomprehensible. Although the State clearly affects day-to-day life in small and large ways, Raič is undoubtedly correct in his observation that:

> Standing on the moon, watching the earth from a different perspective, one sees water and land, and, if one would take a closer look, one might see mountains, rivers, forests and deserts. If one

3 For a discussion of this point see below, section 1(a).

4 By this it is meant that legal systems understand their subjects as a class. Each system is able to identify the categories of persons (natural or artificial) who are its subjects, and the characteristics relevant to the determination of subjecthood. It is able to say whether in a particular instance a person is or is not a subject of the legal system.

5 Dworkin argues that even these uncontroversial examples should provide more pause for though. He describes the process of identifying international law's subjects as exogenous: Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 Philosophy and Public Affairs 2, n 13.

> would get even closer to the surface of the earth, one would be able to distinguish cities, lakes and roads. One would, however, search in vain if one would wish to identify a "State".[6]

In short: a State is not a physical entity – what Searle describes as an 'observer independent function'.[7] Nor, though, is it a 'natural' person, for as Ross observes '[i]n a state with 20 million inhabitants there are not 20 million and one persons.'[8]

This may appear truistic, and even to be artificially introducing uncertainty where none exists. Thus, as was elegantly stated by Hägerström,

> When it is said that the *state* builds railways, runs the postal system, organizes an army, etc., the reality which lies behind the statement is merely the following. Certain persons or complexes composed of persons, empowered by the system of rules in force to exercise the supreme power of regulation within the group in question, *e.g.*, "sovereign organs," issue declarations, in accordance with certain formalities laid down by the rules, having a certain ideal content concerning the building or railways, etc. These declarations involve considered rules of action for determinate persons, "subordinate organs." The rules in question enter as items into the fundamental system of regulations in consequence of principles which themselves form part of the latter. They are actualized by being applied to the persons appointed for that end, in consequence of the forces which maintain the system of rules as a whole.[9]

However, while Hägerström's explanation may serve as a matter of the internal aspect of States, it cannot explain their international features. For in international law one does not equate the will of the State with the will of a sovereign individual or body within it. One does not pierce the veil and examine the 'true' actor behind a State's action. When one comments that 'the United Kingdom believes…', 'France condemns…' or 'Brazil claims…' the thought is attributed to the State, and it is expected that the State's commitments and promises will remain stable through changes of Government, and even changes of governmental system.[10] In other words, the government is not

6 Raič (n 2) 1.

7 John Searle, 'Social Ontology and Political Power' in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003) 196. 'To begin, we need to make a clear distinction on which the whole analysis rests, that between those features of reality which are observer (or intentionality) independent and those that are observer (or intentionality) dependent. A feature is observer dependent if its very existence depends on the attitudes, thoughts, and intentionality of observers, users, creators, designers, buyers, sellers, and conscious intentional agents generally. Otherwise it is observer or intentionality independent. Examples of observer-dependent features include money, property, marriage, and language. Examples of observer-independent features of the world include force, mass, gravitational attraction, the chemical bond, and photosynthesis.'

8 Alf Ross, *A Textbook of International Law: General Part* (Longmans, Green and Co 1947) 31; David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press 1997) 16 et seq.

9 Axel Hägerström, *Inquiries into the Nature of Law and Morals* (Karl Olivercrona ed, CD Broad tr, Almqvist & Wiksell 1953) 38. [Original emphasis].

10 Dworkin, 'A New Philosophy for International Law' (n 5) 8–13.

(directly) bound – and would not be so even in an absolute monarchy – but rather the State as treated as an actor in its own right. That is problematic because, as Ross bluntly states:

> It has been held that corporate units such as joint stock companies, municipalities, and states which are mentioned and treated in positive law as if they were persons co-ordinate with physical persons are in reality only constructions of the brain which may perhaps be useful aids in the technique of scientific exposition, but do not denote any actually existing new subject. The legal rules express themselves as if such persons existed, but actually they do not. [… O]nly individuals have wills. It has never been possible to prove the existence of a collective brain or other collective organs. If several people join in a group no new supreme individual comes into existence.[11]

If a State is neither a natural nor a composite person (properly so called), and nor is it a physical reality, it can be concluded that States are not *real*. This may be referred to as the apparent paradox of statehood: States *cannot* exist, but they *do*. Most accounts therefore conclude that the State is a construct – not a true person but treated as one – created either by law or the action of individuals to serve a function.[12] But that explanation is not satisfying: either such an account must presuppose the existence of international law prior to statehood, and must thus rely on natural law;[13] or must treat States as imperfect persons which have no will beyond the will of that individual (or those individuals) who speaks for them, which in turn fails to explain why the vast majority of international obligations attach to the "State" rather than to the Government.[14] What would be the justification, in such a case, for a treaty surviving a change not only in government but of governmental system, or a transition from dependency to independence, for example?

This (somewhat circuitous) description of the problem leads to the point of departure for this discussion. States are not physical entities which can be identified in the 'real world', but are 'real' entities in the sense that they demonstrably exist – they have effects small and great on the lives of individuals both within and outside of their jurisdictions – and there are elements of the functioning of the international system which cannot be easily explained without the concept. It therefore appears that there is some element to their existence which is *more than* merely the actions of the individuals who make them up, or who speak for them. In seeking better to understand the State this essay will consider *what* they are, and *how* they come to be. As will be

11 Ross (n 8) 30–31.
12 See e.g. Raič (n 2) 1.
13 Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2005) 239.
14 Crawford, *The Creation of States in International Law* (n 2) 678–80.

seen, these questions are not separate but in fact are inextricably linked. It will be concluded that much of the difficulty in understanding what “States” are is linked to the use of the term “State”. Because the term “State” can be used both in a domestic and international context, there is an insufficiently analysed assumption that both contexts make use of a single concept. It will be argued that that is not the case, and that the term “State” needs to be subdivided into two concepts – referred to here as State(Polity) and State(Person) – in order to be adequately understood. For international law, therefore, the question turns out to be not ‘how are States formed’, but ‘how is a State(Polity) transformed into a State(Person).’ It will be concluded that there are two routes to personhood in international law, one – an internal process which results in a State (and thus endorses the “State as fact” theory of State-creation) – which results in full personhood, and a second – an external process (which partially endorses both a theory of constitutive recognition and a theory of legally applied personhood) – which results in a functional subjecthood. Before beginning the analysis, however, it is necessary to identify a number of assumptions which underpin the discussion to follow.

A. Starting points

This discussion is premised on a number of assumptions, most of which will (hopefully) be considered uncontroversial, but none of which is beyond challenge. It has been possible to provide a certain amount of justification for certain of these assumptions – such as the contention discussed above that States are not “real” entities, either in the sense of natural persons or observer-independent features – but a full discussion and defence is beyond the scope of this discussion. For the sake of clarity, therefore, these are briefly set out below.

It was argued above, to begin with, that legal systems must be able to identify their subjects. The enumeration of the features of legal systems (and, indeed, the contention that legal systems have any necessary features at all) has proven a controversial venture, and one which has generated a vast literature.[15] Nevertheless, it is argued that

15 John Austin, *The Province of Jurisprudence Determined* (John Murray 1832); Hans Kelsen, *Pure Theory of Law* (Max Knight, University of California Press 1967); Lon Fuller, *The Morality of Law* (Yale University Press 1969); Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978); Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); HLA Hart, *The Concept of Law* (Joseph Raz and Penelope A Bulloch eds, 2nd edn, Clarendon Press 1994); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1996); Kelsen, *General Theory of Law and the State* (n 2); Neil MacCormick, *Institutions*

the identification of subjects can be seen, implicitly or otherwise, in most theoretical accounts of legal systems, and that the capacity to delineate to whom the system applies should be seen as one of the basic markers of the class. Thus, for example, Austin's classic definition of law as sovereign command, although now generally seen as deficient or incomplete, implies an identification of both the command*er* and the command*ed*:

> A law is a command which obliges a person or persons.
>
> But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.[16]

Kelsen's definition of law as a 'social technique' is comparable, also suggesting an ability to identify the subjects of law. He argues:

> What could the social order of a negro tribe under the leadership of a despotic chieftain – an order likewise called "law" – have in common with the constitution of the Swiss Republic? Yet there is a common element, that fully justifies this terminology, and enables the world "law" to appear as the expression of a concept with a socially significant meaning. For the word refers to that specific social technique of a coercive order which, despite the vast difference existing between the law of ancient Babylon and that of the United States today, between the law of the Ashantis of West Africa and that of the Swiss in Europe, it yet essentially the same for all these peoples [...]'[17]

Similarly, Raz implies a certainty of subjects in his description of law as 'an aspect of a political system, be it a state, a church, a nomadic tribe, or any other. Both its existence and identity are bound up with the existence and identity of the political system of which it is a part.'[18] Raz also notes that:

> By saying of a legal system that it is the legal system of Britain or of the British people one means (a) that its laws apply (roughly speaking) only to acts performed in Britain or by British people; and (b) that when tested by the tests mentioned above in Britain or among British people, i.e. in its sphere of application, it is proved to exist in them.[19]

The ability to identify the subjects of a legal system is implied, too, in Hart's reliance on the internal perspective in his definition of law,[20] and must surely be included in or

of Law: An Essay in Legal Theory (Oxford University Press 2007); John Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011).

16 Austin (n 15) 18. [Original emphasis].

17 Kelsen, *General Theory of Law and the State* (n 2) 19.

18 Raz (n 15) 211.

19 ibid 208.

20 Hart (n 15) 79–99, esp. 88–91.

a prerequisite to Fuller's first desideratum, where he implies that a failure to create rules that are *generalisable* is a failure 'to achieve rules at all'.[21]

This précis of the jurisprudential literature is not intended to deny the legal character of international law. Finnis's concept of 'central case' may be of use, here.[22] Finnis draws inspiration for the idea of the central case from Aristotle's concept of *focal meaning*, and Weber's *ideal-type*.[23] Finnis comments that:

> So there are central cases, as Aristotle insisted, of friendship, and there are more or less peripheral cases (business friendship, friendship of convenience [...]). There are central cases of constitutional government, and there are peripheral cases (such as Hitler's Germany, Stalin's Russia, or even Amin's Uganda). On the one hand, there is no point in denying that the peripheral cases *are* instances (of friendship, constitutionality...). Indeed, the study of them is illuminated by thinking of them as watered-down versions of the central cases, or sometimes as exploitations of human attitudes shaped by reference to the central case. And, on the other hand, there is no point in restricting one's explanation of the central cases to those features which are present not only in the central but also in each of the peripheral cases. Rather, one's descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about those central cases.[24]

In a similar but contrasting vein, Dworkin also assigns significance to those instances which do not meet the central case. A focus on these 'hard cases', in Dworkin's view, reveals a great deal about the system as a whole.[25] These opposing views both suggest that international law's deficient understanding of subjecthood should not be seen as fatal to the system, but rather as a system defect which renders it divergent from the *central case* of a legal system, and therefore worthy of analysis and study.

> In examining subjecthood, it is also assumed that to be an active participant in a legal system (that is, an active bearer of rights and duties) one must be a *person*. This may be contrasted to passive participation in a legal system. Dogs, for example, have certain rights under the law of many countries (such as the freedom from maltreatment), but they remain only passive bearers of these rights, because they lack the capacity of full persons.[26] The intervention of a full person – real or institutional – is needed in order to enforce their rights through access to law. It may

21 Fuller (n 15) 39.
22 Finnis (n 15) 9 et seq.
23 It may be that Plato's conception of *form* is also apposite: see Plato, *The Republic* (Benjamin Jowett and Tom Butler-Bowdon eds, Capstone 2012) 356–60; William A Welton, 'Introduction' in William A Welton (ed), *Plato's Forms: Varieties of Interpretation* (Lexington Books 2002).
24 Finnis (n 15) 11.
25 Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057, 1082.
26 But see, *contra*, *Asociación de Funcionarios y Abogados pro los Derechos de los Animales y Ortos Contra GCBA Sobre Amparo*, EXPTE. A2174-2015/0, Cámara Nacional de Casación Penal de Argentina, 21 October 2015; -- 'Court in Argentina grants basic rights to orangutan' (*BBC News*, 21 November 2014) http://www.bbc.co.uk/news/world-latin-america-30571577 (accessed 28/3/2016).

> be, also, that there are degrees of *legal personhood* – that is, personhood as defined by a particular system of law. It is well established in most domestic legal systems that non-natural (non-organic) persons such as corporations, charities and State organs can be active bearers of rights and duties, and can claim and enforce their rights and be sanctioned for a breach of their duties. It may be that entities such as these which are not real (human) or true persons – that is to say, which do not demonstrate a will independent of the individuals which make them up – can be treated as persons by a legal system where that system considers it necessary of expedient to do so. This may be construed as an example of *functional personhood*.

The discussion begins from the premise that the question of international legal subjecthood and the more basic question of what States are cannot be resolved by referring to international law. Ross puts it well when he says:

> Unfortunately the current expositions of International Law give no clear reply to this important question. For as a rule the term "state" is defined by its sovereignty [...] and this term again by the relation of the state to International Law. Sovereignty, for instance, is defined as the sole subjugation to International Law alone, not to state law. But in that case the *definition given of the term "International Law" would be unmeaning*. We have here a vicious circle: in order to determine whether or not a certain rule is international we must know whether or not the legal community bound by it is a state. But in order to decide this question we must know precisely whether or not the rule in question is international. The term "International Law" is defined by the term "state" and the definition of the term "state" again refers back to the term "International Law". A definition thus biting its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.[27]

This does not imply that the discussion assumes a positivist framework in which the State is understood to precede the law, in preference to the naturalistic framework of law preceding the State. Rather, this discussion is neutral on that score. Ross's point is understood to be a definitional point – that international law requires a definition of State which does not depend on international law, and *vice versa*.[28] Similarly the "State as fact" theory is also an insufficient starting point for, as already discussed, States are not "real" entities with an indisputable existence, and it is therefore impossible to deduce the existence of a State by reference to a given set of facts until it is clear *which facts are relevant*. The lack of a readable "blueprint" results in the quandary over the legal status of the borderline cases – Kosovo, the EU and Shell, for example – to which allusion was made earlier.

