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# International Law and Power

A Theoretical Perspective on Statehood and Self-Determination

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# Abstract

The purpose of the present thesis is to investigate the foundations for statehood and self-determination—two seminal points of international law—through the concept of discourse and its notion of power. The starting point is that language and representations of reality are not merely ‘objective’ depictions, but in fact shaped by the practices that convey the representations. This constitutes the theoretical framework, inspired by Michel Foucault, with a focus on the intricate connections between power and knowledge. To this an investigation of statehood and self-determination is applied, and the result is that the narrative of international law can be seen as influenced by discourse, with structural bias giving primacy to statehood and thus posing obstacles for a development towards greater diversity.

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# 1 Introduction

[T]he starting point [is] that our ways of talking do not neutrally reflect our world, identities and social relations but, rather, play an active role in creating and changing them.<sup>1</sup>

Our ways of talking about the world constitute our subjective representations; our perceived reality. These representations cannot with ease be claimed to be neutral, or ‘objective’, because they depict our perception of what we perhaps cannot fully grasp—reality *in itself*—and which is therefore absent to us. Hence, “[t]he way in which we come to recognize something as real is always a question of what practice is conveying the representations. Because reality is never fully present, it is a misconception to perceive of representations as mere depictions. What we then lack is an understanding of the institutions, actions and situations that shape reality”.<sup>2</sup>

The present thesis is an investigation of the representations of international law. More specifically, it seeks to analyze the representations of sovereign statehood, in an attempt to acquire understanding and explain current practice regarding the right to self-determination. These concepts, statehood and self-determination, are both of major significance in international law and for the international legal order. The former constitutes the basis for international legal personality—that is, being (at least nearly) a full subject of the law—and thus entails capacity of being an agent within the system. To draw an analogy, statehood confers rights and privileges upon organized entities within the international legal order tantamount to what citizenship does to the individual in the domestic equivalent.<sup>3</sup> They are comparable not least in that they are very much praised and desired statuses to hold. Self-determination, in turn, is one of the most fundamental existing principles of international law, as well as a human right, and is explicitly evident in, *inter alia*, the UN Charter;<sup>4</sup> the two major, original human rights covenants;<sup>5</sup> as well as core resolutions from the UN General Assembly on statehood and inter-state relations.<sup>6</sup> It is also one of few methods today of obtaining statehood for upcoming subjects of international law.

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<sup>1</sup> Winther Jørgensen, Marianne, and Phillips, Louise, 2002, *Discourse Analysis as Theory and Method*, p. 1.

<sup>2</sup> Michael J. Shapiro, as cited in Neumann, Iver B., 2003, *Mening, materialitet, makt: En introduktion till diskursanalys*, p. 7 (my translation).

<sup>3</sup> Statehood is a requirement for membership in the United Nations. To the extent that an entity wishes to affect policies within this the largest international organization, the requirement of membership (and thus statehood) then functions like a kind of citizenship. See the Charter of the United Nations, 26 June 1945, Article 4(1).

<sup>4</sup> See mainly: Charter of the United Nations, 26 June 1945, Articles 1(2) and 55.

<sup>5</sup> See: International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3. The common article 1(1) of both covenant establishes that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

<sup>6</sup> See for instance: UN Doc. GA Resolution 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960, Article 2; and UN Doc. GA Resolution 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, *Passim*.

Furthermore, they are also of a constant relevance. In latter day, the perhaps most known, and controversial, examples of situations touching upon self-determination and statehood are Kosovo's declaration of independence, and the conflict between Russia and Georgia regarding the status of the provinces Abkhazia and South Ossetia—to name but a few. These constitute not only political but also military conflicts regarding the right to self-determination; of such importance and serious nature are these concepts. And the flames are constantly fed by the lack of clarity and coherence regarding the treatment of this right.

The purpose of this thesis is to look into the foundation for these seminal points of international law, in search for an explanation and a better understanding of the current conundrum. Both concepts hinges upon statehood which is here subject to critical examination of its underlying assumptions, most notably by addressing it as a discourse and thus as informed by the intricate workings of power and knowledge. For what is this category without its assumed meaning, the truth regarding reality it produces? Is this category, to paraphrase Michael J. Shapiro above, misconceived due to a perception of it as mere depiction of an objective reality? The underlying logic is one also found in the work of Stéphane Beaulac, whose purpose is to “uncover the function that ‘sovereignty,’ the word, has played in the formation of socially constructed reality and the role it is playing in the present-day reality-creating”.<sup>7</sup> Noteworthy differences are his strict focus on the word rather than the concept, and also that this thesis does not solely focus on sovereignty. The core of the present work is the search for the function of the constructed reality (representations), and it is thus shared with Beaulac.

The aim is to investigate the potential for inequality between subjects within the international legal order. This order is one of formally equal sovereign states, given the doctrine of sovereign equality. It is a founding principle for the UN system,<sup>8</sup> and thus of great importance for inter-state relations as a whole. But how does the treatment of the concept—the term—of statehood comply with this doctrine? If for example already existing states control a great deal of the application of statehood, how does this affect new prospects? I find great interest in issues concerning (potentially) exclusionary practices, with the entailing possibilities of seeing the underlying ideal—the construction of the self, if you will—behind such practices.

## 1.1 Research Question

The guiding question for this thesis is: How does power affect the constitution and continuous reproduction of international law—as exemplified by the practice today regarding the right to self-determination? Power is for present purposes applied in a Foucauldian notion—herein called power/knowledge—for an inquiry into how the subjects and facts in the discourse on state sovereignty have been constructed; what ‘reality’ the representations of these facts create.

As steps on the way towards the overall answer some sub-sections are required. These will focus on examining statehood and self-determination, respectively, to clarify the meaning of these concepts. Great focus will be put on the practice—the alternatives for potential

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<sup>7</sup> Beaulac, Stéphane, 2004, *The Power of Language in the Making of International Law: The Word ‘Sovereignty’ in Bodin and Vattel and the Myth of Westphalia*, p. 4.

<sup>8</sup> Charter of the United Nations, 26 June 1945, Article 2(1).

realization—of self-determination (primarily secession), as core concept of this thesis. Everything presented up until then will serve as a basis and an explanatory model for that analysis; for this thesis the role and status of statehood is considered very significant in assessing claims for self-determination.

## 1.2 Methodology

To describe it with somewhat tangible or practical—albeit perhaps unduly laconic—terms, the method used in this thesis is that of case study. This is an ‘approach’ more than a coherent form of research, and its aim is “to identify and describe before trying to analyse and theorize”, the priority being in-depth inquiry more than coverage, and focus being put on the particular/specific.<sup>9</sup> Keywords describing such an approach are: particular, descriptive, inductive, and also heuristic—the latter meaning that it strives to improve the reader’s understanding of the subject of study.<sup>10</sup> It is descriptive in that it describes and explains more than it tries to establish causality.<sup>11</sup> Concerning the aspect of induction a point needs to be made. Given the nature and setting of many case studies it is very difficult to generalize from a small number of observations to a greater population. The accuracy of such theorizing is well questioned (and even said to be impossible if done statistically).<sup>12</sup> For the purposes of this thesis, however, this is not really an issue. The international legal order is such a unique phenomenon that there is, really, no similar and comparable system to which, as subject for another study, inductive reasoning would serve a purpose. Hence, generalizability is of no greater importance, neither as a means or an end, for the present study; the conclusions will concern the international legal order alone.

Of greatest import for this thesis—serving as the backbone of the work more than the method does—is its theoretical framework. This amounts to what Roddy Nilsson calls a thematic use of Foucault, meaning that one or more of his ideas are extracted and applied to the subject of inquiry.<sup>13</sup> The idea, or notion, applied here is that of discourse—intimately connected to the power/knowledge-duality—and will be further elaborated in Chapter 2.

When applying the notion of discourse as a *method*—that is discourse analysis, or sometimes discourse studies—Iver B. Neumann schemes the plan of action as consisting of three steps: choosing and delimiting the discourse, identifying its representations, and identifying its structure and hierarchies.<sup>14</sup> Applying this to the topic of this thesis would possibly entail focusing on a wide range of sources of international law, seeking to therein uncover whether state sovereignty constitutes a discourse, and if so reveal its structure, show its representations and analyze them. However, that is not the blueprint put to work here; I do not try to identify and establish the existence of discourse. The present thesis builds instead on the presupposed notion that

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<sup>9</sup> Stark, Sheila, and Torrance, Harry, 2005, ‘Case Study’, in Somekh, Bridget, and Lewin, Cathy (eds.), *Research Methods in the Social Sciences*, p. 33.

<sup>10</sup> *Ibid.*; Merriam, Sharan B., 1994, *Fallstudien som forskningsmetod*, p. 27.

<sup>11</sup> Merriam, Sharan B., 1994, p. 22.

<sup>12</sup> Stark, Sheila, and Torrance, Harry, 2005, in Somekh, Bridget, and Lewin, Cathy (eds.), pp. 33f.

<sup>13</sup> Nilsson, Roddy, 2008, *Foucault: En introduktion*, p. 182.

<sup>14</sup> Neumann, Iver B., 2003, p. 47.

statehood/sovereignty (the two terms are not without difficulty and potential arbitrariness separated) within international law and the international legal order actually constitute discourse—not too controversial, perhaps, given the recognized centrality of this concept within this field. With this as a background the epistemological consequences are in focus, and their effect on practice. Ergo, starting from the presupposed discourse, the subject of inquiry are the knowledge, truth and subjects this discourse creates. This kind of epistemological approach is described by Neumann as asking ‘how’ rather than ‘why’.<sup>15</sup> It is an inquiry into knowledge, how meaning is created and what limits there are to understanding and action. For present purposes this means that this study concerns mainly the epistemological aspects regarding sovereign statehood (and its implications for self-determination) and not its ontology.<sup>16</sup> The focus is on the production of knowledge regarding these phenomena, that ‘regime of truth’ that has been created as a social representation; the (re)production of reality in discourse, rather than reality *in itself*.<sup>17</sup> To sum up, I consider this procedure as applying discourse as a theory, as a thematic use, rather than as a method—all the while noting the difficulty with such a separation.<sup>18</sup>

The starting point is not unlike that of Martti Koskenniemi’s focus on discourse in his first major work, albeit his scope is deeper. There he describes his approach, very much inspired by linguistic theory, to investigating legal argument as comprising speech-acts and language. The individual speech-acts are the surface appearance of language—the latter being the socially constructed system or code that gives the speech-acts meaning. This concerns the fact that social rules determine the production of arguments.<sup>19</sup> His attempt is to describe the effects of the governing legal language, “the *conditions of what can acceptably be said within it*, or what is possible to think or believe in it”.<sup>20</sup> The field of possibility is limited due to socialization—the fact that legal language is learned; that the concepts and categories of which international lawyers speak are adopted from an already existing language and system of meaning and interpretations.<sup>21</sup> This logic is closely related to that of French theorist Michel Foucault, as will become evident in my theoretical elaboration in Chapter 2; this depiction of legal language, as well as its effects, is a suiting illustration of what will later be called a ‘regime of truth’.

An important aspect of the methodological foundation at hand is that it is a case of ‘interpretation in context’, that is, the object of study is investigated and interpreted in parity to its surroundings. I am not interested in trying to separate the case from its context, and agree with the prevalent doubts regarding the actual possibility to do so.<sup>22</sup> What is—and what can be said about—a societal phenomena without context, in its own, ‘pure’ self? Is there such a phenomenon, or does it acquire meaning only in context? These are all ontological issues worthy of further elaboration in their own right, but they are nonetheless intentionally left out of the

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<sup>15</sup> Neumann, Iver B., 2003, p. 176.

<sup>16</sup> *Ibid.*, pp. 14f., 29f.

<sup>17</sup> See elaboration of these concepts in Chapter 2.

<sup>18</sup> See Chapter 1.2.1.

<sup>19</sup> Koskenniemi, Martti, 1989, *From Apology to Utopia: The Structure of International Legal Argument*, pp. xix-xxii.

<sup>20</sup> *Ibid.*, pp. xxi-xxii (emphasis in original).

<sup>21</sup> *Ibid.*, pp. xxii-xxiii.

<sup>22</sup> Merriam, Sharan B., 1994, p. 25.

present thesis. Discourse studies concern investigations of a social reality from the inside, contrasting its own underlying premises. Such a study is interpretive, hermeneutic, and by necessity related to the context in question.<sup>23</sup> This is the underlying logic of this thesis.

### 1.2.1 *Distinguishing Between Theory and Method*

Explicitly above a distinction is made between theory and method. Such distinctions are commonplace in many, perhaps most, scientific research. Here, however, they are related to discourse, and for clarification it should be noted that such a separation is unpopular and regarded as problematic within this discipline. Many discourse analysts reject such distinctions, claiming that they are too often performed without acknowledging, or perhaps even realizing, that theory influences method and vice versa.<sup>24</sup> It is an important critique, and while I am aware of its implications, this thesis is still said to be based mainly on discourse theory. The distinction is maintained mainly due to the fact that the discourse here studied is presupposed and therefore, one could add, in a sense hypothetical. In that respect the thesis takes a shortcut; this postulating of discourse renders half the work superfluous, and what is left is a study of the epistemological effects of such a postulated situation, as well as its practical consequences. This analysis, come full circle, is aided by the theoretical tools afforded by discourse theory. To conclude, the collapsed relationship between theory and method notwithstanding, this is the most suiting description of the ‘method’ here applied.

## 1.3 Sources

The theoretical framework of this thesis, as mentioned, lends its major concepts from Michel Foucault. His distinguished position within academia today is well recognized, and his work is accordingly subject to both inspired dialogue and harsh critique. Furthermore, he is, of course, not the only writer or thinker on issues concerning discourse, but his production is nonetheless central to the development of this ‘discipline’. It follows that for the theoretical work here applied his production is a suitable starting point. As a natural consequence, then, it builds on literature related to him—in the form of his own works, as primary sources, together with secondary sources in the form of other scholars’ interpretations and operationalization of his theories. This second category contains also ‘general’ literature, or handbooks, on discourse studies, which are influenced by Foucault as well as other scholars.

The remaining parts of the thesis relies heavily on the works of a variety of international law scholars. The issues here studied are of great significance, and contestation, within the discipline, entailing a large amount of literature on the subject. Koskenniemi, again, elsewhere describes his focus on practitioners and scholars of international law as follows: “It may be too much to say that international law is *only* what international lawyers do or think. But at least it is that, and examining it from the perspective of its past practitioners might enhance the self-understanding of today’s international lawyers in a manner that would not necessarily leave things as they are.”<sup>25</sup>

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<sup>23</sup> Neumann, Iver B., 2003, p. 30.

<sup>24</sup> *Ibid.*, pp. 13f.

<sup>25</sup> Koskenniemi, Martti, 2001, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, p. 7.

Mine are not the pretensions of expecting to detect and uncover the ‘self-understanding’ of today’s international lawyers—that would be a daunting task (and one, obviously, already attempted by Koskenniemi). But I use texts of international law scholars, in connection with my theoretical framework, as sources in an attempt to understand the production of certain subjects and knowledge concerning statehood and sovereignty. To paraphrase the quote above, this—investigating what *is*—touches greatly upon precisely that which has left things ‘as they are’, and naturally thus also that which perhaps would not necessarily have done so.

Within discourse there is generally a dominant representation of reality, as well as one or more alternative ones.<sup>26</sup> For the present study on the dominant representations on state sovereignty, such alternative representations are put to use in an explanatory manner. A significant deal of the scholarly sources, namely, should be seen as more or less being affiliated with the ‘critical’ scholarship on international law. This scholarship—part of an ongoing, perhaps somewhat esoteric, discussion within the discipline—is bluntly described as scrutinizing, criticizing, or in some way or form setting in doubt the traditional telling of international law—the Western (mainly European) Canon that has greatly shaped the discipline. These critical studies are often labelled as a post-modern approach,<sup>27</sup> or as related to the discipline’s anxiety.<sup>28</sup> Plausibly, this is due to the deconstruction of the fundamentals, the solid categories, of (positive) law they perform. For this thesis, these scholars serve the purpose of doing just that: aiding me in the deconstruction of the solid categories of international law here investigated, and thus serving as a basis for identifying the dominant representations regarding state sovereignty.

## 1.4 Terminology

Power/knowledge and discourse are herein treated together. Power/knowledge, as will be explained below, is a conceptual duality constructed to show the intricate workings and ties between power and (the production of) knowledge. Furthermore, this occurs in and through discourse. Hence, these concepts share a complex, mutually informing relationship that is not useful to separate. And thus, the terms are used quite interchangeably. Throughout the work, when writing ‘power’ or ‘discourse’, if not described otherwise what is intended is the overall network as it is herein presented.

## 1.5 Delimitation

Naturally, self-determination like any phenomenon can be conceived of and delimited in various ways. Antonio Cassese, for example, distinguishes five variations of self-determination as a political principle.<sup>29</sup> This thesis presents a general history of this concept, but in the analysis

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<sup>26</sup> Neumann, Iver B., 2003, pp. 56f.

<sup>27</sup> Carty, Anthony, 1991, ‘Critical International Law: Recent Trends in the Theory of International Law’, in 2:1 *European Journal of International Law*, p. 66.