27 Ross (n 8) 12. For a further discussion of the concept of sovereignty in international law see above, Chapter 1.

28 D'Aspermont identifies a similar circularity in the theory of sources of international law: Jean d'Aspremont, 'The Idea of "Rules" in the Sources of International Law' (2014) 84 British Yearbook of International Law 103, 113–19.

II. A Vocabulary of Statehood: Beetles in Boxes

Pain words, says Wittgenstein, are beetles in boxes.[29] Here, Wittgenstein hits upon both a characteristically insightful example, and a typically colourful metaphor. Pain words are examples of non-ostensive references – they refer to something which has no correspondence in the physical world. An individual may say 'I am in pain', but their words can have only a very limited meaning for anyone else, because only they can experience the pain to which they refer. Nevertheless, it is habitually assumed that pain phrases – headache, burning pain, stabbing pain, throbbing pain, etc. – are transferable. When someone says "I have a stabbing pain in my stomach", we automatically assume that we can understand what they are feeling, because we understand how we make use of the term in relation to our own pain and assume that the sensation can be generalised.[30] Wittgenstein constructs his metaphor of the beetle in a box to explain such words:

> Suppose everyone had a box with something in it: we call it a "beetle". No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at *his* beetle. – Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing. – But suppose the word "beetle" has a use in these people's language? – If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all: not even as a *something*: for the box might even be empty. – No, one can "divide through" by the thing in the box; it cancels out, whatever it is.[31]

In such circumstances "beetle" is vacated of meaning. It cannot have any descriptive or explanatory force because no one can say with certainty to what it refers. Indeed, the situation will often be more complex still, because the people speaking of "beetles" will generally believe that they know to what the word refers, and will tend to believe that everyone else uses the word in the same way. Any one individual may be correct that their interpretation is generally shared – or, more plausibly, certain others may share their interpretation – but the degree of convergence remains unverifiable.

Pain words are, of course, an extreme example, being a wholly internal experience. Nevertheless, it is argued that the word "State", albeit to a lesser extent, shares many of the characteristics of beetles in boxes. Like pain words, "State" is a non-ostensive reference: whether viewed from the internal or external point of view it is impossible

29 Ludwig Wittgenstein, *Philosophical Investigations* (2nd edn, Blackwell 1958) [293].
30 For a discussion of pain words as an example of language relating to unverifiable experience see Marion V Smith, 'Language and Pain: Private Experience, Cultural Significance, and Linguistic Relativity' (Unpublished Thesis, University of Cambridge 1990).
31 Wittgenstein (n 29) [293].

to identify any element which is uniquely *the State*. Moreover, as has already been alluded, “State” appears to refer to different things when taken from an internal than from an external perspective.

A. Internal and External Perspectives

Viewed from within, it appears impossible to sufficiently capture in any description of its constituent parts the *all encompassing* aspect of the word “State”. An attempt to describe the “State” from the internal point of view will serve to illustrate. The “State” is the entity which demands payment of taxes, and which pays benefits; it has borders and demands the production of appropriate documentation in order to cross them; it builds roads and paints markings upon them, (usually) in conformity with a harmonised scheme throughout its area of control; and performs a thousand and one other tasks small and large. Yet none of these functions, nor a list of them all, is a satisfying description of “State”. A different tack would be to seek to identify, rather than describe: to begin with, *State* and *Government* appear distinct, as do *State* and *Legislature* – for clearly *State* is a larger idea than either.[32] It can be said that the State does not govern, rather it has a government; it does not make the law, rather it has laws. A number of other non-equivalences can be identified. The State is not the civil service, whose function it is to perform the administrative tasks necessary to carry out the function of governance within the State. The State is not the police, whose task is to enforce its laws. The State is not Judge, central bank or military, nor is it individuals, communities or cities. However, while these things may be incorporated within the term “State”, it would not be automatically true to say that a State that lacked, for example, a central bank is deficient to that extent. The term “State” appears to be capable of appropriating to itself things which are not, in and of themselves, *requirements* of a State.

When viewed from an internal perspective, then, it appears that no person or agency can be identified as embodying [fully?] the personality “State”. Indeed, in addition to these functional elements, the “State” appears to include things which have none: it may be used to denote a certain geographical area, for example, or to a population. All of these things fall within the totalising definition of “State” from an internal perspective.

32 *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica)*, (Tinoco Arbitration) (1923) 1 RIAA 369, 377–378 et *seq.*

Yet on the international plane, the challenge is to arrive at a definition of "State" which is sufficiently *discriminatory*, or that sufficiently captures the distinction between those elements which are a part of "the State" and those which are not. International law necessitates the characterisation of the "State" as a unitary entity – a legal person – which can act (can wage war, conduct trade, impose sanctions), which can interact (can sign treaties, conduct diplomacy, have and resolve disputes), and can cognise action (can plan, choose, justify and rationalise its actions). The "State" is also environment-aware, system-aware and self-aware, and can assess the legality, morality and political acceptability of its actions and, being capable of thought, belief and motivation, can develop an *opinio juris* and can represent (or even misrepresent) that *opinio juris* in its interactions with others.[33] A search for the bearer of that consciousness within the State is bound to fall short.[34] It must exclude, first of all, the territory. Although territory may be a useful concept in understanding the relative authority-claims of one State as opposed to another, territory cannot "think", and so cannot be the actor which is sought. It must also exclude the population. Although it may be conceivable that a population can have a common thought or belief, it is not credible that the population will be the source of an international *opinio juris*, for most individuals within the population will not be aware of the specificities of any given situation, let alone of the international customary law which applies to them.[35] The same objection applies to many of the State organs – such as the police force, the highways agency and the revenue service – which were discussed above. Although each of these may form opinions on law within their specialist area, they cannot be understood as the consciousness of the State because of their limited scope, and because such organs rarely, if ever, exercise an exclusive competence. The search must even exclude the government and the Head of State, for international obligations are not addressed to the government, but to the State itself. Only a very few of the most serious international wrongs engage the individual responsibility of, for example Presidents and Prime Ministers.[36] These unusual norms aside, the vast majority of international rights and obligations – maritime claims, trade agreements, sovereign debt and so on – attach to the State, and not to any figure within its government. This is not merely

33 Cassese, for example, speaks in terms of States being motivated to act by both by legal and other internal and external considerations (such as "social, economic or political needs"), and makes the uncontroversial point that the distinction is highly significant: it is only where the subjective belief on the part of States exist that their actions are mandated by law that a customary norm will be seen to emerge. See, Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 157.

34 For a discussion of collective consciousness see section 2(c)(ii), below.

35 A similar observation has been made with regard to domestic law by Hart. See Hart (n 15) 114–15.

36 Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 3, preamble, Art. 1.

a technical distinction, but rather a point of some importance: it is for this reason that the international rights and obligations of the State survive changes in government, and even changes in governmental system.[37]

In complete contrast to the internal perspective, therefore, in seeking to identify the "State" from an external perspective, it is difficult or impossible to produce a definition that is sufficiently discriminatory. The State must be an actor – a person – but no individual actor within the State appears to satisfy the definition. While the internal perspective seeks to totalise, the external seeks to exclude. Notably, neither approach arrives at a satisfactory conclusion. It is suggested, however, that both are, in some sense, correct. It is not possible to prefer one point of view over the other and to declare it to be the "appropriate" position from which to assess what the State is: they are in tension. For this reason this examination will advance two conceptions of the State, viewed from the internal and external perspective. Moreover, it will be argued that both are necessarily present in any classic "State", and that when "State" is understood as referring to two concepts it becomes significantly easier to unpick the definitional difficulties encountered thus far.

B. State as Polity: the Internal Perspective

It has been argued above that, when viewed from the internal perspective, it is necessary to define the State in a way that is sufficiently *totalising*. Moreover, when viewed in this way the State appears to contain certain elements – such as governments, police forces, cities and so on – but these do not appear to be either equivalent to it, nor necessary elements of it. The State appears to be passive – a forum of action rather than an actor in its own right. Giddens describes it as a *structure*,[38] and this description appears to have great explanatory potential. From the internal point of view, then, the State can be described as a *structure within which a social life is conducted*. Henceforward such a structure will be referred to as a State(Polity).

37 Crawford, *The Creation of States in International Law* (n 2) 678–80.
38 Anthony Giddens, *The Constitution of Society* (Polity Press 1984) 1–2. It is important to note that Giddens' observations are made in the context of an inquiry into the nature of society, rather than "the State". For this reason the vocabulary used does not comfortably transfer. Giddens refers to societies as structures, using the term "state" to refer to the governmental organs of the society, which he contrasts with "civil society" (Anthony Giddens, *The Nation-State and Violence* (University of California Press 1985) 20.).

Having arrived at a satisfactory definition, it is necessary to reformulate the original question: how is it that States(Polities) come to exist? The question is not mechanical but social: the structure in question is analogous to an arrangement of pillars and beams only in the most metaphorical sense and its existence – original and continued – depends entirely on the attitudes of individuals. The State(Polity) is, as Searle describes it, an 'observer dependent feature', one having no existence independent of the social fact that individuals treat it as existing.[39] This may appear, at first sight, to be untrue: the cry of "I do not acknowledge your authority" has never had a great deal of credence with courts, police officers or tax collectors. Nevertheless, Giddens is unquestionably correct when he comments that:

> [W]hile the continued existence of large collectivities or societies evidently does not depend upon the activities of any particular individual, such collectivities or societies manifestly would cease to be if all the agents involved disappeared.[40]

If the continued existence of the structure is dependent on the continued existence within it of agents – a population – then those agents must be carrying out a function that sustains its existence. Giddens argues that the population sustains the structure through recursive social action:

> Human social activities, like some self-reproducing items in nature, are recursive. That is to say, they are not brought into being by social actors but continually recreated by them via the very means whereby they express themselves as actors. In and through their activities agents reproduce the conditions that make these activities possible.[41]

Populations create the social fact called the State(Polity) by acting in their relations towards one another, it and others *as if it exists*. Searle makes a similar observation in relation to the functions of individuals within a structure, describing their authority as a 'status function':

> But it is a remarkable capacity of human beings that they can assign functions to people and objects, where the people and objects perform the function not in virtue of their physical structure, or not solely in virtue of their physical structure, but rather because the person or object is assigned a certain *status*, and with that status, a function that can be performed only in virtue of the collective acceptance of that status. Examples are pretty much everywhere: that a person is President of the United States only because he is recognized or accepted as President, and he can perform his functions in virtue of that collective recognition or acceptance[.][42]

39 Searle (n 7) 196.
40 Giddens, *The Constitution of Society* (n 38) 24.
41 ibid 2.
42 John Searle, 'Language and Ontology' (2008) 37 Theory and Society 443, 452.

The President, tax collector, Judge and so on do not have an inherent authority; rather their authority is a social fact. That is not to imply that their authority is any less real, merely that it is contingent on the continued recognition of their authority by society as a whole. The same applies to other social facts: ownership, marriage, currency and other such things need to be explained by reference to the attitudes of individuals. Searle argues that 'all of institutional reality is both created in its initial existence and maintained in its continued existence by way of representations that have the same logical structure as Declarations,'[43] while, in turn, a declaration is defined as a linguistic act whereby:

> [W]e make something the case by representing it as being the case. [...] For example, we adjourn the meeting by saying, "the meeting is adjourned"; we pronounce someone husband and wife by saying, "I now pronounce you husband and wife." We thus achieve world-to-word direction of fit, but we achieve that direction of fit by way of representing the world as having been changed, that is, by way of the word-to-world direction of fit.[44]

"State(Polity)" – and its cognates – is not merely a description, then, but a speech act; an example of language as action.[45] It is a self-constituting reference which both describes and creates a situation.

At this point it is possible to hazard an account of State(Polity) creation, conceived as a linguistic act: *a State(Polity) is created where a group of individuals begin to speak of and act consistently with the presence of a social community within a bounded space*. A further clarification is required, however. It is important to note that referring to State(Polity) creation as a linguistic act does not mean a contractarian model. Although a social contract moment would be entirely consistent with the account set out above, one is not required. All that is necessary is for the individuals within the relevant space to have a common understanding that they stand towards each other in a social and/or political relationship, and to act accordingly. For this reason, the existence of such a common understanding need not imply *consent*. For even dissent against the idea of the State and an attempt to resist the imposition of the social and/or legal norms which accompany it would, on the framework given by Searle, serve as acknowledgement of its reality. Such dissent is capable, therefore, of being one of the recursive constituting actions which sustain the polity's existence.

43 ibid 451. [Emphasis omitted].
44 ibid; see also John Lawrence Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisà eds, 2nd edn, Harvard University Press 1975) 2–6 et seq.
45 Dennis M Patterson, 'Law's Pragmatism: Law as Practice & Narrative' (1990) 76 Virginia Law Review 937, 956.

The account of State(Polity) creation implies a definition, and it is now possible to expand the definition given at the start of this section. A State(Polity) is a structure comprising a bounded space within which individuals act consistently with the presence of a common social and/or political community, and where their language refers to the existence of that structure. It therefore requires a group of individuals, action consistent with a shared social life and language which refers to the existence of that State(Polity). The State(Polity) is the site of politics and law, but does not depend on either. It is a larger and a prior idea: the space that contains them rather than being itself reducible to them. Moreover, and more significantly for the purposes of this examination, the State(Polity) is not an actor, rather it is passive. It is a space within which there exists a base-level agreement of sociability, a structure within which individuals act, but having no ability to act of its own.

It therefore become necessary to ask what transforms a State(Polity) into a person.

C. State as Person: the External Perspective

Before it is possible to answer the question of how a person is created, it is necessary to examine what it means to say that something is a person. Personhood is, of course, the subject of a rich and growing literature which examines, *inter alia*, the many philosophical questions which are raised by this complex idea. It is, for the most part, not necessary to address these questions here, and this section will primarily focus on the more practical aspects of the question and seek to arrive at a working definition.

Naffine identifies four major schools of thought in identifying persons: legalism, rationalism, religion and naturalism.[46] Of these, naturalism and religion can be immediately dismissed as unlikely to provide any insight into international personhood. Naturalism is defined by Naffine as a school of thought which believes persons 'are best regarded as natural corporeal beings who can feel pleasure and pain, and who live natural mortal lives'.[47] Plainly international persons are not natural, but instead are constructed or artificial persons. The distinction was most influentially drawn, perhaps, by Hobbes:

46 Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing 2009) 20.
47 ibid 24.

> A Person, is he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.*
>
> When they are considered as his owne, then is he called a *Naturall Person*: And when they are considered as representing the words and actions of another, then is he a *Feigned* or *Artificiall person.*[48]

It would appear similarly absurd to claim that States fall within the religious definition of personhood:

> The mere presence of human life, it is thought, generates rights because all human life is divinely valued and valuable: we are all sacred. We all have the spark of the divine. (Divine) humanity (defined spiritually not according to the capacity to reason) is the hallmark of law's true person. In this view, all human beings are fitting legal subjects, whether or not they are competent to make their own legal decisions, because all humans are 'ensouled'.[49]

Not only does adopting the religious view of personhood entail, perforce, a leap of faith, but it cannot provide an explanation of State personhood. It should go without saying that States are not 'ensouled', and it seems highly unlikely that they have 'the spark of the divine.'

Legalism, too, seems unlikely to offer any useful insight in the context of international law.[50] According to Naffine, Legalism is a school of thought which attempts to avoid the metaphysical debates which beset the various realist positions.[51] While these approaches seek a "true" measure of personhood, legalism is 'a strictly formal and neutral legal device for enabling a being or entity to act in law, to acquire what is known as a "legal personality": the ability to bear rights and duties.'[52] However, as noted above, Ross provides a compelling explanation for why a legal definition of personhood cannot apply on the international level.[53] Whereas under a domestic legal system a legal person – say a corporation or a charity – is a subject of the law, in international law a person must be both subject and author. This is, in itself, not a fatal objection, but it becomes so where no other concept of personhood exists. It is a basic

48 Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge University Press 1991) §80. [*sic.*]
49 Naffine (n 46) 23.
50 It should be noted that this is an argument in relation to a specific case, that of international law. It is not intended as a rejection of the utility of legalism as an explanatory framework in other jurisprudential contexts.
51 Naffine (n 46) 21.
52 ibid.
53 See above, text to n 27.

premise of any non-natural theory of law that law cannot pre-date its authors.[54] If, under a legalist framework, the relevant persons are creations of law, however, who (or what) were the authors of the law which enabled the creation of persons? A positive system of law must be created by an original set of subjects which are natural persons: any system of law which does not count natural legal persons among its authors, as international law does not, will inevitably descend into a circle of infinite regress, where the "chicken or egg" problem of whether the law predated its authors or the subjects predated the law renders the definition of both meaningless. As Ross puts it, the 'term "International Law" is defined by the term "state" and the definition of the term "state" again refers back to the term "International Law". A definition thus biting its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.'[55]

Only rationalism, therefore, remains. And this avenue to personhood does not appear promising for an account of the State, given Naffine's initial description of the most influential school of rationalist thought. Personhood under this conception means, she says, that 'legal persons are, in essence, real flesh-and-blood human beings whose most important characteristic is their ability to reason and deliberate.'[56] Clearly such a definition cannot apply to the State, which may have no 'flesh-and-blood' existence. Naffine later gives a more detailed description of the rationalist legal person, however, which does not include this element. She says:

> Here we have an active, autonomous actor: someone who is positively able to bear legal duties and to assert legal rights in their own capacity. This person is imagined as an attentive, articulate litigant or defendant, who can appreciate the complexity of law's demands and respond directly and personally, for his own reasons. This is someone who can choose to heed or reject those demands and can fairly be blamed if the choice is made to refuse the dictates of law.[57]

This remains, however, an exceptionally high threshold, and one that Naffine criticises for, amongst other things, giving an incomplete account of humans. For, as Naffine points out, there are many humans – the very young, the very old, the disabled and the person in a coma, for example – who have either not yet achieved, have

54 As Gardner comments, in the course of seeking to identify the core beliefs of legal positivism, 'What should a "legal positivist" believe if not that laws are *posited*? [… A] norm is valid as a norm of [a legal] system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it.' John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 American Journal of Jurisprudence 199, 200; Dworkin, 'A New Philosophy for International Law' (n 5) n 13.

55 Ross (n 8) 12. [Footnotes omitted].

56 Naffine (n 46) 59.

57 ibid 60.

temporarily or permanently lost, or who will never possess this capacity for high level reason. In this context, Naffine says, rationalist thinkers who insist on this strong version of rationalism should extend the doctrine to its logical conclusion and declare that such humans are not persons.[58] Lucy regards this criticism as going wide of its mark, however, describing Naffine's characterisation of rationalism as a 'double exaggeration: on the one hand, she exaggerates the level of rationality required of the rationalist legal person while, on the other, she exaggerates the range of that account.'[59] Lucy argues instead 'that rationalists have no such highly sophisticated reasoner in mind when they sketch their conception of the person.'[60]

> [R]ationalists think the legal person must be rational and not non-rational. As such, the legal person on this view must be capable of acting upon and understanding reasons. This need not mean that the legal person must be pre-eminently rational, never making mistakes as to what they have reason to do and always and ever conducting themselves in a rationally optimum way. Nor does it mean that the legal person always and ever conducts themselves on the basis of the weightiest reasons they have for acting or refraining on some, most or all occasions. It does not even mean that the legal person always and ever conducts themselves upon the basis of reasons; rather, it need only require that the legal person has the general capacity to conduct themselves upon the basis of reasons and does so much of the time.[61]

These accounts of the rationalist person, taken together, yield criteria for personhood. A person is an actor (i), which is self-aware (ii), which is aware of its environment (iii), which is capable of forming reasons for acting (iv), and which can act in accordance with those reasons (although it need not always do so) (v). Such a person is, as Naffine observes, capable of understanding the legal, moral and political norms which apply to it (although it need have no more than a lay, working understanding), and of choosing whether to act in conformity with or to disobey them. It can be said to be the author of its actions, and any of its actions which breach the legal, moral or political norms applicable to it can therefore be said to engage its, and not any other's, responsibility. Before these criteria can be applied to the State, however, it is necessary to clarify and further refine certain elements. It is also necessary to rephrase the question somewhat: these factors are currently phrased as specific requirements, and must be assessed in relation to a particular group. The question to be considered first then is not "is the group an actor", but the more general "can groups act".

58 ibid 93.
59 William Lucy, 'Persons in Law' (2009) 29 Oxford Journal of Legal Studies 787, 795.
60 ibid.
61 ibid.

(i) What is an Actor?

States, as artificial entities, have no flesh-and-blood form in and of themselves. They are composites; conglomerates of individuals who imbue them with certain powers, competences and purposes, and who in turn may be employed to perform certain tasks on behalf of or to represent the opinions of the entity as a whole.[62] In considering whether States, as composite entities, can be can be "actors" it is valuable to step outside the international law context and to consider collectivities in general. The majority of positions in this debate fall into two broad camps. The first holds that collectivities are capable of performing actions in and of themselves, in the sense that they have a "consciousness" – an ability to think and to develop purposes – that is distinct from the individuals who comprise them. When an individual performs an action that is mandated by a collectivity, therefore, it is primarily its responsibility that is engaged, and not the responsibility of the individual. The school of thought originated in the work of Hobbes,[63] although many significant modern accounts diverge significantly from Hobbes's original description. These include Pettit, Schmitt and Tuomela.[64] A second school, however, holds that collectivities are no more than the sum of their parts. Thus actions which are taken "on behalf of" a collectivity engage the responsibility of individuals, either the individuals who comprise it and are therefore the "true" authors of the action, or the individual who carried it out. These accounts find their intellectual foundations in the scholarship of Hegel.[65]

The most significant challenge to the ability of collectivities to act derives from the work of Danto, which implies that only individuals can be true causative agents. Danto developed the concept of 'basic action' – an action with no prior "cause" other than the act of will of the individual. Basic actions, Danto says, are therefore actions which the individual *performs*, rather than something the individual *causes to happen*.[66] He is intentionally coy in defining a basic action, stating that:

62 David Copp, 'Collective Actions and Secondary Actions' (1979) 16 American Philosophical Quarterly 177, 177; Raimo Tuomela, 'Actions by Collectives' (1989) 3 Philosophical Perspectives 471, 472; Hobbes (n 48) §81–83.

63 Hobbes (n 48) §81–83.

64 Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Polity Press 2001); Phillip Pettit, 'Groups with Minds of Their Own' in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003); Frederick F Schmitt, 'Joint Action: From Individualism to Supraindividualism' in Frederick F Schmitt (ed), *Socializing Metaphysics: The Nature of Social Reality* (Rowman & Littlefield Publishers inc 2003); Tuomela (n 62).

65 Georg WF Hegel, *Elements of the Philosophy of Right* (HB Nisbet tr, Cambridge University Press 1991).

66 Arthur C Danto, 'Basic Actions' (1965) 2 American Philosophical Quarterly 141, 141.

> I have avoided citing unconditional instances of basic actions, in part because any expression I might use, e.g., “moving a limb,” could also be used to designate something that was caused to happen, or something that was not an action, much less a basic one. I think there is nothing that is always and in each of its instances an unmistakably basic action. This is reflected by language in the fact that from the bare description “M's limb moved,” for example, one could not tell whether M had performed a basic action or even an action. Nor could one tell this by observing only the motion of the limb without bringing in differentiating contextual features.[67]

Instead Danto describes a basic action as one which the individual cannot *try* to do, they can only *do* it. He gives the example of a paralysed person asking what one need do in order to raise one’s arm. What, says Danto, ‘do we do *first*’?[68] This is a question without an answer, he asserts, and one which the paralysed person, lacking the capacity for this particular basic action, not only cannot understand but cannot conceive: ‘[j]ust raising the arm is what we do first.’[69] Danto contends that everything that is conventionally described as an action – what may, perhaps, be described as a chain of causation – is founded upon a basic action. He gives the example of moving a stone. When one says that an actor caused a stone to move:

> This then means that, in order to cause the motion of the stone, something else must be done, or must happen, which is an event distinct from the motion of the stone, and which stands to it as cause to effect. Now this other event may or may not be a basic action of *M*'s. But if it is not, and if it remains nevertheless true that moving the stone is an action of his, then there must be something else that *M* does, which causes something to happen which in turn causes the motion of the stone. And this may be a basic action or it may not. But now this goes on forever unless, at some point, a basic action is performed by *M*.[70]

Steinberger argues that Danto’s account of basic actions dovetails neatly with Hegel’s theory. For Hegel, the State is imbued with sovereignty by the individuals who comprise it.[71] It is not automatically an actor, however: it gains the ability to act only when its action-capacity is concentrated in a single individual.[72] This is because, Steinberger explains, ‘there are certain *kinds* of actions that collectivities cannot perform.’[73] Steinberger argues that actions described by Hegel as acts of free will are substantially the same as Danto’s basic actions. He maintains that

67 ibid 142.
68 ibid 147.
69 ibid.
70 ibid 145.
71 Eerik Lagerspetz, ‘Hegel and Hobbes on Institutions and Collective Actions’ (2004) 17 Ratio Juris 227, 233.
72 Peter J Steinberger, *Logic and Politics: Hegel’s Philosophy of Right* (Yale University Press 1988) 220.
73 ibid 216.

> In view of this, then, there is a sense in which the actions of a collectivity cannot be autonomous and free in the way that an individual's actions can. The collectivity's actions cannot be self-generated but, rather, can only be caused by something distinct from itself. [… I]t seems to be for this reason that phrases attributing actions to collectivities often have an artificial or metaphorical character.[74]

If all actions are, at their root, basic, then all causation-chains are founded upon a basic action. To speak of a collectivity acting must, on this understanding, finally be traceable back to a basic action by an individual. If that is so, it might be asked, should it not be the individual who performs the action, rather than the collectivity, who bears ultimate moral responsibility for the consequences? Copp ultimately answers that question in the affirmative, but argues that simply asserting that collectivities cannot perform basic actions is not sufficient. The fact that actions of collectivities can always be traced back to the actions of individuals does not, he says, imply an answer to the secondary question: 'why should we regard this as showing that collectivities do not act, rather than merely as showing how their actions can ultimately be explained?'[75] In seeking to answer that question, Copp develops the analogy of a declaration of war by a State. This is, Copp argues, an example of a secondary action, or of two agents standing in 'constitutional relation'.[76] In Copp's invented State, the Prime Minister's proclamation will result in a declaration of war, provided that the relevant constitutional conditions are satisfied. Nevertheless, Copp argues, these are two actions, with 'different causes and effects. It follows, I claim, that [the Prime Minister's] issuing of the proclamation and [the State's] declaring war were not identical.'[77] Copp also reasons that the issuance of the proclamation did not *cause* the State to declare war: it was *sufficient* for a declaration of war. Steinberger reformulates the point:

> The secondary action, the country's declaration of war, is a different action from the prime minister's issuing of the proclamation, and the latter certainly need not be the cause of the former. Nevertheless, the proclamation is, in some sense, an action in that, given certain relevant facts, it must be the case that the country has declared war. Thus the one action constitutes, although it does not cause, the other.[78]

Thus, Copp says, the action of the Prime Minister was sufficient for the declaration of war given that certain facts – '"*C-R* relevant" facts' – pertained.[79] There is no situation in which the Prime Minister issues a declaration of war and the relevant facts pertain

74 ibid 217.
75 Copp (n 62) 178.
76 ibid 179.
77 ibid.
78 Steinberger (n 72) 217.
79 Copp (n 62) 180.

and war is not declared. Concurrently, however, the Prime Minister's action will not amount to a declaration of war where those facts are not present,[80] and it is entirely plausible that war could have been declared even without the proclamation of the Prime Minister.[81] Nevertheless, an action by an individual which, in the presence of the "*C-R* relevant" facts, is sufficient to constitute the action of the collectivity is an absolute requirement of the collectivity's action.