<sup>28</sup> Kennedy, David, 2002, ‘The Twentieth-Century Discipline of International Law in the United States’, in Sarat, Austin; Garth, Bryant; and Kagan, Robert A. (eds.), *Looking Back at Law’s Century*, pp. 414ff.

<sup>29</sup> Cassese, Antonio, 1995, *Self-Determination of Peoples: A Legal Reappraisal*, pp. 32f., 90f.

focuses mainly on the issue's relation to statehood, and not any specific model of self-determination.

Furthermore, one aspect of great significance—and debate—regarding self-determination is the fact that this right is afforded to 'all peoples', without any explanation concerning who these 'peoples' are. For coherent practice a more detailed principle is of course necessary, but nonetheless, this issue is not addressed in the present thesis. The subject here keeps focus on self-determination as a means to acquire statehood—a procedural investigation, if you will—why the issue of who can use this procedure has to be left out.

## 2 Power/Knowledge and Discourse

Discourse in the wider social sense—as apart from the 'merely' linguistic—is "the broad range of discussion that takes places within a society about an issue or a set of issues", and thus "not simply talk itself, but the way something gets talked about".<sup>30</sup> This is the starting point for this thesis. Following from this notion of discourse is that 'the way something gets talked about' affects how people think and act with regards to it. Indeed, it shapes how they come to experience it as true, and herein lies the power of discourse. Furthermore it reflects the society's power structure, that is reinforced by the reproduction of a dominant discourse through its usage.<sup>31</sup> Michel Foucault formulated this idea as follows:

Each society has its régime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true; the mechanisms in instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.<sup>32</sup>

Discourse analysis examines the creation of meaning. In this thesis sovereign statehood is presupposed as a dominant discourse, a 'régime of truth', within international law, and the analysis will focus on what the consequences are for the knowledge and subjects this regime creates. First, however, the notion of discourse and power/knowledge needs to be further elaborated, in order to serve as a foundation for what is to come.

### 2.1 Power/Knowledge

To talk of power within the social sciences is practically to talk about everything and nothing—at the same time. It is such a potentially immense concept that it must be further detailed or distinguished for a reasonable analytical application to be possible. The mere term itself, namely, is a complex compound of "techniques, relations, actors, processes, experiences and more".<sup>33</sup> It is a natural consequence, then, that one has to be more specific or the application tends to be too blunt.

As touched upon above,<sup>34</sup> the notion of power applied in this thesis circles around the concept of power/knowledge and is extracted from the works of Foucault.<sup>35</sup> This term is constructed to show the tight bond between the workings of power and the production of

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<sup>30</sup> Conley, John M., and O'barr, William M., 1998, *Just Words: Law, Language, and Power*, p. 7.

<sup>31</sup> *Ibid.*

<sup>32</sup> Foucault, Michel, 1980a, 'Truth and Power', in Gordon, Colin (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, p. 131.

<sup>33</sup> Börjesson, Mats, and Rehn, Alf, 2009, *Makt*, p. 29 (my translation).

<sup>34</sup> See Chapter 1.4.

<sup>35</sup> But one of many uses and perspectives on power performed by Michel Foucault, it should be noted.

knowledges,<sup>36</sup> in the practices of discourse. Very concisely, to begin with, this concept can be described as follows: it concerns power in terms of the ability to define terms, and thus to control the use of language;<sup>37</sup> in other words to control discourse. Statements of knowledge are a part of a power apparatus—or network, to speak with Foucault (see below)—which allows that very knowledge, legitimizes it and shapes the perception of it as being useful.<sup>38</sup> Knowledge is furthermore the basis for exercising power—and in that also power *over* the knowledge by means of its (re)production.<sup>39</sup> It entails a circularity of mutual strengthening between the two phenomena; neither one is prior to the other. These knowledge regimes are subtle and serve to discipline their subjects and also make them internalize that discipline.<sup>40</sup> Power, then, is the medium in which the subject is defined.<sup>41</sup> It follows from this that the subjects—that is, actors—are not themselves creating social practices. Foucault considers the situation to be the opposite; they are products of power through its practices.<sup>42</sup> Different subjects and phenomena are thus not naturally given objects, but given constructions; ”subjects of certain forms of knowledge and as targets for historically specific projects of reformation and regulation”.<sup>43</sup> Or, as described in a recent operationalization of the term: the subjects are “a result of ideological and cultural networks of understanding, communication and identification; in other works a discursive framework”.<sup>44</sup>

### 2.1.1 *Productive Power*

The construction of subjects is part the productive sense of power, according to which it is to be seen as something producing reality, subjects and rituals of truth.<sup>45</sup> It is according to Foucault a more adequate concept of power than the too narrow, however widespread, one focusing on repression. Herein lies also its persistence; “What makes power hold good, what makes it accepted, is simply the fact that it doesn’t only weigh on us a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body [...]”.<sup>46</sup> The

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<sup>36</sup> This plural form of ‘knowledge’ does of course not exist in everyday language. It is nonetheless the word used by Foucault, indicating the focus on the multiple specific knowledges existing regarding specific objects and phenomena.

<sup>37</sup> Börjesson, Mats, and Rehn, Alf, 2009, p. 17f.

<sup>38</sup> *Ibid.*, p. 46.

<sup>39</sup> *Ibid.*; Alvesson, Mats, and Sköldberg, Kaj, 2008, *Tolkning och reflektion: Vetenskapsfilosofi och kvalitativ metod*, p. 373f.

<sup>40</sup> Börjesson, Mats, and Rehn, Alf, 2009, p. 47.

<sup>41</sup> *Ibid.*, p. 51.

<sup>42</sup> Alvesson, Mats, and Sköldberg, Kaj, 2008, pp. 372f.

<sup>43</sup> *Ibid.*, p. 373.

<sup>44</sup> Parsi, Rouzbeh, 2009, *In Search of Caravans Lost: Iranian Intellectuals and Nationalist Discourse in the Inter-War Years*, p. 40.

<sup>45</sup> Foucault, Michel, 1993 [1975], *Övervakning och straff: Fängelsets födelse*, p. 227.

<sup>46</sup> Foucault, Michel, 1980a, in Gordon, Colin (ed.), p. 119.

individual and the knowledge one might gain of her/him too is part of this production,<sup>47</sup> simultaneously being subject to as well as exercising it.<sup>48</sup>

One aspect of the power of discourse through production is the inclusion of the relational and constitutive aspects of identity, whereby the Self is shaped by distinction from the Other, the deviant.<sup>49</sup> Foucault saw as one of power's prime effects "that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. [...] The individual which power has constituted is at the same time its vehicle".<sup>50</sup> Here again, the self-strengthening circularity is visible. The subject of inquiry, then, is not simply discovered or analyzed but defined as being the opposite of the Self, and by doing so the identity of the Self is strengthened. This idea is visible in Foucault's discussion concerning what is science and what is not,<sup>51</sup> and the same logic is also manifest in other works of Foucault, for example on the developments of the relation between insanity *vis-à-vis* reason<sup>52</sup> to name one. There is nothing neutral about such acts, and with this logic applied to practice regarding statehood and self-determination it is ever so evident (see below).

### 2.1.2 *Representations and Conditions for Understanding*

Between the reality and our perceptions of it are the representations of reality. "Representations are things and phenomena in the form they occur to us"<sup>53</sup>—in the form of established categories that serve the purpose of reducing and simplifying the 'data' available for our perception. It is a process of simplification and reduction.<sup>54</sup> The task for the discourse analyst is to show how representations are created and diffused, as well as what representations at given times constitute a discourse, and there is thus no interest for the 'pure matter' but for how it is represented.<sup>55</sup> These representations are determinant of, and a limitation for, understanding. One of Foucault's ambitions, for example, was to show how the thoughts of the individual "during a given period of time and in a disciplinary context, occur in a field whose structure is determined by a system of rules that is more fundamental than the statements expressed by the individuals [acting in that field]".<sup>56</sup> By 'field' is implied a discursive field, and understanding is sought by trying to uncover its structure and the governing rules. This concerns thoughts, which are furthermore also related to language. A system of language and its constructions holds limited accounts of meaning, available statements, and this has the effect of also causing limitations of the range of possible actions. It follows that actions that do occur do so "as a result of the prescribed interpretations,

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<sup>47</sup> Foucault, Michel, 1993 [1975], p. 227.

<sup>48</sup> Foucault, Michel, 1980b, 'Two Lectures', in Gordon, Colin (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, p. 98

<sup>49</sup> Neumann, Iver B., 2003, pp. 110f.

<sup>50</sup> Foucault, Michel, 1980b, in Gordon, Colin (ed.), p. 98.

<sup>51</sup> See Chapter 2.1.3.

<sup>52</sup> See Foucault, Michel (edited by Khalfa, Jean), 2006, *History of Madness*, London: Routledge.

<sup>53</sup> Neumann, Iver B., 2003, p. 33 (my translation).

<sup>54</sup> *Ibid.*, pp. 31ff.

<sup>55</sup> *Ibid.*, pp. 34ff. See also the discussion concerning such 'raw material' in Chapter 2.1.3 below.

<sup>56</sup> Neumann, Iver B., 2003, p. 36 (my translation).

that is, those that have acquired general legitimacy”.<sup>57</sup> When such ‘approved’ acts are institutionalised, thus repeating the interpretation, a discursive practice is established.<sup>58</sup> The discourse is a multitude of anonymous, historical rules which during a specific period of time and context defines the conditions for statements—that is, what can be said.<sup>59</sup> Consequently, since this system is where perceptions are defined (through representations) our perceptions are not neutral, or ‘objective’.

One more important aspect to consider of discourse is the concept of subject position. The idea is that different subjects, namely, ‘carry’ discourse, and they differ in authority and power resources (the ‘traditional’ sense of power as capacity) as well as means and authorization to comment on the order of things. “When carriers of the same representations [...] are institutionalized, they constitute a *position* in discourse”.<sup>60</sup> Thus, such repeated representations can shape the dominant view presented in discourse—especially when adding the concept of subject position; that *who* says something can be just as important, if not more, than *what* is said.<sup>61</sup> This, then, is a potentially self-sustaining factor for maintaining the ‘truths’ of discourse, when those with stronger position carry and reproduce the same representations.

### 2.1.3 Questioning ‘Discoveries’

Foucault focused extensively in his works on turning the tables on established ‘knowledge’, its production, and its elevated position. He saw as necessary the following type of questions:

What types of knowledge do you want to disqualify in the very instant of your demand: ‘Is it a science?’ Which speaking, discoursing subjects—which subjects of experience and knowledge—do you then want to ‘diminish’ when you say: ‘I who conduct this discourse am conducting a scientific discourse, and I am a scientist?’ Which theoretical-political *avant garde* do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it?<sup>62</sup>

This is an effect of the centralizing powers within a society, the effect of which is the institution of such a scientific discourse.<sup>63</sup> Foucault poses the questions above in an exemplifying discussion regarding whether Marxism, psychoanalysis or, for that matter, the semiology of literary texts, in the view of the scientific discourse, could be said to constitute science. However, the questions have an overall value and a relevance for the discussion here, touching upon discursive practices and power producing knowledge. It is the theory itself, its distinguishable patterns, that are important. Worth noting is also that the quote touches upon what is denied in discourse; what is removed or kept out. This is an aspect of great import when determining power and discursive practices.

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<sup>57</sup> Michael J. Shapiro, as cited in Neumann, Iver B., 2003, pp. 37f. (my translation).

<sup>58</sup> Neumann, Iver B., 2003, p. 38.

<sup>59</sup> Foucault, Michel, 1972 [1969], pp. 133f.; Neumann, Iver B., 2003, p. 38.

<sup>60</sup> Neumann, Iver B., 2003, p. 33 (my translation; emphasis in original).

<sup>61</sup> *Ibid.*, pp. 104ff.; 146f.

<sup>62</sup> Foucault, Michel, 1980b, in Gordon, Colin (ed.), p. 85.

<sup>63</sup> *Ibid.*, p. 84.

Foucault's focus is on the 'traditional' scientific discourse and the power attributed to it and its 'workers'. To escape the situation posited above he proposed a model of releasing knowledges previously subjected to the scientific discourse; to reactivate local—'minor'—knowledges and discursivities, which previously had been ignored or overlooked. Such a project would turn on his own concepts of 'archaeology' and 'genealogy'—characterized as methodology and tactic respectively.<sup>64</sup> It is a struggle to reform; an "insurrection of knowledges against the institutions and against effects of the knowledge and power that invests scientific discourse".<sup>65</sup>

Foucault investigated categories, such as 'insanity' and 'sexuality', and admitted that there is 'raw material' to assess – like behaviour or gestures and more. However, his point was that the perception of these distinct phenomena or categories *as such* is a consequence of practices of differentiation, classification and placement, on both a material and an epistemological level. The objects are not mere representations of reality; they are created discursively and materially through different historical practices.<sup>66</sup> What was of interest to Foucault, then, was to reveal how the 'discovery' of such phenomena was made possible, and how they in historical developments were continued and, in revised as well as unaltered form, reproduced.<sup>67</sup>

Discourse to him was not just where a number of previously established objects were grouped together; rather the practices of discourse constitute a form of criteria for objects to appear, making it impossible to talk about whatever whenever and simply "say something new". He saw for the subject of his studies how the norms and values of a number of societal institutions—for the categories above mainly justice- and penal system, medicine, family, religion, tradition, and the like—formed authorities for how the object could emerge, be specified and delimited. This complex construct makes up a discursive formation, and with the establishment of such a framework any object could be made to fit into that discourse.<sup>68</sup> The logic of the ensuing production is that discourse is a practice that continuously create the objects it appear to simply 'talk about'. Accordingly, then, the issue to Foucault was not who was 'insane' during a certain period. Nor was it about what constituted such insanity in its original form, before it was organized into discourse and then reproduced—although he holds possible such a history; to uncover the 'prediscursive' experiences and free them from the text. Rather, Foucault tried to develop a theory whereby objects are to be defined without referring to such an inner, basic truth about them, and instead seek the rules that allow for them to be created as objects of discourse and thus also constitute the criteria for their historical emergence and continuity.<sup>69</sup> This differs from commonplace accounts of how scientific discourse of madness (to keep with the same example) resulted from a linear process of increasing rationality. Rather the psychiatric concepts in question were culturally created, produced with the coming into being of the science itself.<sup>70</sup>

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<sup>64</sup> *Ibid.*, p. 85.

<sup>65</sup> *Ibid.*, p. 87.

<sup>66</sup> Alvesson, Mats, and Sköldberg, Kaj, 2008, p. 373.

<sup>67</sup> Foucault, Michel, 1972 [1969], p. 51.

<sup>68</sup> *Ibid.*, pp. 51ff.

<sup>69</sup> *Ibid.*, pp. 55f.

<sup>70</sup> Nilsson, Roddy, 2008, p. 33.

This logic, or pattern, is a notion of centrality also for a certain critical branch of international law.

## 2.2 Power/Knowledge in International Law

Within the critical legal scholarship described in the introductory chapter a lot of the same logic and arguments presented in this chapter are visible. This ‘Newstream’<sup>71</sup> scholarship with its critique and deconstructing manners is much similar to the Foucauldian ideal of questioning the established ‘truths’ and ‘discoveries’. Foucault noted that “there are no relations of power without resistances; [...] they are formed right at the point where relations of power are exercised; resistance does not have to come from elsewhere to be real”.<sup>72</sup> It is a fitting description for these scholars, as practitioners of international law being a part of the discourse all the while striving to reveal its bias.

One major premise of this scholarship is the idea that traditional international law is in fact governed by a particular discourse that in essence is a ‘disguised’ (in legal language) version of liberal political theory. The necessity consists in questioning the certainty of a positive, universal law, for perhaps traditional scholars in fact applied universal language to what was actually a particularistic discourse—dressing it in a cloak of apparent recognition.<sup>73</sup> The basis of this system is sovereignty and liberal equality. The world order revolves around sovereign actors at liberty to determine value for themselves; to act as they please as long as no harm to others is done. There is no overarching, objective value, like justice, as a guideline, because the inclusion of such morals would take primacy over sovereignty.<sup>74</sup> Likewise, the intellectual structure of international law is shaped by its ideological underpinnings and thus restricted, with only some arguments qualifying as international legal arguments while others do not. The result is that the ‘is’ and the ‘ought’ in the conceptualization of the world are collapsed into one, which also affects both the law’s substantive and procedural rules.<sup>75</sup> This very brief picture of how discursive practices control the agenda fits well with my theoretical framework of power/knowledge.

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<sup>71</sup> See: Cass, Deborah Z., 1996, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’, in 65:3-4 *Nordic Journal of International Law*, pp. 341-383.

<sup>72</sup> Foucault, Michel, 1980c, ‘Power and Strategies’, in Gordon, Colin (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, p. 142.

<sup>73</sup> Carty, Anthony, 1991, p. 66.

<sup>74</sup> Purvis, Nigel, 1991, ‘Critical Legal Studies in Public International Law’, in 32:1 *Harvard International Law Journal*, pp. 95f.

<sup>75</sup> *Ibid.*, pp. 98-102.