Having clarified the relationship between an action of a collectivity and the action of an individual – that the individual's action, given certain facts, does not *cause* the collectivity's action, but instead *constitutes* it – Copp argues that 'all secondary actions are constituted by primary actions of persons, and [...] any primary action either is or is constituted by basic actions.'[82] He thus succeeds in linking the inability to perform basic actions to the actions they do perform sufficiently closely, he argues, to conclude that

> [T]he actions of collectives are constituted by actions of persons, and a collective is not a self-sufficient agent. Not being a self-sufficient agent, moreover, it follows that a collective is not a self-sufficient *moral* agent. That is, simply, the actions of a collective cannot accord, or fail to accord, with the requirements of morality unless some person performs an action which constitutes the collective's doing so.[83]

Although Copp's argument is, for the most part, convincing, his conclusion seems somewhat unsatisfying. After all, if it is accepted that the individual's action constitutes the action of the collectivity only because of the presence of certain facts ('"*C-R* relevant" facts') – on which point Copp's analysis seems to be entirely correct – to what extent can the collectivity's ultimate action be described as *solely* the responsibility of the individual? There may be instances, as Copp suggests, where the relationship truly is so simple. An example might be a law firm acting for a client.[84] Given the presence of certain facts – a representation agreement and so on – it can be said with some certainty that the action truly belongs to the individual, and the legal consequences (as well as any moral praise or censure) should ultimately fall upon them. Similarly, Copp argues that Massey's example of group action – Tom, Dick and Harry carrying a piano upstairs[85] – is best understood as the actions of three

80 ibid 182.
81 ibid 181.
82 ibid 185.
83 ibid.
84 ibid.
85 Gerald J Massey, 'Tom, Dick, and Harry, and All the King's Men' (1976) 13 American Philosophical Quarterly 89, 89.

individuals.[86] Yet it is somewhat difficult to see why this should be so. After all, this is surely an example of an action that individuals can accomplish only by combining their efforts into one endeavour. Copp, however, describes this as a *mereological* action: one where the whole is constituted entirely by its parts, and he relies on this observation to conclude that the action is therefore merely the sum of its parts, and is reducible to them.[87] Yet it is possible to regard this as an example of a group action *par excellence*. After all, the composite action in this case (the lifting of the piano) could not have been achieved without the efforts of all three men. Indeed, without the efforts of them all, it is entirely plausible that *none of the contributory actions could have been achieved*: had Tom, Dick or Harry attempted to carry the piano upstairs on his own, the result would not have been that only a part of the piano was moved, it would have been that the piano *did not move at all*.

Indeed, it is quite possible to imagine a scenario yet more difficult to explain using Copp's thesis. One such example is given by Schmitt, who argues that there is a quality to group action which is not reducible to mere individual action in concert. Take as an example a set of three individuals – A, B and C – who together comprise the entire membership of two different committees – the library committee and the food committee.[88] When these individuals take an action as members of one committee – such as recommending that the library purchase a particular volume – it is not true to say that *both* committees have done so. The food committee has done nothing. Nevertheless, were the actions of the library committee *nothing more* than the combined individual actions of A, B and C, and were the actions of the food committee *nothing more* than the combined individual actions of A, B and C, it would not be possible to say that this was an action of one committee, rather than of both. [89] Clearly there is, in this example, a *synergistic*, rather than a *mereological* quality to the action taken (the recommending of the book). It is not explicable by the actions of A, B and C alone, but has gained an additional quality as a result of being a combined action.

Giddens describes action as the exercise of power.[90] By this he does not mean political, financial or position-related power, but rather something much more mundane. Power in this context refers to the ability of the agent to create an effect:

86 Copp (n 62) 183–84; Massey (n 85).
87 Copp (n 62) 184.
88 Schmitt (n 64) 148.
89 ibid 147–50.
90 Giddens, *The Constitution of Society* (n 38) 9.

> To be able to "act otherwise" means being able to intervene in the world, or to refrain from such intervention, with the effect of influencing a specific process of state of affairs. This presumes that to be an agent is to be able to deploy (chronically, in the flow of daily life) a range of causal powers, including that of influencing those deployed by others. Action depends on the capability of the individual to "make a difference" to a pre-existing state of affairs or course of events. An agent ceases to be such if he or she loses the capability to "make a difference", that is, to exercise some sort of power.[91]

Put another way, Giddens says, 'action logically involves power in the sense of transformative capacity.'[92] Such a minimalist definition has a great instinctive appeal. After all, as Schmitt has demonstrated, there are examples of group actions which have a transformative effect that is qualitatively different from the effects of the combined individual actions. Viewed from this standpoint the question "can groups act" appears to be somewhat facile: of course they can. They can perform actions which individuals cannot. An example might be the passage of a piece of legislation, which gains its force not from the fact that the necessary number of individuals have supported it, but from the fact that those individuals are acting as a particular body: a legislature. The judgement of a Court does not gain its precedential force from the fact that the majority agreed on the interpretation of the point of law, nor from the status of the individuals – exactly the same individuals could have written an academic article expressing the same opinion, but the *kind* of authority the article possessed would have been quite different to that of the judgement – but from the status accorded to the group in its context.[93]

It is argued, therefore, that groups are capable of action, defined (with Giddens) as the exercise of a transformative power which effects the course of events. Although Danto's observation that collectivities cannot perform basic actions is undoubtedly correct, it does not appear to capture all that is significant about actors. As Schmitt has demonstrated, there can be a synergistic quality to group action which results in an effect that is not fully accounted for by the constitutive actions of the individuals concerned. To the extent that they can produce effects, therefore, it must be concluded that collectivities can be actors. A more interesting question, perhaps, is whether

91 ibid 14.

92 ibid 15.

93 Hernández discusses the precedential authority of the previous decision of the ICJ, and employs Hart's concept of content-independent authority in explaining why the Court reasons from precedent, despite the exclusion of precedential authority in the Statute of the Court. See HLA Hart, 'Commands and Authoritative Legal Reasons' in HLA Hart (ed), *Essays on Bentham: Studies in Jurisprudence and Philosophy* (Clarendon Press 1982) 261–66; discussed in Gleider I Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 170.

collectivities can be independent actors or, in other words, whether their thoughts, beliefs and intentions can be attributed to the collectivity, rather than to their members. The distinction is significant: if collectivities can believe that a state of affairs exists, evaluate whether a response is required and what that should be, and formulate an intention to act in that manner, the collectivity is something more than a group with a synergistic action-power, but should arguably be called a *person*.

(ii) Can Collectives Think?

The criteria for personhood set out above required that the person be an actor (i), be self-aware (ii), be aware of its environment (iii), be capable of forming reasons for acting (iv), and be capable of acting in accordance with those reasons (although it need not always do so) (v). It has been concluded above that collectivities can satisfy the first criterion, that of being an actor. It remains to be seen, however, whether groups can satisfy the other criteria (ii-v). As was stated above, however, before embarking on an examination of these questions it is necessary to reformulate them as general rather than specific enquiries. The relevant questions, therefore, are: can groups be self aware, can they be aware of their environments, can they formulate reasons for action, and can they then select a course of action on the basis of those reasons. These are, it is suggested, aspects of a yet more general question: can collectivities think?

Of course, such a question immediately evokes ideas of a sci-fi-style collective consciousness; of the highly sinister single group mind of Star Trek's Borg. In fact the question is not so far-reaching. It is not necessary to show a collective consciousness, or the creation of a new being ("the Group") which possesses a *durée*-consciousness analogous to that of an individual.[94] Rather it needs to be demonstrated that, similarly to action, there is some element to group thought which is not explained solely by the sum of the thoughts of the individuals who comprise it, or that it is not necessary in certain circumstances to enquire into their states of mind for some other reason. Schmitt argues that this is indeed so for many groups:

> We say that the Ford Corporation slashes prices to compete with General Motors. The Ford Corporation believes that General Motors is a threat to its business, desires to reduce that threat, believes that by slashing prices it can do so, forms the intention of doing so, and acts from that intention. [...] We comfortably say that the Ford Corporation has the sorts of background beliefs and desires attendant upon an intention to slash prices and upon the end of competing with General Motors. We are comfortable saying these things because the Ford Corporation has so

94 Giddens, *The Constitution of Society* (n 38) 3.

> much structure that we expect to observe behavior compatible with, and naturally explained by, the attribution of such beliefs, intentions, dispositions, and capacities.[95]

He concludes that:

> We don't need to know what individuals' dispositions are to be able to predict what the Ford Corporation will do. The Corporation will act to further its interests, given its beliefs. Of course, this requires that individuals in the Corporation act in certain ways, but we do not need to consider what those ways might be, or the causes of those actions, to predict what the Corporation will do.[96]

Schmitt is correct to observe that the Ford Corporation has certain aims, goals and institutional understandings which are internally and historically consistent. Individual employees may come and go, Board members and Chief Executives may change, but the major aims and attitudes of the Corporation would be expected to remain generally stable over time.

While this may be indicative of a group mind, however, it is some way short of a proof of one. Pettit has advanced an argument which demonstrates, he claims, that the decisions of collectivities need not represent the opinions of their membership, and which thus demonstrates that collective minds are separate from the minds of their members. This is so, according to Pettit, when a collectivity makes decisions by 'deliberative reason'.[97] Pettit uses the analogy of a workers' co-operative to explain the concept. Let us say that a workers' co-operative is faced with a decision of whether to give themselves a pay rise, or to instead to introduce a new safety measure on a particular machine in the workshop, and let us assume for simplicity that the cost of the two measures is the same, that there are no additional funds, and that this is, therefore, a choice between mutually exclusive alternatives.[98] In order to make that decision rationally, Pettit says, the workers must individually evaluate a series of variables. In schema, these might be, first, whether there exists at present a serious danger which it would be beneficial to eliminate; secondly, whether the proposed measure is likely to be effective; and thirdly, whether the pay sacrifice involved would be a bearable loss give their personal circumstances. Logically, answering "no" to any of these questions will lead the individual worker to conclude that the pay sacrifice should not be made.

95 Schmitt (n 64) 160.
96 ibid 161.
97 Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (n 64) 110.
98 This analogy can be found in ibid 107–08.

In Pettit's scenario, the responses of the workers can be arranged into three categories, all of which answer "no" to only one of the three questions, but which all therefore answer "no" to the question of whether or not the pay sacrifice should be made and the measure introduced. Thus, group A do not believe that the proposed measure will be effective, B do not believe that there is at present a danger against which it is necessary to guard, while group C believe that the measure would be effective, and that the danger is real, but they do not consider the loss to be bearable. In such a situation, Pettit says, the decision that is reached will depend entirely on the decision making process employed. Thus, if the co-operative holds only a single ballot, asking the question "should the pay sacrifice be made", the measure will be rejected. Pettit argues, however, that it would be equally legitimate for the collectivity to ask the workers to decide each question separately, and for it to infer a decision from their answers. In such a case, given that that a majority answered "yes" to each of the three questions, the collectivity will conclude that it should make the pay sacrifice, this despite the fact – and possibly in complete ignorance of the fact – that no individual within the collectivity supports the pay sacrifice. Thus, the group has reached a decision which is equivalent to that of no individual member of the group, and must, Pettit argues, therefore possess some independent mind, even if minimal.[99]

Of course, this example is highly stylised, and it may be objected that relatively few groups will make decisions in this manner. Pettit argues, however, that such decision making is, in fact, very common.

> Suppose that over a period of time a group makes a judgement on each of a set of issues, deciding them all by majority vote and perhaps deciding them on incompletely theorized grounds: different members of the group are moved by different considerations. Sooner or later such a group is bound to face an issue such that how it should judge on that issue is determined by the judgements it previously endorsed on other issues. And in such an event the group will face the old choice between adopting a conclusion-centred procedure and adopting a premise-centred one. The members may take a majority vote on the new issue facing them, running the risk of adopting a view that is inconsistent with the views that they previously espoused as a collectivity. Or they may allow the previously espoused views to dictate the view that they should take on this new issue.[100]

Indeed, Pettit argues that there is a significant pressure to take the latter course, in that a group that routinely adopts inconsistent positions will not be capable of presenting itself as an effective pursuer of its purposes, either to its members (who may therefore leave) or to the outside world (who will not treat it as a serious actor).

99 ibid.
100 Pettit, 'Groups with Minds of Their Own' (n 64) 173.

Indeed, it may find that it *cannot* effectively pursue its purposes because of its inconsistent positions.

> Suppose that a political party announces in March, say on the basis of majority vote among its members, that it will not increase taxes if it gets into government. Suppose that it announces in June, again on the basis of majority vote, that it will increase defense spending. And now imagine that it faces the issue in September as to whether it will increase government spending in other areas of policy or organization. Should it allow a majority vote on that issue, too?[101]

Although Pettit's argument is convincing, it is somewhat narrow. He may be correct to argue that collectivised reason of the kind he describes is very common, and that there is a pressure towards collectivised reason. Nevertheless, it would suggest that groups can gain and lose personality on almost a minute-by-minute basis: can it be suggested that where a decision is made on the basis of collective reason it remains the property of the group, but any decisions taken (even at the same meeting) by a majority or unanimity would remain the property of the members? It could be said instead, perhaps, that groups that have the *capacity* for collective reason have personality independent of their members, but such a definition risks committing the opposite sin of being too static: what does it mean to have the capacity for collectivised reason if it is not routinely exercised, and at what point is that capacity lost? Overall, therefore, it is perhaps best to regard Pettit's argument as an elegant proof that groups may have a mind separate from that of their members, but to regard it as somewhat insufficient as a description of the mechanism whereby this is so.