### 3 The ‘Essence’ of Statehood

This chapter sets out to first set the context, by examining the centrality of statehood in international law and what this status actually means. The description will consist of, as a basic introduction, the legal criteria for statehood, and the concept of sovereignty. This is followed by an alternative telling of the same phenomena.

Statehood is a central feature—extremely important at that—of international law. Firstly, states are the main actors within the international legal order, as well as the only subjects of international law possessing complete international legal personality. These are somewhat relative terms, requiring some elaboration. Being a subject to the law, in any legal system, means that the particular subject is recognized as capable of possessing certain rights and/or duties within that system.<sup>76</sup> This is not automatically followed with legal personality for the subject; there is a distinction between the terms that is often neglected or ignored. Legal personality, namely, is the recognized capacity for the subject to bring claims with the purpose of enforcing its rights.<sup>77</sup> All international legal persons, then, are subjects of the law—they are afforded certain rights *and* the capacity of maintaining them by claims—but not all subjects of the law are recognized as international legal persons.

Within the international legal system the state is considered the fullest expression of international legal personality. Other actors—there is a significant amount of them in the international system—such as individuals or organizations, are only bestowed with a degree of international personality, and only for particular purposes.<sup>78</sup> Influence on the international plane, it should now be clear, is not enough for legal personality—case in point being criminal groups or networks.<sup>79</sup> An indication of the existing hierarchy between actors is the fact that the UN requires statehood as the basic condition for potential membership, but more so that it also *only* accepts states as members.<sup>80</sup> This is not directly related to legal personality, but illustrative of the system’s structure nonetheless. Secondly, states are also, in a way, creators of the law. Given the logic of the system, with its basis in participant states’ consent, the law is created by the states themselves for their own regulation.<sup>81</sup>

An important aspect of statehood is its inseparability from the notion of sovereignty. The latter is an attribute to the former, as an attainable status, and is as such not a precondition to statehood.<sup>82</sup> Together they form the basis of international law. Put differently: “If sovereignty is the essential attribute of statehood, and states are the essential constituent members of the

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<sup>76</sup> Shaw, Malcolm N., 2008, *International Law*, pp. 195f.; Brownlie, Ian, 2008, *Principles of Public International Law*, pp. 57f.

<sup>77</sup> Raič, David, 2002, *Statehood and the Law of Self-Determination*, pp. 11ff.

<sup>78</sup> Charlesworth, Hilary, and Chinkin, Christine, 2000, *The Boundaries of International Law: A Feminist Analysis*, p. 124.

<sup>79</sup> Shaw, Malcolm N., 2008, pp. 196f.

<sup>80</sup> Charter of the United Nations, 26 June 1945, Article 4(1).

<sup>81</sup> Hammer, Leonard M., 2007, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, p. 9.

<sup>82</sup> Crawford, James, 2006, *The Creation of States in International Law*, p. 32.

international community, then one could reasonably understand sovereignty to touch on virtually all international law”.<sup>83</sup> The present chapter touches on both these concepts.

### 3.1 The Legal Criteria

The existence of the territorial nation-state, as a part and a product of the European state-system, is often told to have its origin in the Peace of Westphalia of 1648. James Crawford (and many with him) argues, however, that this system of states actually existed long before.<sup>84</sup> Still, during early international legal scholarship *legal* definitions of statehood have been rare. Hugo Grotius, for example, worked with a philosophical definition. The existence of the state was taken for granted, seen as an “association of free men”, and automatically bound by the law of nature.<sup>85</sup> Francisco de Vitoria, later on, had a more legal viewpoint wherein thoughts on government and independence were visible. Moreover, his definition was also part of the purpose of his writing on the justifications of war—something that could only be declared by the state or its prince.<sup>86</sup> With the advent of more positivistic, rather than naturalistic, reasoning—Emerich de Vattel being an early proponent—appeared distinctions between states and sovereign states, and Vattel also saw independence and the equality between states as leading to each state’s sovereign authority over its territory. Worth noting is that the law of nature still was prominent; the law of nations, namely, was natural law applied to states. Unlike earlier theory, though, the sovereign authority meant that violations of this law was *not* grounds for other states’ intervention.<sup>87</sup>

Moving on, still in the predominant doctrine regarding statehood during the nineteenth century, no explicit rules determining statehood within international law existed; “the matter was within the discretion of existing recognized states”.<sup>88</sup> The issue has remained mainly as a question of practice, and statehood is often been said to be a question of fact more than a question of law.<sup>89</sup> Still, the notion of statehood is founded in legal criteria; anything else would lead to arbitrariness in interstate relations and opting out of contracts and obligations by simply claiming the other part to not be a state. Further more, to the extent that there is conflict concerning these aspects it is rather about the facts than about the criteria.<sup>90</sup> In other words, when states are to consider matters, ‘within their discretion’, there has to be something tangible to base judgement on, and it appears that such criteria now exists and that it is widely accepted.

It is always problematic to postulate *the* criteria concerning any phenomenon, but regarding statehood the 1933 Montevideo Convention on the Rights and Duties of States possesses a status amounting to something of that effect. It is widely acknowledged and referred to in major works

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<sup>83</sup> Fox, Gregory H., et al., 2005, ‘Sovereignty: Essential, Variegated, or Irrelevant?’ in 99 *American Society of International Law. Proceedings of the Annual Meeting*, p. 387.

<sup>84</sup> Crawford, James, 2006, pp. 10f.

<sup>85</sup> *Ibid.*, p. 6.

<sup>86</sup> *Ibid.*, p. 7.

<sup>87</sup> *Ibid.*, pp. 7f.

<sup>88</sup> *Ibid.*, p. 5.

<sup>89</sup> Brownlie, Ian, 2008, p. 69; Crawford, James, 2006, pp. 3ff.

<sup>90</sup> Brownlie, Ian, 2008, p. 69.

and textbooks on the subject.<sup>91</sup> Article 1 of the convention details the fourfold criteria of statehood: “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”.<sup>92</sup> With criteria established, how should it then be determined when an entity is a state; how is that status acquired? This normal procedure for this issue to be determined is by existing states, through recognition,<sup>93</sup> and concerning this aspect a ‘great debate’ exist between two major theories, differing on the point of what recognition actually means.

### 3.1.1 *Recognition of Statehood*

First, there is the constitutive theory, which claims that recognition is the procedure by which a state becomes a subject of international law and an international legal person; this is due to the meaning of the recognition being the attribution of rights and duties upon the state.<sup>94</sup> Note the distinction between legal personality and statehood. The state *itself* is not created through recognition; it already exists—as a fact—given that it fulfils the legal criteria, but is not a subject to law or a legal personality until recognized as such. Moreover, such recognition applies only in relation to the recognizing state;<sup>95</sup> third parties are not bound by any such declarations made.

The second category is the declaratory recognition, according to which both a state’s existence, as well as it being a legal person, is independent of recognition. As soon as it fulfils the criteria, and thus as a fact is a state, it automatically also becomes a legal person.<sup>96</sup> Still, recognition is necessary to be applicable in relation to other states.

To sum up, both theories acknowledge the existence of the state as something given in itself, right at the moment the criteria are fulfilled. Furthermore, what is interesting is that the situation is such, that prior to recognition a constitutive theorist sees the state as only a state, thus possessing neither rights or duties nor capacity to enforce them. At the same time, a declarative theorist sees it as a full subject and a legal person—but since this status only applies in relation to recognizing states, the capacity to enforce claims is still very limited. In the end, then, a state—prior to recognition—has basically the same capacities regardless of which theory one subscribes to. In such a case the state, no matter what, hangs in limbo.

### 3.1.2 *The Role of Politics*

For the process of recognition, politics are hard to ignore. Given the structure of the legal system—that is, the absence of any organ competent to decide on this kind of issues—existing states, for these issues, “administer the law of nations”.<sup>97</sup> Still, states are not entitled to practice

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<sup>91</sup> *Ibid.*, pp. 70ff.; Crawford, James, 2006, pp. 45ff. (describing it as “[t]he best known formulation of the basic criteria for statehood”); Shaw, Malcolm N., 2008, *International Law*, p. 198 (calling it “the most widely accepted formulation [...]”).

<sup>92</sup> Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19, Article 1. See also, for instance: Crawford, James, 2006, pp. 45f.

<sup>93</sup> Crawford, James, 2006, p. 19; Raič, David, 2002, p. 19.

<sup>94</sup> Raič, David, 2002, pp. 29f.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, pp. 32f.

<sup>97</sup> Lauterpacht, Hersch, 1944, ‘Recognition of States in International Law’, in 53:3 *The Yale Law Journal*, p. 385.

such recognition (or the withholding thereof) merely in their national interest.<sup>98</sup> But they certainly have the ability to do so. The process can be structured as follows: recognition is an act for existing states to determine compliance with certain *legal* criteria. Whatever the answer is, the result is a statement (or denial) of certain *facts*. However, it is hard to extract from such acts the influence of *policy*. This is indeed a complex situation, causing Leonard Hammer to view recognition as “an area of international law that straddles the legal-political divide”.<sup>99</sup> Separation or ‘objective’ judgement simply seems impossible.

From previous situations there are some illustrative examples. The formation of states in former Yugoslavia constitutes an exception, or modification, of the legal criteria. They were recognized as states, and even allowed as members in the UN, without being in effective control over the territory.<sup>100</sup> A similar situation is the US and many European states recognition of Kosovo as an independent state. Sweden too has done so, at the same time acknowledging the continued necessity with international troops present.<sup>101</sup> This could be seen as an indication of effective control not being fulfilled, which would cause these acts of recognition to be made prematurely, and thus constitute an illegal act against the parent state of whose territory the ‘new’ state exists.<sup>102</sup>

## 3.2 The Meaning of Sovereignty

The basic assumption of the doctrine on sovereign equality is that, all other differences aside, all states are at least equal *in law*.<sup>103</sup> In general, as simply put by James Crawford, “the term [...] has a long and troubled history, and a variety of meanings”.<sup>104</sup> One assessment of the term renders it “greatly overrated”, especially from practitioners of international law, why the author sees a need for great rethinking.<sup>105</sup> Robert Lansing, US Secretary of State in Woodrow Wilson’s administration, saw in the term a distinguishing status, not to say capacity for domination. He drew an analogy to the fact that women, historically, had never succeeded in the competition for power, and this “inherent weakness in women is still recognizable in the states of the world, and the possession of sovereignty is deemed today a masculine prerogative just as it has been for thousands of years”.<sup>106</sup> Such a view focuses on sovereignty as an attribute, or really a privilege, to the truly powerful. Although serving as an instant justification for a gender perspective on the history of international law, it is not very helpful.

Searching for the content of sovereignty, a classic quote is Judge Max Huber’s opinion in the *Island of Palmas* (or *Miangas*) case of the Permanent Court of Arbitration. This quote, from 1928,

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<sup>98</sup> Lauterpacht, Hersch, 1944, p. 385.

<sup>99</sup> Hammer, Leonard M., 2007, p. 29.

<sup>100</sup> Shaw, Malcolm N., 2008, p. 201.

<sup>101</sup> Utrikesdepartementet, Pressmeddelande 4 mars 2008.

<sup>102</sup> Raič, David, 2002, pp. 82f.

<sup>103</sup> Simpson, Gerry, 2004, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, p. 6.

<sup>104</sup> Crawford, James, 2006, p. 32.

<sup>105</sup> Franck, Thomas M., 1998, *Fairness in International Law and Institutions*, p. 3.

<sup>106</sup> Robert Lansing, as cited in Fox, Gregory H., et al., 2005, p. 387.

sets out as a definition a form of supreme authority over a territory: "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".<sup>107</sup> Sovereign equality in this modern, Westphalian form is a consequence of the lack of a pre-existing hierarchy of values. It is thus made up of three ideas contingent upon each other: denial of natural law, independence, and equality. This, to Koskenniemi, is evidence of "the structuring power of liberal ideas in international law"<sup>108</sup> and it is consistent with the commonplace description of sovereignty as an attribute, not a precondition, to statehood.<sup>109</sup> The description of this definition of sovereignty as 'Westphalian' needs some further explanation.

### 3.2.1 *The Westphalian Order*

For sovereignty, like power, "the meaning of the term depends on the theoretical context within which it is being used".<sup>110</sup> Generally, or most dominantly, this theoretical context has been the image of the Westphalian system/order, mainly given support due to its centrality within international law, as well as its "long lineage" in the discipline.<sup>111</sup>

The Peace of Westphalia of 1648 possesses an almost unsurpassed status in traditional narratives of the birth and development of the modern international system. There are many descriptions—of different types but with the shared characteristic of focusing on the timeless meaning and significance of this event. It was seen as the starting point, indeed the foundation, for the modern nation state and the inter-state, political (and legal) order as one between sovereign equals; it thus includes the advent of the sovereignty doctrine too. The concept of sovereignty has then served as a central feature of the debate concerning the perception of the world, and the kind of entities it is made up of.<sup>112</sup> The appeal of the concept, the sovereign state model, is that it offers "a simple, arresting, and elegant image [that] orders the mind of policymakers"<sup>113</sup> and also serves as a basic analytical assumption for most scholars of international relations theory (as well as for alternative histories focusing on the erosion of said concept).<sup>114</sup> This traditional telling is founded on the idea that the sovereign state emerged in Europe during this period, the 1600s, as a fixed and stable autonomous entity, with effective control, authority, over its territory.<sup>115</sup> One example of such an account is cited by Beaulac: "Sovereignty, as a concept, formed the cornerstone of the edifice of international relations that 1648 raised up. Sovereignty was *the crucial element* in the peace treaties of Westphalia [...]"<sup>116</sup>

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<sup>107</sup> Judge Max Huber, as cited in Franck, Thomas M., 1998, p. 4.

<sup>108</sup> Koskenniemi, Martti, 1989, p. 72.

<sup>109</sup> Crawford, James, 2006, p. 32.

<sup>110</sup> Krasner, Stephen D., 1995/6, 'Compromising Westphalia', in 20:3 *International Security*, p. 121.

<sup>111</sup> Simpson, Gerry, 2004, p. 26.

<sup>112</sup> Bartelson, Jens, 2006, 'The Concept of Sovereignty Revisited', in 17:2 *European Journal of International Law*, p. 464.

<sup>113</sup> Krasner, Stephen D., 2001, 'Rethinking the Sovereign State Model', in 27:5 *Review of International Studies*, p. 17.

<sup>114</sup> *Ibid.*, p. 17 and *passim*.

<sup>115</sup> Orford, Anne, 2006, 'A Jurisprudence of the Limit', in Orford, Anne (ed.), *International Law and its Others*, p. 9; Krasner, Stephen D., 1995/6, p. 115.

<sup>116</sup> Mark Janis, as cited in Beaulac, Stéphane, 2004, p. 68 (my emphasis).

Explicit here, the actual treaties are said to comprise the concept of sovereignty that has since shaped the structure and perception of the modern world order. This basic principle is supposed to, since then, have worked as the foundation for international law and relations,<sup>117</sup> gaining consideration as “the *grundnorm* for international society”.<sup>118</sup> This description of the treaties, however, might well be compared to the alternative image presented by Stephen D. Krasner. The treaties’ renowned introduction of sovereign equality onto the world political map would include the sovereign prerogative of every state to perform their own foreign policies, for example by treaty-making. However:

The Treaty of Münster [one of the two treaties of the Peace] is 42 pages long. It contains 128 provisions. The right to make treaties is given in one sentence in a section of the Treaty that spells out the rights of states within the Holy Roman Empire to participate in the deliberations of the Empire and which concludes with an admonition that no Treaty should be directed against the Emperor and the Empire. Only after the fact can this be read as an endorsement of the principle of sovereignty which rejects any external restraint on the way in which states might conduct their foreign policies.<sup>119</sup>

Because of such tendencies, Krasner finds it almost easier to view the Peace as a constitution for the post-war Holy Roman Empire,<sup>120</sup> and—noting the discrepancy between the actual treaties and their immense status—simply states that “the Peace of Westphalia was not Westphalian”.<sup>121</sup> This is but one example, but the tendency is clear.

As mentioned, the commonplace image of sovereignty has served as an analytical foundation for much international relations theory. Interestingly, and perhaps logically, a similar aspect exists regarding international law—or rather international legal scholarship. In the eyes of David Kennedy, the insistence on the significance of 1648 and the ensuing period has stabilized the self-image of the discipline itself. It displays international law as a rational philosophy, demarcated from the religious ideals that preceded it. “As part of the effort to sustain this image, public international law historians have consistently treated earlier work as immature and incomplete—significant only as a precursor for what followed”.<sup>122</sup> By doing so, the significance—indeed, inevitability—of the ‘new’ discipline is reaffirmed, regardless of the fact that the depiction of pre-1648 international law texts was rigidly simplistic and thus inescapably erroneous.<sup>123</sup> This shows the discursive framework in practice and is thus an analysis showing how “the meaning of sovereignty is dependent upon its *use*”; it is not a fixed category.<sup>124</sup>

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<sup>117</sup> Beaulac, Stéphane, 2004, pp. 69f.

<sup>118</sup> Reus-Smit, Christian, 2001, ‘Human Rights and the Social Construction of Sovereignty’, in 27:4 *Review of International Studies*, p. 519.