Tuomela, meanwhile, explains intentional group action by means of 'we-intentions'.[102] A we-intention is an intention to act together and, Tuomela argues, is the major difference between group action towards a common end, and a mere confluence of individual actions.

> We say that a member A_i of a collective G we-intends to perform a joint social action X if and only if i) he intends to do his part of X, ii) believes that the conceptual joint action opportunities for X obtain (e.g. that the other operative members are going to do their parts of X), and iii) believes that it is a mutual belief among the participating members of G that the conceptual joint action opportunities for X obtain.[103]

To say that the members of a group intend to lift a piano it is, therefore, not sufficient to say that Tom, Dick and Harry each intend to lift the piano without regard for the other two. Although if, by happenstance, their uncoordinated individual efforts

101 ibid 177.
102 Tuomela (n 62) 478.
103 ibid 479.

combine to produce the effect of lifting the piano, they have not acted as a group in so doing. Whereas, if Tom, Dick and Harry each intends that, together, the three of them will lift the piano, intends to play his part in lifting the piano, and believes that each of the other two intends to play their parts in the effort of lifting the piano, they have demonstrated the necessary we-intention and act as a group. This does not amount to a proposition of group minds however: the we-intention appears to suggest, on the contrary, that group intentions are never more than the sum of their parts. Tuomela then argues, however, that it is possible for certain individuals within a group, the 'operative members', to act on behalf of the group as a whole.[104] This is so, he argues, because groups can be premised on conditional we-intentions.[105] In such a case the action-capacity of the operative member(s) is founded on a secondary intention on the part of the group that those/that individual(s) should be competent to act on behalf of the group:

> [C]onsider a state's making a pact with another state. This takes place by, say, the cabinet ministers' agreeing to the pact, and the Prime Minister's signing it. Most of the citizens of the state do nothing relevant here, we may assume; the Cabinet represents them. But the state would not act fully intentionally unless the (non-operative) citizens were (at least to some degree or in some sense) aware that there are operative agents acting on their behalf, although they may not know who they are and in what roles they act nor exactly what relevant act they are performing.[106]

This is highly reminiscent of Hobbes's theory of group action, which relies on the existence of a representative (or representative body) to demonstrate that a group can act as one:

> A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that bareth the Person, and but one Person: And *Unity*, cannot otherwise be understood in Multitude.[107]

These accounts cannot significantly advance the inquiry on this subject, however. To begin with, although Tuomela's we-intentions demonstrate that groups can act with common aims and in pursuit of common goals, these appear to be reducible in a mereological sense to the various intentions of the members who represent the group. It remains necessary to rely on other features of the group to demonstrate that there

104 ibid 480.
105 ibid 481.
106 ibid 480.
107 Hobbes (n 48) §80.

exists a mind more than the mere sum of the minds of its members, and while Tuomela's thesis contributes to the inquiry it thus does not appear to capture all that is significant about group decision.

It remains unclear, however, *what* such a mind would consist of, and *how* it is to be identified. In the absence of a compelling theoretical account, it is perhaps useful to attempt a description of such a group mind. To begin with, as has already been argued, such a mind must be more than the mereological sum of the individuals who comprise the group. In other words, the *group* must have a unity of thought, even where the *individuals* who comprise it are divided. Such a situation could emerge on a simple level where, for example, a collectivity was united by an action, but not by a decision; such as where a collectivity agrees to act according to a simple majority vote. It seems unlikely that such a unanimity of action would be enough on its own, however. It also implies a power of thought that goes beyond the thoughts of the designated representative. It is entirely possible for an individual to be empowered or mandated to act or to express an opinion which they would not themselves have chosen. This, too, does not appear to suffice, however.

The relevant shift, it is suggested, is from we-collectivity to I-collectivity. Groups may be classified into three broad types: basic groups, we-collectivities and I-collectivities. a basic group is a collection of individuals who, although they may share common features, have no shared faculties or capacities, or where such shared faculties or capacities as do exist are informal and transient. Examples may include crowds, mobs, population groups and so on. Thus, while it is possible to identify a number of individuals present in a location at the same time as a crowd, or to refer to the prevailing voting patterns of pensioners, the expected situation would be of a number of individuals acting on their own behalf. Of course, pensioners may combine to form a movement for the advancement of issues specific to them, and a crowd jeering a politician may select (formally or informally) a member to be their mouthpiece, and in that situation a basic group has the potential to become a we-collectivity. We-collectivities differ from basic groups in that they have a group identity, although that group identity may be ephemeral. The individuals involved in the group feel a certain connection to the others of that group, such that in reporting the group's activities, opinions or intentions a representative could consistently use the mass pronoun "we". Similarly, a we-collectivity can transform into an I-collectivity. While the division between a we-collectivity and a basic group is somewhat fluid, and a we-collectivity need not have longevity – individuals who were in the crowd jeering the politician, for example, may feel a sufficient connection to the activities conducted and the opinions

expressed by the group or its representatives to later report these as things "we" have said or done, as opposed to "they", even if the we-collectivity existed only for minutes or hours – the dividing line between a we-collectivity and an I-collectivity is somewhat more pronounced. An I-collectivity has a conception of itself separate from its members. It can act, think and theorise on its own account sufficiently for its to refer to itself in the first person singular. Thus, it is possible to say that "the United Kingdom believes", "Oxfam has discovered" and "Ford Corporation has decided". The shift between we- and I-collectivity, it is suggested, is in the development of an institutional consciousness.

Although the idea of an institutional consciousness is applicable to any I-collectivity organisation, arguably its paradigmatic example – and the subject of this enquiry – is the State. In order to provide context to the discussion, therefore, this section considers the idea of the institutional consciousness that is necessary for the formation of an I-collectivity through the lens of the State. It was identified earlier that the State lacks a single locus of consciousness: it cannot be said, for example, that the consciousness of the State is located in the President, the Parliament, the Prime Minister, or any other body. Nevertheless, the search for a definition was exclusionary: there are many aspects and actors within the State which clearly do not contribute to its consciousness. It is argued that this is true and, further, that it may always have been true. The consciousness of the State will not be located in a single individual or point even in most absolute monarchies. That is because a State will inevitably have a number of mouthpieces, a number of decision makers at various levels, and a history of actions. To state the contention simply: the State's mind is comprised of the statements and actions of those individuals authorised to act on its behalf, past and present (such as the Head of State, Head of Government and plenipotentiaries); the opinions of the major domestic actors, in particular the government of the day, Parliament, the relevant decisions of Courts and popular opinion; and an institutional inertia that is associated with all large apparatuses (such as the civil and diplomatic services) which have been pursuing certain goals (close relations with a neighbouring State, for example, or compliance with a treaty) for a number of years. Taken together, these elements result in a situation where the mind of the State, although it can be changed by many of the actors in small ways, and by some of them in more substantial ways, does not depend entirely upon any one of them. There is, therefore, an ineffably "organic" quality to State belief and State will, and some part of each remains isolated (although, most likely, not entirely immune) from deliberate change by the government of the day.

Nor is the characterisation of this interaction as a separate State mind an entirely fictionalised account, although some element of fiction will inevitably remain. Reference to the institutional inertia of State opinions and State action, for example, invokes Pettit's collectivised reason, where decisions are taken in the present in order to maintain consistency with decisions of the past. Nor would it appear to be unreasonable to describe the interaction as synergistic: the effect is compound, with the decisions of the President and the opinions of the parliament (for example) both informing and being informed by institutional inertia. Although the account is incompletely theorised, therefore, it seems necessary to conclude that States can, after a fashion, think.

(iii) State as Person

Having concluded both that collectivities can act and that institutionalised I-collectivities can think, it remains necessary to apply the criteria of personhood to such I-collectivities to establish whether they can meet the definition of a rationalist person. The criteria as reformulated to provide a general rather than specific examination were: can collectivities act, can they be self aware, can they be aware of their environments, can they formulate reasons for action, and can they then select a course of action on the basis of those reasons?

It has been established above that collectivities can exercise a transformative power which can effect the course of events. Although Danto is correct to argue that collectivities cannot perform basic actions,[108] it was argued by Pettit that there can be a synergistic quality to group action which is not accounted for by the sum of the constitutive actions of individuals.[109] In order to take full account of the action-power collectivities can have, therefore, it is necessary to categorise them as actors in their own right. It was also concluded that institutional I-collectivities can think in a way that is not mereologically attributable to their members. To that extent, an I-collectivity may be capable of self-knowledge and self-reference (self-awareness); it is capable of awareness of the actions of other actors and of relevant conditions for acting, such as legal, moral or political norms (environment awareness); and it is capable of formulating reasons for acting on the basis of that knowledge, and of selecting a course of action in furtherance of those reasons. An institutional I-collectivity is, therefore, capable of being a full person under a rationalist framework.

108 See *supra*, 16–18.
109 See *supra*, 21–24.

III. Beetles to Butterflies: the transformation of Polity to Person

The discussion thus far has concluded that there exist two forms of (usually) territorial social integration, both of which are commonly referred to as "the State". It was further argued that the two forms often, if not usually, overlap, with both applying to a single socio-political community within a single bounded space. Thus, it is possible to view "the State" both from an internal and an external perspective, and each viewpoint reveals a different *kind* of entity. The different perspectives require that different elements of "the State" be prioritised: while the internal perspective was seen to be a totalising definition, the external was discriminatory, excluding much of that which the internal perspective sought to include. Viewed from the internal perspective, "the State" was defined as a State(Polity), or a structure comprising a bounded space (usually territorial) within which individuals act consistently with the presence of a common social and/or political community, and where their language refers to the existence of that structure. Put more simply, a State(Polity) refers to a *society* and its *area of concern* (its boundaries). Viewed from the external perspective, meanwhile, "the State" was defined as a State(Person). The State(Person) is an actor which is capable of action, interaction, and of cognising action. It is an I-collectivity capable of self-awareness, environment-awareness and reasoned action, and therefore may be properly described, following Hobbes, as an *artificial person*.

A number of questions are still to be addressed, however. An account of the creation of a State(Polity) has been given, but it remains to be seen how a State(Person) comes to be. Three questions are of particular importance: (a) is a State(Polity) always a State(Person), (b) can a State(Polity) transform itself into a State(Person) by means of a process internal to that State(Polity), and (c) can a State(Polity) be transformed into a State(Person) by means of an international process. The third question can be further subdivided into two parts: can a State(Polity) be transformed into a State(Person) by means of (i) a process of international law, and (ii) an international process conducted by other States acting separately or in concert. This section will consider these questions in turn.

A. Is the State(Polity) always a State(Person)?

An answer to this question has already been implied in what has been said above, in particular in the contention that it is necessary to treat States(Polities) and States(Persons) separately for the purposes of analysis. Nevertheless, it is of value to revisit the question now that the two forms have been defined in more detail. It may be observed as a preliminary point, however, that the two forms of State remain non-equivalent: States(Polities), as was observed earlier, necessarily comprise elements which cannot contribute to the State(Person) (such as the territory or other bounded space by which the community is delineated) and elements which need not contribute to the State(Person) (such as the population and certain institutions, which may or may not form a part of the person depending on the individual case), and it cannot therefore be said that a State(Polity) *is* a State(Person), however close the link between them may be. It would perhaps be more apposite to ask the question "will a State(Person) inevitably exist where there is a State(Polity)".

This question, too, should be answered in the negative. It is entirely conceptually possible to envisage a type of society (i.e. a community with a social and/or political life) that fits the description of a polity, but which does not constitute a person. Such a society would exist in any community which has no concept of the plenipotentiary. To take an example, imagine a society – Atlantis – that has developed in complete isolation. Although it has evolved a sophisticated governance structure, an advanced legal system and many or most of the institutions commonly associated with a modern State, it has no diplomatic service, no foreign minister, no process for assigning plenipotentiary powers, and no agreement on who speaks for the society in external affairs, for the simple reason that it is not aware that anything external to itself exists. Were Atlantis to be contacted by, for example, a somewhat surprised team of scientists in a submersible, Atlantis would become aware of a world beyond itself and would need to develop a system which enabled the society to speak to the outside world with a single voice. In other words, it must create a *person*. Of course, given the sophistication of Atlantis's government, it may be that a person can be created in an ad-hoc fashion; it may be that there is an obvious choice of plenipotentiary, and therefore that Atlantis had a *latent personhood*, which only required a prompt to emerge. Nevertheless, the person is not an automatic part of the polity, but must be created in response to need. Furthermore, it may not be that Atlantis has an obvious candidate for plenipotentiary. Let us imagine a second scenario, in which Atlantis is a society consisting of three autonomous units which are, to all intents and purposes, entirely self-governing. The three are linked by a common constitution and a

constitutional court, but Atlantis has no legislative or executive functions: these are delegated in their entirety to the sub-units. When the team of sea-bed geographers stumble blinking out of their submersible and alert the Atlanteans to the world outside, who will act as their mouthpiece? Will a single State(Person) emerge to represent Atlantis (suggesting that Atlantis is most closely analogous to a federal State), or will each sub-unit create itself as a State(Person) in its own right (suggesting that a better analogy for Atlantis would be a supra- or inter-national organisation)?

Of course, this example is somewhat far-fetched. A notable parallel exists, however, with the international community. The international community, it is argued, is a polity without a person. Although it recognises itself as a community of actors who engage in a shared social life (although often not a very harmonious one), and although there exist some tentative steps towards a measure of international governance (such as the Security Council, the International Court of Justice and the Universal Postal Union), the international community does not have the conventional, legal and institutional framework necessary for it to represent itself externally with a single voice. And that is entirely unsurprising, for there is no need for it to do so. Although it is now recognised the possibility that life (and even intelligent life) may exist on other planets, the likelihood of contact with such life on human timescales appears extremely remote, and the likelihood that we would have need to communicate officially (to negotiate, for example) less likely still. It is nevertheless an interesting thought experiment to speculate, were an alien species to enter orbit, who or what would speak for the Earth.

Moving away from examples best consigned to science fiction, examples of polities lacking persons have existed, and do exist. Early Twentieth Century Tibet is a fascinating possible example. At the turn of the twentieth century, Tibet had a near complete (if not complete) *de facto* independence from Manchu China, but did not seek to act independently. Lord Curzon, then Viceroy of India, described the fiction, averred and perpetuated both by the Tibetan and the Chinese Governments, that Tibet remained under the suzerainty of China as a 'solemn farce'.[110] Nevertheless, Tibet's dealings with Russia during this period were characterised as purely religious and having no political aspects,[111] while the excuse of a purely notional Chinese veto over Tibetan foreign relations was used to avoid entering into relations with the British

110 George Curzon, in Michael C van Walt van Praag, *The Status of Tibet* (Wisdom Publications 1987) 32.
111 ibid 31–32.

Government in India.[112] As van Walt van Praag notes, this attitude was to harm Tibetan independence in the future.[113] When, in 1904, the British Government forcibly compelled Tibet to enter into a trade agreement with British India, it then concluded an Adhesion agreement with China, which recognised China's suzerainty over Tibet,[114] and in 1909, when China again invaded Tibet, Britain's protest was only that China, in so doing, was violating the treaties it had concluded with Britain on Tibet.[115] Other intriguing examples may include Somalia in its recent history,[116] and various tribal societies, including so-called "uncontacted" tribes.[117]

112 ibid 32. Shimmelpennick van der Oye notes that, in the main, England and Russia were content to leave Tibet in its 'self-imposed "splendid isolation."' David Shimmelpenninck van der Oye, 'Tournament of Shadows: Russia's Great Game in Tibet' in Alex McKay (ed), *The History of Tibet*, vol 3 (RoutledgeCurzon 2003) 51 et seq..

113 van Walt van Praag (n 110) 32.

114 ibid 37–38.

115 ibid 127. Crawford reaches the same conclusion, stating that '[t]he invasion of Tibet was thus not a case of invasion of an independent State' (Crawford, *The Creation of States in International Law* (n 2) 324–25.).

116 As Little observes, during Somalia's period of State collapse, '[t]he ultimate paradox [...] is that some sectors of Somali economy and society are doing quite fine – as well, if not better than during the pre-war (pre-1991) years.' (Peter D Little, *Somalia: Economy without a State* (The International African Institute 2003) 2.) He notes, too, that despite that 'Somalia was defined as a conflict-ridden non-state by the UN and Western countries, [...] neighbouring states, such as Djibouti or Kenya, have foreign policy initiatives for Somalia that assumed some type of governance existed.' (ibid 4.) Little later notes that the governance structures and civil society institutions which have emerged in post-war Somalia are primarily local, rather than national (ibid 152.). They are, nonetheless, "real", and lead Little to laud the resilience of Somalia's 'stateless society', despite fully appreciating the many and serious challenges which face the territory's people (ibid 161.).

117 Eisenstadt notes that 'in all primitive societies [...] there exists some basic mechanism of social control which regulates the affairs of the tribe and resolves conflicts arising among its component groups.' (Shmuel Noah Eisenstadt, 'Primitive Political Systems: A Preliminary Comparative Analysis' (1959) 61 American Anthropologist 200, 201.) Nevertheless, it is far from clear that all tribal groups will have mechanisms to enable those invested with internal authority to speak authoritatively externally. Price, for example, notes that pre-contact Nambiquara groups lacked a concept of "group" or "band", instead identifying members of their immediate community as individuals or by way of relationships, and only identifying outsiders as collectives (David Price, 'Nambiquara Geopolitical Organisation' (1987) 22 Man 1, 13–14.). Despite this, Nambiquara settlements are held together by 'common adherence to a leader', who exercises a form of internal authority (ibid 15.). In external dealings (i.e. between Nambiquara settlements), however, Price implies an authority structure which is, if not undefined, then fluid, with the authority of the leader relevant principally in raids and warfare (ibid 16–17.). A clearer example still may be seen in the contract between the pre- and post-contact social organisation of the Maori. Van Meijl describes a transformation from loose communities to more tightly defined tribes as a result of contact with external actor, a process which also resulted in the creation of formal leadership structures capable of engaging in relations and trade with European settlers. He notes that 'the development of clear boundaries between different tribes [...] can only be explained as a result of colonial contact' (Toon van Meijl, 'Maori Socio-Political Organization in Pre- and Proto-History: On the Evolution of Post-Colonial Constructs' (1995) 65 Oceania 304, 316.). It should, finally, be noted that

It can only be concluded, therefore, that while the existence of a State(Polity) will often entail the existence of a State(Person), that the latter does not automatically follow the former. It is clear, however, that there is an inherent *pressure towards personhood* as a result of a collectivity existing alongside others in the same social or pre-social space.

B. Can a State(Person) be created as a result of an act internal to a State(Polity)?

This question will be answered in the affirmative. In order to reach an adequate understanding of this matter it is necessary to ask not only what is the process whereby a State(Person) is created in a State(Polity), but also who is the actor. It is evident, first of all, that the constitutive act cannot be performed by the Polity *qua* Polity. The Polity was defined above as a structure: a space within which certain activities – those pertaining to the social and political life of the community – can be conducted. As such, it is not an actor, but is understood better as a vessel. It has no will, no consciousness, no moral force, and no action-power. It cannot perform an action. Any constitutive action must, therefore, be taken by actors within the polity, rather than by the polity itself. The only inherent actors within the polity – that is to say, things with a natural, rather than artificial or composite, action-power – are individuals, and individuals acting in concert (that is to say, as part of a political process, whether that be through representatives, a constitutional convention, a referendum or any other means) will therefore be the focus of this section.

A polity is a we-collectivity. It involves a group of individuals who live in a relation of social and/or political ties to one another that are sustained over time. The question is, therefore, one of how a we-collectivity can become (or can produce a parallel) I-collectivity. Different thinkers have addressed this question in different ways. For Hegel, as previously discussed, the I-collectivity emerges only when it invests a single

there remain tribes which have had little or no contact with peoples organised into a State, and some who have had little or no contact even with other tribal societies. The most isolated such group remaining are probably the Sentinelese, of North Sentinel Island in the Indian Ocean. Pandit, the first anthropologist to land on North Sentinel Island as part of (unsuccessful) efforts to make contact with the Sentinelese, notes that nothing is yet known of their social and leadership structures, if indeed any exist (Triloknath N Pandit, *The Sentinelese* (Seagull Books 1990) 23.). If the Sentinelese choose to initiate contact in the future, it will be interesting to observe whether (and, if so, how) their social and leadership structures change either to facilitate or following that contact.

individual with the competence to believe, decide, speak and act on behalf of the group as a whole. As Steinberger says:

> If then, political society is to be an actor, it must be conceived of in terms of a single, real human being; and this human being is the monarch. Louis XIV's claim that "L'état c'est moi" is, I believe, adopted by Hegel as an analytically true principle of political society. In a very real sense, the state *is* the monarch; hence, the state is an actor – autonomous and responsible – only insofar as the monarch is too.[118]

Hobbes, too, argues that a society gains personhood when it imbues an individual or certain individuals with the capacity to represent it. Unlike Hegel, Hobbes accepts that a group or an assembly can bear the function of the representative, but he is similarly emphatic that it is through representation that a group acquires personhood:

> A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*.[119]

Both accounts have been rejected as an insufficient description of personhood, although it is notable that both suggest that a political process is capable of constituting an I-collectivity.

It was concluded above that imbuing a single person or a representative group with the action- and thought-power of a group did not produce a person: the opinions and decisions of such a group are unlikely to amount to more than the mereological sum of their parts. What is needed, it is argued, is a similar but related concept, which will be referred to here as the *plenipotentiary rule*. The plenipotentiary rule is a constitution-rule (a "*C-R* relevant" fact, in Copp's terminology) which enables the designation of individuals (*qua* officials), both in particular situations and longitudinally, as capable of engaging the responsibility of the group.[120] The plenipotentiary rule need not be the product of a formal constitution, but rather should be understood as a 'status function', in the sense of the term used by Searle.[121] It is, therefore, a linguistic phenomenon: a product of a general acceptance of the declaration-form "individual x has the

118 Steinberger (n 72) 220.
119 Hobbes (n 48) §81.
120 This is similar to the formulation given by Tamanaha to describe the creation of system officials for the purposes of Hart's conception of law as the practice of system officials: 'A "legal" official is whomever, as a matter of social practice, members of the group [...] identify and treat as "legal" officials.' Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 142. [Emphasis omitted].
121 Searle (n 42) 452.

plenipotentiary power", and creates the double (word-to-world and world-to-word) direction of fit which Searle associates with declarations.[122] The creation of the plenipotentiary rule need not be explicit, therefore; and like the creation of the State(Polity) itself need not rely on a contractarian model. Instead, it is possible to say that an I-collectivity with an appropriate plenipotentiary rule will emerge *where the individuals within the State(Polity) begin to speak of and act consistently with the existence of a plenipotentiary rule such that individuals designated under that rule may represent the polity as a person.*[123]

There remains, however, something somewhat troubling about the idea of politics altering the polity. After all, the polity is both larger than and prior to politics, which can only take place once the political space has been defined. The polity must, therefore, surely be on a lower – that is to say, more basic – normative plane than the political system which operates within it.[124] Can it be correct, therefore, that the one can alter the other? The point can be answered, however. Although the creation of the plenipotentiary rule has been referred to as a political process, it would be incorrect to categorise it as an act within the political system. It is better understood, it is argued, as an act akin to the creation of the polity itself, and it engages the same popular legitimacy. In short, as an act of political self-determination which, as Waldron has argued, is a pre-political act.[125]

A true State(Person) can, therefore, be created by means of a self-determination process within a State(Polity). That process need not be an identifiable 'moment', and

122 ibid 451, 459.

123 It seems likely that this accurately describes the international law conception of persons as it currently exists. The Vienna Convention on the Law of Treaties declares that an individual shall be competent to bind a State where they are imbued with full powers, but it remains the sole preserve of the State how and by what means such individuals are designated, with the exception of a limited number of offices (Head of State, Head of Government, heads of relevant diplomatic missions and so on) who will automatically be taken to bind the State by their actions (Vienna Convention on the Law of Treaties (concluded 23 May 1969, in force 27 January 1980) 1155 UNTS 331, Article 7.). In declaring that an individual is competent to bind the State, the individual is invested with that ability. In their (relevant) actions, they subsequently act as the State. As Aust notes, the formal document ("full powers") is not required in order to affect this transformation: 'A person is considered as representing a state [...] if (a) he produces appropriate full powers, or (b) it appears from the practice of the states concerned, or from other circumstances, that their intention was to consider the person as representing the state for such purposes and thus to *dispense* with full powers' (Anthony Aust, *Modern Treaty Law and Practice* (2nd Edn., Cambridge University Press 2007) 77. [Original emphasis].).

124 The point is derived, with some modification, from Waldron, who argues that the operation of the political system and the choice of the political system are not of the same type – the choice of political system is a more basic act. See Jeremy Waldron, 'Two Conceptions of Self-Determination' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 408.

125 ibid.

does not require a particular method be employed, but requires that the we-collectivity polity begin to understand itself and speak of itself as having at its disposal a plenipotentiary rule, such that individuals can be selected to speak on behalf of the collectivity as a whole, and to engage its responsibility. It such circumstances it becomes an I-collectivity, and is properly referred to as a Person.

C. Can a State(Polity) be transformed into a State(Person) by means of an international process?

The forgoing analysis has argued that legal personhood is a concept of limited utility when applied to States. This is because, as Ross has eloquently stated, international law can be defined only by reference to the State, which is its author and its plenary subject.[126] Any attempt to define personhood by reference to law therefore inevitably encounters a familiar problem: which came first? This is not a controversy which can be addressed here, nor one which this analysis is well placed to answer. Personhood has thus far been conceived not as a creation of law, but as a function of capacity: that personhood exists as a function of reality. However, almost all domestic legal systems have mechanisms for the imposition of personhood on groups, whether or not these groups meet the criteria of I-collectivity set out above. These systems will, in general, not attempt to regulate basic groups *qua* groups (i.e. they will not impose an obligation on the citizens of Edinburgh or men in their 30's to perform a single task, but may regulate individuals as a result of some shared group characteristic, such as road users, for example), but regularly impose collective obligations on we-collectivities and on genuine I-collectivities. United Kingdom company law requires evidence of the existence of a group, of capacity to act, a distinct identity and a lawful purpose for the registration of a corporation, for example.[127] What this amounts to, in the case of imperfect persons, is not that the law thereby confers the capacity for personhood on a collectivity – it does not perfect its personhood – but rather it imposes a partial personhood on the collectivity, and grants it a certain set of legal rights and responsibilities. To this extent, it is distinct from true personhood, and should be perhaps considered as legal subjecthood, or as *functional personhood*.