<sup>119</sup> Krasner, Stephen D., 2001, p. 37.

<sup>120</sup> *Ibid.*, p. 35.

<sup>121</sup> *Ibid.*, p. 38.

<sup>122</sup> Kennedy, David, 1988, ‘A New Stream of International Law Scholarship’, in 7:1 *Wisconsin International Law Journal*, p. 14.

<sup>123</sup> *Ibid.*, pp. 15ff.

<sup>124</sup> Aalberts, Tanja E., 2004, ‘The Sovereignty Game States Play: (Quasi-) States in the International Order’, in 17:2 *International Journal for the Semiotics of Law*, p. 248.

These thoughts are, according to the theoretical perspective investigated in this paper, indicating that the sovereignty doctrine can be seen as constituting discourse, and that it in fact to a great extent regulates—at the very least shapes perspectives—the perceptions regarding what entities inhabit and make up the international system. Herein lies the relevance in further scrutinizing the foundations of this doctrine, and the practice. There is a great potential, through the power of language, of socially creating the ‘facts’ about the significance of an event like the Peace of Westphalia.

### 3.3 An Alternative View: What ‘Essence’ of Statehood?

As has been claimed, international law’s “basic intellectual structures are wedded to the concept of sovereign statehood”, on which is built such instances as territory, jurisdiction and responsibility.<sup>125</sup> More significantly is that this is based on a certain ontological notion; an idea that states existed naturally in the world. They were taken for granted, and the states in question were of European lineage. These, then, served as a common basis, the common attributes of which set the standard for what a state actually was, and, furthermore, new states had to be recognized by them.<sup>126</sup> Once again there is the tendency were subjects with a strong subject position get to produce the ‘facts’ that are supposedly universal.

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<sup>125</sup> Jodoin, Sébastien, 2008, ‘International Law and Alterity: The State and the Other’, in 21 *Leiden Journal of International Law*, p. 2.

<sup>126</sup> *Ibid.*, pp. 7f.

## 4 Self-Determination

This chapter will begin with presenting the historical background and meaning to the norm of—later on right to—self-determination. In this description the differing responses to claims of self-determination will appear, and in that also shed light on the possibilities in practice of realizing this legal rights. This will then combine with the law’s bias towards statehood, as presented above, in a final examination and evaluation of the status of the right to self-determination, and the problems it faces. The issue presented will generally focus on secession, since that is the focal point of the current controversy.

### 4.1 A Brief History: From Norm to Right

Self-determination has a complex standing within the international legal order. While being widely acknowledged as important, its *de facto* meaning is still not agreed upon, rendering its application problematic.<sup>127</sup> Still, as a norm it has had a great impact on the notion of statehood. As shown above, given the centrality of statehood in international law it is a status very much desired to gain. Before the occurrence of self-determination, however, no right had existed specifying *how* to become a state.<sup>128</sup> There was no such guide available. The history of this norm reaches back at least to the nationalist movements of the nineteenth century,<sup>129</sup> or even to the American Declaration of Independence, the ideals of the Enlightenment period, and the Jacobin followers of the French Revolution.<sup>130</sup> Its origins display the multifaceted, even ambiguous, character of the concept;<sup>131</sup> being “both radical, progressive, alluring and, at the same time, subversive and threatening” it is Janus-like in nature.<sup>132</sup>

#### 4.1.1 *The United Nations and Decolonization*

In the revolutionary cases of America and France the principle was expressed as a liberal, democratic form of self-determination, based on the idea that the government required the consent of the governed—with the external consequence that the government should be seen as legitimate in the international community.<sup>133</sup> After World War II the status of this principle was strengthened when it was included in the UN Charter as an explicit part of the organization’s

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<sup>127</sup> Xanthaki, Alexandra, 2005, ‘The Right to Self-Determination: Meaning and Scope’, in Ghanea, Nazila, and Xanthaki, Alexandra (eds.), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, p. 15.

<sup>128</sup> Warbrick, Colin, 2006, ‘States and Recognition in International Law’, in Evans, Malcolm D. (ed.), *International Law*, p. 224f.

<sup>129</sup> Crawford, James, 2001, ‘The Right of Self-Determination in International Law: Its Development and Future’, in Alston, Philip (ed.), *People’s Rights*, p. 7.

<sup>130</sup> Castellino, Joshua, 2000, *International Law and Self-determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial ‘National’ Identity*, p. 8; Cassese, Antonio, 1995, pp. 11ff.

<sup>131</sup> Cassese, Antonio, 1995, p. 1.

<sup>132</sup> Cassese, Antonio, 1995, p. 5.

<sup>133</sup> Castellino, Joshua, 2000, p. 11; Cassese, Antonio, 1995, p. 11.

purpose.<sup>134</sup> Any explicit content of the principle was left out, and its presumed beneficiaries—who are a ‘people’—were left undefined. However, the *travaux préparatoires*, the documented preparatory work, to the Charter shows that discussions had focused on the right to determine the internal political status of the state.<sup>135</sup> Like the earlier revolutions this once again concerned the democratic ideal. The same notion was visible in the coming UN Decolonization Declaration of 1960, which, according to Alexandra Xanthaki, was the first explicit attempt at specifying the content of the principle, and furthermore to develop the principle into a *right*.<sup>136</sup> The declaration was passed unanimously,<sup>137</sup> and self-determination was therein defined as a right bestowed upon “all peoples”, and “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.<sup>138</sup> Moreover, it contains strong formulations on alien domination, subjugation and exploitation constituting a human rights violation.<sup>139</sup> To achieve self-determination during this time, focus was put on representation, easing the demands in areas of criteria otherwise strictly requiring stability and effective control to achieve independence.<sup>140</sup> Thomas M. Franck adds, however, that under prevailing UN practice there was also the opportunity to either join a neighbouring state, split into two states, or to remain in the present state of relationship with the colonial state.<sup>141</sup> These external aspects were visible in the 1970 Declaration on Friendly Relations. Consistently through this period territorial integrity was emphasized, in relation to self-determination. Also, in all the expressions of the right, significant room for interpretations is left “for the international community to tune the meaning and use of the right according to contemporary needs”.<sup>142</sup> The author notes this in the positive, compared to standard-setting by states unilaterally,<sup>143</sup> although it naturally is a tough balance between flexibility and arbitrariness.

#### 4.1.2 *Self-Determination or Uti possidetis*

For situations where a defined group, such as a ‘people’, strive to break away from a recognized state to create a new one or to join another—that is, situations concerning title to territory—international law has developed two principles in response: *uti possidetis* and self-determination. The first is static, meaning territorial integrity of the existing state(s); the latter is very much dynamic, and holds a theoretical possibility for the creation of a new state.<sup>144</sup> Possible responses from the international community towards these types of secessionist claims are either upholding

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<sup>134</sup> Charter of the United Nations, 26 June 1945, Articles 1(2) and 55 (and to a certain extent, that is, during the period non-self-governing territories were still on the map, also Article 73).

<sup>135</sup> Xanthaki, Alexandra, 2005, in Ghanea, Nazila, and Xanthaki, Alexandra (eds.), p. 16.

<sup>136</sup> *Ibid.*

<sup>137</sup> Castellino, Joshua, 2000, p. 22.

<sup>138</sup> UN Doc. A/RES/1514, 14 December 1960, Article 2.

<sup>139</sup> *Ibid.*, Article 1.

<sup>140</sup> Shaw, Malcolm N., 2008, p. 205.

<sup>141</sup> Franck, Thomas M., 1998, pp. 150f.

<sup>142</sup> Xanthaki, Alexandra, 2005, in Ghanea, Nazila, and Xanthaki, Alexandra (eds.), p. 20.

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

<sup>144</sup> Franck, Thomas M., 1998, p. 146.

*uti possidetis*, or granting self-determination, or in fact a combination of the two. These three alternatives are the results of three specific historic contexts which have shaped the rules. With the collapse of the Spanish empire in America *uti possidetis* was produced; with the fall of the German, Austrian and Ottoman empires self-determination surfaced; and in the post-1945 era the two principles “were redefined and synthesized into a doctrine of decolonization”.<sup>145</sup> So, during the decolonization, when self-determination was practiced quite extensively, this meant that ‘peoples’ were granted self-determination but within the given boundaries of the previous colonial state. This synthesis generally worked well, but where problems occurred the international system gave primacy to *uti possidetis*.<sup>146</sup> It is safe to say, then, that redrawing boundaries—however arbitrary—has never been a popular choice.