A number of writers have argued that collectivities should be subject to such a functional personhood. These accounts tend to focus on the collectivity's ability to

126 Ross (n 8) 12.
127 Companies Act 2006 c46 Part 2, s9.

cause harm, rather than on its moral personhood. Shockley argues that such accounts should focus on:

> [T]he causal significance of groups, and work from the causal relevance of groups in the production of harms and benefits to an account of collective responsibility. After all it seems clear that groups enable the production of certain states of affairs. In a very real sense […] groups make things happen.[128]

Smiley, meanwhile, phrases the question in terms of a collectivity's ability to 'produce bad things',[129] while Sadler refers to 'collective effects'.[130] Crawford adopts a more oblique approach, arguing that 'systemic' effects should produce collective responsibility. Thus, speaking in context of the death of civilians as a result of US action in Iraq she argues that:

> There was no conspiracy to kill civilians; in this case the atrocity was systemic – caused by structural forces, prior policy choices and institutional constraints. While individual moral agency exists, it cannot be understood outside the institutional contexts within which the individuals act.[131]

As a result, she argues, '[c]ollective, systemic forces constrain individual agency and ought to direct us to look at collective processes and at the potential for collective moral responsibility.'[132] Shockley, too, argues that harms caused by collectivities should be assessed as such, and not merely as aggregated wrongs by individuals:

> This point is crucial: individual consequences, when aggregated, constitute a harm different from that of the individuals, different *in kind*. We can differentiate these kinds of harms by their ties to the capacities of the entities to whom they are causally attributed. Insofar as there is an ineliminable reference to a collective in the explanation of the production of that harm, the collective should be attributed responsibility for the production of that harm, including blame.[133]

The ultimate goal, Crawford argues, in understanding harms produced by collectivities as such, is that those harm-producing actions can be more appropriately controlled.[134]

128 Kenneth Shockley, 'Programming Collective Control' (2007) 38 Journal of Social Philosophy 442, 433.
129 Marion Smiley, 'From Moral Agency to Collective Wrongs: Re-Thinking Collective Moral Responsibility' (2010) 19 Journal of Law and Policy 171, 171.
130 Brook J Sadler, 'Collective Responsibility, Universalizability and Social Practices' (2007) 38 Journal of Social Philosophy 486, 486.
131 Neta C Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (2007) 15 The Journal of Political Philosophy 187, 189.
132 ibid 211.
133 Shockley (n 128) 451.
134 Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (n 131) 212. It should be noted that Crawford is referring, here, to internal control of harm-producing practices by the collective, rather than external, legal or political control.

There are, therefore, (at least) two routes to legal responsibility. True personhood is innate: it is a capacity-dependent trait which accrues to I-collectivities simply by virtue of their status as such. It cannot be imposed – a we-collectivity or basic group without a plenipotentiary rule does not have the capacity to exercise personhood – and cannot be withheld. However, a functional personhood can be imposed on an imperfect person with the goal of regulating those of its functions with the ability to cause harms of the relevant type. The first route, therefore, is legal responsibility as a result of moral responsibility, and applies to natural persons and true artificial persons, or I-collectivities. The second is legal responsibility as a result of action-power. Although we-collectivities are not persons, they may nevertheless possess a significant action-power. Societies and legal systems have an interest in regulating those who possess a significant action-power, and functional personhood offers a means by which to do so. It is logically necessary, however, to be able to answer the questions *to whom* a regulation is addressed, and *to whom* any sanction would apply. As Lucy observes:

> If the law confers this ability regardless of any pre-existing capacity to exercise rights and discharge duties, then presumably it can be conferred on, inter alia, the North Wind and some particular cloud of fog. But the "ability" in question here is surely almost meaningless: how can fog and wind "exercise" their rights or "discharge" their duties? These verbs are completely inappropriate here.[135]

A functional person must, therefore, be an entity with a stable identity (i.e. must not be ephemeral, but have stable identifying factors, for example a stable territorial reach, leadership or membership), possessed of an action-power.

(i) International Politics or International Law?

It has been concluded that true personhood cannot be imposed on an entity from above. True personhood is a function of capacity, and that capacity can be created only as the result of an internal process of self-determination. Nevertheless, a lesser, functional, personhood can be applied to stable entities possessed of an action-power. Where the entity thus rendered a functional person is a Polity, international law refers to the resultant functional person as a State, failing to differentiate between functionally applied and capacity-based personhood. It remains to be seen, however, whether the process of applying functional statehood to a polity is best understood as a process of law or of the political will of existing States.

135 Lucy (n 59) 790–91. [Footnotes omitted].

The mechanism for the creation of functional statehood is understood as (constitutive) recognition. Two major schools of recognition exist. The first, most influentially stated by Oppenheim, holds that a decision to recognise a new State is entirely a matter of discretion on the part of the State recognising, and that no State is under a duty to recognise another.[136] It can be implied from this that no, or only a minimal, criteria pertain to recognition. The opposite position is taken by Lauterpacht, who argues that States are under a duty to recognise an entity which meets the criteria for statehood.[137] An examination of the process of recognition, however, suggests an answer.

In recognising an entity, States make a declaration, in Searle's terms. Recognition is a statement by which they refer to the entity in question using the term "State", and it thus exhibits the double direction of fit (word-world and world-word) which Searle identifies as characteristic of declarations.[138] This is because the consequence of recognition is the assignation of a status function.[139] What has changed about the entity as a result of its recognition? In physical and institutional terms, most probably nothing. It has gained the status of "State", however, at very least in its relations with the recogniser. Recognition is, therefore, an example of a linguistic act.[140] By applying the word "State" to the entity in question, the recogniser declares it to be a "State", and constitutes it (or contributes to its constitution) as such. It may be, therefore, that certain of the criteria that apply to the process (if any criteria apply, relate to the meaning of the word "State". To put it another way, it may be that the word "State" is subject to a *language rule*. Patterson explains the concept:

> The justification for any application of a rule is the internal relation exemplified by the grammar of the rule. Applying the rule correctly is a matter of grammar; correct application means no more than applying a rule in accordance with its grammar.[141]

Baker and Hacker give the example "red":

> What *justifies* calling rubies 'red'? Red is this ↑ colour; and rubies are this ↑ colour, i.e. red! Saying 'rubies are red' is a correct application of this rule for the use of 'red'. What *makes* it correct? Nothing. That is what we call 'applying "red" correctly.' There is no room for justification.[142]

136 Lassa Francis Lawrence Oppenheim, *International Law. A Treatise – Volume 1: Peace* (2nd edn., Longmans, Green and Co 1912) 117.
137 Lauterpacht (n 2) 78.
138 Searle (n 42) 455.
139 ibid 452.
140 Indeed, the prevalence of such linguistic acts may support Searle's conclusion that 'all of institutional reality is both created in its initial existence and maintained in its continued existence by way of' language. See ibid 451.
141 Patterson (n 45) 949.
142 Gordon P Baker and Peter MS Hacker, *Scepticism, Rules and Language* (Blackwell 1984) 83.

By contrast, if, as Oppenheim implies, the recogniser may apply the term "State" to anything, "State" would be a term which ceased to have descriptive meaning, and therefore would be nothing more than a status function. It would be more akin to Wittgenstein's beetle in a box: a term each defines by reference to some internal standard which is not (or is not readily) communicable. It would be a term which 'cancels out, whatever it is.'[143] In short, it would have no meaning other than "an entity which is granted international rights and duties."[144] On the contrary, however, "State" appears to be a term which retains meaning, largely because it is applied by States in consistent ways.[145] Although individuals bear certain international rights (under, for example, the ICESCR/ICCPR) and certain international duties (not to commit certain acts designated international crimes), it would be seen as manifestly absurd to describe an individual as a "State". Although there is disagreement in penumbral cases, therefore, it can be observed that a certain core of meaning applies to the term "State".

Most contemporary authors recognise that Article one of the Montevideo Convention on the Rights and Duties of States is the starting point for any discussion of the meaning of statehood in contemporary international law.[146] The Convention, which despite having only a few States Parties is generally regarded as having entered customary law,[147] declares that

143 Wittgenstein (n 29) [293].

144 Indeed, the term may not even refer to a specific or expansive set of rights and duties. As Anghie has observed, the history of international law has been comprised of a series of frameworks which limit the rights and sphere of action of certain States. (Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) esp. 115–194.)

145 The concept of *meaning* is highly uncertain and difficult to describe. Wittgenstein dedicates a substantial section of his *Philosophical Investigations* to an examination of the idea, and suggests, rather than states, an answer to the question "what is it for a word to have meaning", and to the connected question "how does it come to be that a word has meaning for a certain group?" (Wittgenstein (n 29) [1-242].) Meaning, clearly, is socially constructed. Wittgenstein begins with an example of language acquisition in infants, where words are learnt as a signifiers which attach to objects, actions and so on. ([1].) This is not simply a case of learning definitions, however, but also of learning and contributing to a *practice*. Wittgenstein gives the example of a sign-post, which has significance for an individual only because they 'have been trained to react to [sign-posts] in a particular way'. Thus, 'a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom.' ([198].) Indeed, a system of language rules is meaningless without a consonant practice: 'If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgements.' ([242].)

146 Crawford, *The Creation of States in International Law* (n 2) 36; Montevideo Convention on the Rights and Duties of States (26 December 1933).

147 Grant notes that the Montevideo criteria have become a 'touchstone for the definition of the State': Grant (n 2) 416.

> The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.[148]

Significantly, although a number of writers have argued in recent years that the enumeration is no longer adequate,[149] and should be expanded to take into account such factors a legality of origins, minority rights, and democracy, these factors – and, in particular, the first three – have remained largely stable for many years. As Grant observes, for example, writing in the 1930's Jellinek defined statehood in relation to three broadly similar elements – effectiveness, population and territory – and similar criteria were widely accepted in other accounts of the time.[150] Similarly, Hall defined statehood as an independent political community within a defined territory.[151] In fact, the markers of statehood, in a form recognisable today, can be seen in the writings of Bodin in 1576,[152] and in Grotius in 1625.[153]

Not only do these criteria appear to have been broadly accepted as an accurate definition of a State by publicists, but they appear to have been accepted by States themselves. During the course of the *Kosovo* advisory proceedings, a number of States submitted written comments to the Court, some of which addressed the question of whether Kosovo could claim to be a State. Although differences existed between the participants as to whether recognition is constitutive or declaratory, all of those States which addressed the issue referred either to the Montevideo criteria themselves or a similar list of requirements of statehood. Serbia, for example, noted that '[t]he requirements of statehood focus upon the criteria of population, territory and

148 Montevideo convention (n 146) Art.1.

149 See e.g. Crawford, *The Creation of States in International Law* (n 2) 89–95; Grant (n 2) esp. 453; Sterio (n 2). James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 89–95; Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Colombia Journal of Transnational Law 403, *esp*. 453; Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2010) 39 Denver Journal of Internaitonal Law and Policy 209.James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 89–95; Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Colombia Journal of Transnational Law 403, *esp*. 453; Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2010) 39 Denver Journal of Internaitonal Law and Policy 209.James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 89–95; Thomas D Grant, 'Defining Statehood: The Montevideo Convention and Its Discontents' (1998) 37 Colombia Journal of Transnational Law 403, *esp*. 453; Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' (2010) 39 Denver Journal of Internaitonal Law and Policy 209.

150 Grant (n 2) 416.

151 ibid 417.

152 Jean Bodin, *Six Books of the Commonwealth* (Tooley (tr), Basil Blackwell 1967).

153 Hugo Grotius, *The Rights of War and Peace* (Richard Tuck tr, Liberty Fund 2005).

governance',[154] while Luxembourg referred to the need for a 'define territory, a settled population, and an effective government',[155] and Japan, although arguing that recognition is constitutive, stated that

> For the formation of a State, international law generally requires that an entity shall meet the conditions of Statehood, namely an entity holds an effective government which governs a permeant population within a defined territory. The question of whether an entity fulfils these requirements usually comes into play in the context and in the phase of recognition by other States.[156]

Japan's position is highly illuminating. It suggests that, although Japan conceived of statehood as a matter of recognition, States are not unfettered in the exercise of their power to recognise. Lalos characterises States as 'gatekeepers', who 'ensure that de facto states meet the criteria outlined under the Montevideo Convention.'[157] Mugerwa argues on similar lines that 'there appears to be universal acceptance of the rule that recognition must be accorded only when all the conditions of statehood are fulfilled.'[158]

These criteria have come under attack in recent years, however. Grant is particularly forthright, denouncing that Montevideo criteria as 'over-inclusive, under-inclusive, and outdated.'[159] He correctly identifies that a number of entities which have appeared to meet the Montevideo criteria – such as Rhodesia – have not been recognised, while entities with serious defects in terms of the criteria have been treated as States.[160] He identifies a list of eight criteria which, he says, would at least have to be given serious consideration, were a new international instrument on the lines of the Montevideo Convention to be considered. These include independence; a claim to statehood; self-determination; internal and external legality; the existence of a people joined by historical, cultural, religious or other factors; and United Nations membership, as well as a formal requirement of recognition.[161] By contrast, although Sterio agrees that additional criteria should now be applied to the process of State creation (such as recognition by regional States and the great powers, respect for human and minority

154 Written Statement of Serbia, *Kosovo* Advisory Opinion, [416].
155 Written Statement of Luxembourg, *Kosovo* Advisory Opinion, [16].
156 Written Statement of Japan, *Kosovo* Advisory Opinion, 2.
157 Dimitrios Lalos, 'Between Statehood and Somalia: Reflections of Somaliland Statehood' (2011) 10 Washington University Global Studies Law Review 789, 800.
158 Nkambo Mugerwa, 'Subjects of International Law' in Max Sørensen (ed), *Manual of Public International Law* (MacMillan 1968) 277.
159 Grant (n 2) 453.
160 ibid 442–47.
161 ibid 450–51.

rights and acceptance of international law), she argues that these are best considered to be sub-elements of the fourth Montevideo criterion, capacity.[162]

By contrast, a somewhat weaker claim is advanced here. It is argued that the Montevideo Convention criteria should be not regarded as a list of requirements for Statehood, but rather as an iteration of a definition generally understood. Thus, while significant disagreements remain when faced with penumbral cases, States, commentators and others share a schematic understanding of what it is to be a "State". In short, that the term "State" is a term defined: "State" is subject to a language rule.

In the context of functional statehood, then, States are not entirely at liberty to recognise as "State" whatsoever they wish: rather they must take account of the meaning of the word "State". Nevertheless, as has been observed, functional statehood is not true Statehood, and it is reasonable to assume that the definition of "State" would, in this context, be less stringent, therefore. The precise ambit of the definition would require a review of State practice that is beyond the scope of this piece, but it is possible to make a number of observations. It is settled practice, for example, that States are territorial entities, although it is accepted that the borders of the territory in question need not be precisely delineated.[163] Similarly, States are populous, and an entity without a population will not be considered a State.[164] Thirdly, States are polities – that is so say, a group of individuals arranged within a socio-political community.[165] Finally, an entity will not be regarded as a State if it is under an effective authority-claim by another State.[166] For that reason, a sub-State unit cannot be recognised as a

162 Sterio (n 2) 2010.

163 In its judgement in the *North Sea Contiental Shelf* case the ICJ commented that: 'There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not[.]' (*North Sea Continental Shelf*, Judgement, (1969) ICJ Reports 3, [46].) Crawford comments that 'even a substantial boundary or territorial dispute with a new State is not enough, of itself, to bring statehood into question. The only requirement is that the State must consist of a certain coherent territory effectively governed[.]' (Crawford, *The Creation of States in International Law* (n 2) 52.)

164 Lauterpacht argues that a State must possess 'a population subject to the natural process of renewal and growth' (Lauterpacht (n 2) 48.), although it is worth noting, with Duursma, that '[n]o reservations have been made by the international community with respect to statehood because of the limited number of nationals of micro-states.' (Duursma (n 2) 118.)

165 The classic formulation is Vattel's, now usually taken as a truism: 'A nation or State is, as has been said at the beginning of this work, a body politic, or a society of men united together to promote their mutual safety and advantage by means of their union.' (Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Luke White 1792) 15.)

166 Vattel argued that entities which are in certain ways dependent upon others will not necessarily be denied statehood on that account. The significant factor is authority. This, he declares that States 'acknowledge no other law, than that of nations' (ibid 17.), and by implication holds that entities which acknowledge the rule (the authority-claim) of another cannot be considered States. Crawford, similarly,

State under international law, and breakaway regions will be recognised only once the State recognising believes that it has successfully displaced the authority-claim of the former power.[167]

Is there, in addition to the constraint imposed by the language rule, a legal limit on State action in recognising an entity as a bearer of functional personhood? This question is complex, and the search for an answer would require an examination of State practice in cognisance of the effects of the language rule, such that its effects could be excluded from the investigation and the remaining legal rules revealed. Such an investigation is beyond the scope of the present work, but it is possible to make a preliminary observation. Although it may perhaps be possible for international law to impose regulatory-style obligations on States (i.e. obligations where the corresponding right attaches to the system, rather than to another State or a group of States), the archetypal international obligation is one owed by a State to another, or by a State to a group of States.[168] The structure of such obligations is distinctive, and may be used to differentiate them from language rules. Language rules impose an obligation, but it is not legal in structure and does not carry a corresponding right.[169] Rather, a language rule is an obligation of sense. A may object that B's description of a ruby as blue (that is to say, this ↓ colour) is manifestly nonsensical, given that rubies are red (this ↑ colour), but A cannot claim that s/he has thereby suffered a wrong. Any obligation which carries with it a corresponding right for another party must, therefore, be something other than a language rule. In relation to recognition, at least one such obligation is discernible: the presumption that a State will not recognise an entity which is subject to an existing authority-claim by another State. This is a repeated theme in the practice of States and the United Nations in relations to secession movements, where references to the territorial integrity of the State power are often

states that: 'A new State attempting to secede will have to demonstrate substantial independence, both formal and real, from the State of which it formed part before it will be regarded as definitively created.' (Crawford, *The Creation of States in International Law* (n 2) 63.)

167 Crawford, *The Creation of States in International Law* (n 2) 63.

168 As the ICJ confirmed in *Barcelona Traction*, international obligations owed by one State to another remain the rule, with *erga omnes* norms an exception: *Barcelona Traction, Light and Power Company, Limited*, Judgment (1970) ICJ Reports 3 [33–35]. Similarly, Cassese notes, 'The relations between the States comprising the international community remain largely *horizontal*. No *vertical* structure has yet crystallised, as is instead the rule within the domestic systems of States.' Cassese (n 33) 5; Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens & Sons 1951) 29.

169 As Patterson comments, '[t]he justification for any application of a rule is the internal relation exemplified by the grammar of the rule. Applying the rule correctly is a matter of grammar; correct application means no more than applying a rule in accordance with its grammar. Thus, there cannot be, and need not be, any external (social) *justification* for a claim that a particular extension of the rule is mandated or warranted.' Patterson (n 45) 949.

seen as decisive, and territorial integrity was confirmed to be an obligation owed by States to States in the ICJ's judgement in *Kosovo*.[170] Dugard gives the example of Katanga, the secession of which was not recognised as valid by any State, and which was condemned by the UN Security Council.[171] The Security Council variously referred to the attempted secession as 'in opposition to the authority of the Government of the Republic of Congo' and 'contrary to the Loi fondamentale', and called upon member States to 'refrain from promoting, condoning, or giving support' to the secessionist effort.[172] In the same vein, Dugard refers to the decision by Israel in 1981 to effectively annex the territory of the Golan Heights, which it had occupied since 1967.[173] The Security Council declared the action to be 'null and void and without international effect',[174] while the General Assembly stated its determination that Israel's decision was 'illegal and invalid and *shall not be recognized*'.[175] Indeed, the wrongful recognition of a State's control over a territory has even been the subject of a complaint before the International Court of Justice in the case concerning *East Timor*.[176] Although the ICJ in that case found that it did not have the jurisdiction to consider the complaint, that Portugal considered a violation to have occurred may be considered suggestive.

It can be concluded, then, that States are not free to exercise unfettered discretion in the course of recognising new States. However, it may not be correct to characterise certain of the limitations on State action in this regard as obligations, nor as stemming from law. Although certain legal rules do apply to the recognition process (such as the obligation not to recognise an entity over which an existing State exercises an authority-claim), and it may be that legal rules exist in parallel with the limitations discussed here, it was found that States are primarily limited by the constraints of language. States are not 'bound', in the sense of being subject to a norm, but rather are guided by a language rule: they cannot apply the term "State" to an entity which is manifestly ill-suited to bear the term because to describe the entity as a "State" *would not make sense*. It is, thus, both a less stringent and less certain guide to behaviour than a legal rule, but is perhaps stronger in that it is somewhat isolated from deliberate change (although meaning may naturally shift over time). Of course, as with any rule, there remains significant room for disagreement in penumbral cases, but these will

170 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, (2010) ICJ Rep 403, [80].
171 Dugard (n 2) 86–90.
172 UNSC Res 5002 (24 November 1961).
173 Dugard (n 2) 115.
174 UNSC Res 497(1981) (17 December 1981).
175 UNGA Res 37/123A (16 December 1982). [Emphasis added].
176 *East Timor (Portugal v. Australia)*, Judgement, (1995) ICJ Rep 90.

not normally present a challenge to the meaning of the word itself, rather focusing on whether a particular set of facts fall just inside the definition or are excluded by it: the core features of the definition are usually accepted by both disputants and, indeed, are therefore reinforced rather than damaged by the dispute.

IV. Conclusion

International law is the law that applies to States: States are those communities bound only by international law. Such is the definition of both international law and statehood that practitioners and scholars in international law have been examining, criticising and employing for many years. Ross highlighted the fundamental deficiencies in these linked definitions, correctly describing it as an 'unmeaning' definition 'biting its own tail', and concluding that the 'consequence is that on the point in question the definition is in reality a blank.'[177] Nevertheless, modern international lawyers continue to work within the same constrictive framework identified by Ross in 1947. It remains true today that international law lacks an understanding of subjecthood – surely one of the basic requirements of a legal system – and that lack of understanding manifests in a variety of ways. The seemingly never-ending debate over the nature of recognition is an academic symptom of that malaise, but its effects are felt, too, far beyond the academy.

This article has sought to contribute to that debate by providing a theoretical examination of the concept of statehood. Many excellent summaries of international policy and practice exist on statehood and recognition, and this discussion has attempted to supplement that top-down approach by providing a bottom-up examination of the concept. It first examined a typified State both from the internal and external perspectives, and concluded that two, rather than one, entities were engaged. These entities appeared to be theoretically distinct, with the internal perspective tending towards a totalising definition of the term "State" while the external perspective tended towards an exclusionary description. These were termed, respectively, the State(Polity) and the State(Person), and it was concluded that the processes by which they are created are, similarly, distinct.

177 Ross (n 8) 12.

Of most significance for international law, the analysis suggests that there are two routes to international legal statehood. The first is that associated with personhood, and occurs when a we-collectivity State(Polity) becomes an I-collectivity State(Person). The creation of a person within the State which is capable of representing the Polity and its inhabitants (act), which is aware of its environment and can engage in relations with others (interact), and which can develop reasons (theorise action) will, of course, always be a somewhat fictionalised account. There is no mythological, leviathan presence in the State which speaks with the voice of all. Nevertheless, it is possible that the fiction expresses a greater truth in this case. Where a community establishes a plenipotentiary rule, it invests a series of individuals with a (to a greater or lesser extent) limited power to speak for the polity in certain situations. Thus, while the Head of State may have the power to speak for the polity in any situation where s/he acts in the capacity of the Head of State, a diplomat may exercise the plenipotentiary power only within a particular theatre. The various pronouncements and actions of these plenipotentiaries combine to create a history of actions and opinions which, together with the infrastructure associated with a large organisation which pursues functions, were referred to as "institutional inertia". The product is a State mind which is a synergistic amalgamation of parts, with decisions both informing and being informed by institutional inertia, and which is not (or is not entirely) reducible to the mereological sum of the plenipotentiaries. To that extent, an I-collectivity State(Person) is, it was argued, capable of self-knowledge and self-reference (self-awareness); it is capable of awareness of the actions of other actors and of relevant conditions for acting, such as legal, moral or political norms (environment awareness); and it is capable of formulating reasons for acting on the basis of that knowledge, and of selecting a course of action in furtherance of those reasons. The creation of the plenipotentiary rule, it was argued, need not be the product of a political process, or even an act of deliberate creation: rather, it is a social rule that, as Searle has described, is predicated upon social understandings created through language.[178] Thus the plenipotentiary rule will emerge where the individuals within the State(Polity) begin to speak of and act consistently with the existence of a plenipotentiary rule. Such a social understanding is not dependent on the politics of the polity, but is rather a pre-political act, and it is therefore best understood as an exercise of political self-determination.

The rationalist framework of personhood rejects a legal method of person-creation. In direct contrast to the legal framework, rationalist thought is a subcategory of realism:

178 Searle (n 42) 451.

the view is inherent in realist constructions of personhood that law should take account of a person which exists in fact.[179] This, it is suggested, is an appropriate attitude for international law to employ. As has already been argued, with Ross, a legal construction of statehood in international law is not tenable: such a definition of statehood results in a circular and meaningless definition both of international law and of the State, and contributes to the vacillation between apologist and utopian tendencies identified by Koskenniemi as a feature of the discipline.[180] International law's plenary understanding of statehood should therefore not be legal, but should accord with the rationalist framework. It follows that an entity which, in fact, has the properties of an I-collectivity State(Person) should be treated as a State for the purposes of international law. The foregoing analysis therefore supports the "State as fact" school of thought.

The analysis has also identified a second possible route to statehood, however. This was identified as "functional personhood", or that form of subjecthood which can be imposed on an entity which does not meet the criteria for full rationalist personhood. As Shockley, Smiley, Crawford and others have observed, the capacity to produce effects (action-power) is not confined to I-collectivities, but can also be possessed by we-collectivities and basic groups. Given the natural interest of societies and legal systems in regulating the effects of the exercise of action-power, functional personhood is required. The imposition of functional personhood is not unlimited, however. It is necessary, as a conceptually required first step, to be able to answer the questions *to whom* the regulation is addressed, and *to whom* the sanction would apply. A functional person must, therefore, be an entity with a stable identity. Additional criteria also apply on the international plane, where functional persons, like full persons, are given the label "State", and its imposition must therefore accord with the relevant language rule. It was concluded that, although a certain amount of uncertainty would remain in penumbral cases, States are defined as populous, territorially defined polities which have a strong authority claim over themselves, and this language rule (in addition to any legal criteria which may apply) guides State conduct in recognition cases. Recognition, therefore, does have a role to play in the creation of those entities conventionally known as "States" in international law: while it is not the mechanism whereby true persons are created, it has the constitutive effect of conferring functional personhood on imperfect elements, and thereby raises them to the status of functional international persons.

179 Lucy (n 59) 790; Naffine (n 46) 20 et seq.
180 Koskenniemi (n 13) esp. 58–69.

To the extent that the controversies surrounding statehood are conceived as a conflict between the “State as fact” doctrine, constitutive recognition and declaratory recognition, the foregoing analysis suggests that the debate somewhat misses the mark. By contrast, the debate should be focused on achieving a deeper understanding of the various different meanings applied to the word “State”. The term is used to denote at least four different ideas: the polity, a we-collectivity within which a population engages in a shared social and political life; the person, the semi-fictionalised actor which represents the State in external affairs and whose responsibility is engaged in international affairs; the functional person, the polity which is granted a measure of international responsibility as a consequence of its action-power despite lacking true personhood; and the language rule, denoting an ideal-typical (if minimal) State, which guides the recognition process. Understanding statehood as a composite, rather than unitary, concept significantly alters the horizons of the enquiry. Rather than construing “State as fact” and constitutive recognition as polar opposites, for example, the foregoing discussion casts them as concomitant processes which apply different routes to statehood associated with different kinds of States. The bottom-up approach adopted here does not replace, but rather supplements the traditional top-down, practice oriented approach taken by many international lawyers. It suggests, however, that the search for practice should in future be directed by a more rigorous understanding of what the term “State” means.