## 4.2 Post-Colonial Self-Determination

With the 1990s the decolonization of the ‘Third world’ was almost completed. This process, approximately between 1950 and 1980, was what James Crawford calls the active part of self-determination.<sup>147</sup> Thereafter the world changed, and while claims for self-determination continued, they met a different treatment. The new situation has been described as one where, as a new factor, a wave for tribal, ethnic and religious self-identification saw the light of day, and with it challenging demands directed towards host states around the world—demands ranging from minority rights or regional autonomy to total independence.<sup>148</sup> In a somewhat similar exposition Crawford groups the post-1989 claims into three categories, claiming that self-determination has been invoked either to justify an intervention in another state; or to seek secession from a state; or, thirdly, seeking special arrangements within a state to the effect of special or minority rights. It is the second, secession, that is the most controversial—and, as follows, most denied.<sup>149</sup> Territorial integrity, to uphold regional stability, have been a priority.

The notion of a broader application of the principle – that is, the secessionist model – is a logical continuation of the original idea that was meant for universal use.<sup>150</sup> However, noted by Jan Klabbers, practice in courts, tribunals and quasi-tribunals have lately treated the norm of self-determination as an ‘open-textured principle’ rather than an enforceable right, and the issue is practically conceived more as a procedural norm focusing on minority treatment, with the idea of secession more and more regarded as a separate (possible) right.<sup>151</sup> Practice by states has denied unilateral secession and also the UN, despite above mentioned generous phrasing, have been

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<sup>145</sup> Franck, Thomas M., 1998, p. 147.

<sup>146</sup> Franck, Thomas M., 1998, p. 151.

<sup>147</sup> Crawford, James, 2001, ‘The Right of Self-Determination in International Law: Its Development and Future’, in Alston, Philip (ed.), *People’s Rights*, p. 39.

<sup>148</sup> Franck, Thomas M., 1998, pp. 140f., 143.

<sup>149</sup> Crawford, James, 2001, in Alston, Philip (ed.), pp. 39f.

<sup>150</sup> Koskenniemi, Martti, 1994, ‘National Self-Determination Today: Problems of Legal Theory and Practice’, 43:2 *International and Comparative Law Quarterly*, p. 242.

<sup>151</sup> Klabbers, Jan, 2006, ‘The Right to be Taken Seriously: Self-Determination in International Law’, 28 *Human Rights Quarterly*, pp. 196-199.

strict in this area.<sup>152</sup> The colonial model was the only accepted one. The reason for this is an emphasis on some degree of status quo. Even when self-determination was greatly practiced, during the decolonization, the principle of *uti possidetis* served to regulate it. This means that the new state inherits the colonial boundaries, no matter how arbitrary, in order not to disturb the regional situation and the territories of neighbouring states. This limits the territory within which self-determination can be claimed, and also what population are entitled to that option.<sup>153</sup> To sum up, the practice of self-determination has always been subject to great limitation. Because it only has been accepted exclusively in the colonial context, Koskenniemi views it as a conscious choice to contain its revolutionary nature.<sup>154</sup> That nature was also noted by Robert Lansing, Secretary of State to US President Woodrow Wilson, who in a 1918 note exclaimed: “The phrase is simply loaded with dynamite”.<sup>155</sup>

#### 4.2.1 *Statehood: Both the Problem and the Cure*

One explanatory factor is to be found in the status of statehood. Joshua Castellino quite succinctly paints the picture of the problem here examined, as statehood being “the alpha and omega of the problem [of self-determination] since it is from states that groups, notably ‘national’ minorities seek to secede, but in doing so, the modern international legal system forces them back into the straight jacket [*sic*] of another state”.<sup>156</sup> The same notion is evident with Malcolm N. Shaw, albeit in more cautious terms; given the non-applicability of *terrae nullius* today, the creation of new states “can only be accomplished as a result of the diminution or disappearance of existing states, and the need for careful regulation thus arises”.<sup>157</sup> The situation, then, is one of states being the prime subjects and most significant actors within the international legal order. The consequence is that peoples striving for self-determination have to conform to this model in order to become some force of reckoning with—and also within already established boundaries.

Simpson claims that “[t]he whole idea of statehood and sovereignty operates as a discourse of exclusion and hierarchy”.<sup>158</sup> The state has monopolized legal life, with the result that they are the only subjects to which formal equality applies. And, furthermore, for ‘new’ subjects, “[a]dmission to the Family of Nations is only open to those who would play the part of the state”.<sup>159</sup>

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<sup>152</sup> Shaw, Malcolm N., 2008, pp. 226f., 256.

<sup>153</sup> Warbrick, Colin, 2006, in Evans, Malcolm D. (ed.), pp. 225f.

<sup>154</sup> Koskenniemi, Martti, 1994, p. 241.

<sup>155</sup> Robert Lansing, Note of 30 December 1918, as cited in Knop, Karen, 2002, p. 8. *Nota bene*, for context, that he expressed concern regarding the principle of self-determination mainly due to his conviction of “the danger of putting such ideas into the minds of certain races” (*Ibid.*).

<sup>156</sup> Castellino, Joshua, 2000, p. 2.

<sup>157</sup> Shaw, Malcolm N., 2008, p. 198.

<sup>158</sup> Simpson, Gerry, 2004, p. 84.

<sup>159</sup> *Ibid.*

#### 4.2.2 *Identity and Structural Bias*

Karen Knop structures the ways in which groups entitled or otherwise affected by the right to self-determination into three groups: participation, identity and interpretation. While the first concerns procedural possibilities, the second, identity, is about language; about description and thereby shaping perception and thus the construction, by international law, of the group's identity. Furthermore, of importance, the legal texts concerning this right assume a particular kind of world, and create an own world in relation to it. It is this world, that is created and thus particular, subjective, that informs our understanding of its content.<sup>160</sup> "In this sense, the texts on self-determination construct and are constructed on *identity*. The universe they define looks quite different, however, from the community of formally equal sovereign states posited by other international legal norms. Public international law overwrites everything with the narrative of sovereign sameness in order to establish a discourse where all states are equal".<sup>161</sup> The difficulty and the core of conflict, then, is the combination of the aspirations of international law with the particularity and diversity that self-determination, and all its non-state actors, brings.<sup>162</sup>

The kind of reasoning that Knop performs is evident also elsewhere. Cassese describes his starting point in his 'legal reappraisal' of self-determination in the following terms: "How does the story of self-determination [...] contribute to the perennial argument on the extent to which international law actually constrains State behaviour or, instead, simply provides a 'structure of justification' for that behaviour?".<sup>163</sup>

Expressing a notion very much sounding like that of Foucault, Dianne Otto calls for questioning of what we know as solid, what has been produced behind the veil of (European) modernity. The project entails giving voice to "knowledges at the limits of Enlightenment epistemologies", for, she continues: "There is no doubt that the international community could be imagined as a collectivity that is vastly more participatory than the existing society of nation-states [but in order to] achieve these shifts, the understanding that multiplicity is incommensurable with order, and that order depends on force and discipline, must be unlearned".<sup>164</sup>

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<sup>160</sup> Knop, Karen, 2002, *Diversity and Self-Determination in International Law*, pp. 4ff.

<sup>161</sup> *Ibid.*, p. 6.

<sup>162</sup> *Ibid.*

<sup>163</sup> Cassese, Antonio, 1995, p. 7.

<sup>164</sup> Otto, Diane, 1996, p. 360f.

## 5 Conclusions

I have in this thesis argued, and tried to show support, for the idea that power affects the constitution and continuous reproduction of international law by producing a *narrative* of international law, one might say, that collapses the 'is' with the 'ought' of existence. This is also greatly affected by a presupposed notion of statehood and sovereignty, that affects the content and the practice of the law. Rather I have tried to show the potential for insecurity, or lack of stability, in some of the features of international law that are commonly regarded as essential.

Some examples given have been how statehood is a concept riddled with technical language and legal criteria, but still a somewhat 'unclear' category; how acquisition of statehood cannot escape the issue of recognition, which, in turn, is seemingly inseparable from political considerations. Throughout the thesis, the concept of subject position has shown relevance; that it matters greatly *who* says something. In this case already existing states have the power—both in a traditional sense and in my power/knowledge sense—to determine 'truth'.

The pattern is one of presupposed certain ontological objects—states and the concept of sovereignty—setting the standard to be applied universally. In reality there are good grounds to doubt parts of those objects, such as problematic legal regulation regarding statehood and the criticism against the orthodox narrative of sovereignty. Still, the perception is that these phenomena have been rather stable. The continuity (or the image thereof), then, could be said to be a part of discourse; seemingly a representation of the reality as it is, but in reality something the 'truth' and 'knowledge' of which is a production of discourse.

The overall result is an indication of a system within which structural bias giving primacy to statehood, and thus constructing obstacles for a development towards greater diversity.

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