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STATEHOOD AND SELF-DETERMINATION

The concepts of statehood and self-determination provide the normative structure on which the international legal order is ultimately premised. As a system of law founded upon the issue of territorial control, ascertaining and determining which entities are entitled to the privileges of statehood continues to be one of the most difficult and complex matters in international law. Moreover, although the process of decolonization is almost complete, the principle of self-determination has raised new challenges for the metropolitan territories of established states, including the extent to which 'internal' self-determination guarantees additional rights for minority and other groups. As the controversies surrounding remedial secession have revealed, the territorial integrity of a state can be questioned if there are serious and persistent breaches of the human rights of its citizens. This volume brings together such debates to reflect further on the current state of international law regarding these fundamental issues.

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FOREWORD

Self-determination has formed part of the vocabulary of international law since the Treaty of Versailles and the formation of the League of Nations. Its influence has not been constant, but has waxed and waned according to circumstances. Following the virtual completion of the decolonization process (Western Sahara and Palestine two notable exceptions), the 'first generation' of self-determination has largely run its course. But the principle has not lapsed or been deprived of all continuing value, even if its relevance to cases such as the dissolution of the former Yugoslavia remains equivocal and contested.

Thus, the international law on statehood and the principle of self-determination provide a normative framework that supports the classic conception of the international legal order as shaped by and constituted of states. From a distance, it appears enduring, even basal. But quiet waters run deep, and the declarative effect of statehood and self-determination masks significant ongoing uncertainties, as well as disguising the difficulties inherent in applying these doctrines to novel and persistent factual situations. This is revealed in the International Court of Justice's 2010 Advisory Opinion on Kosovo, over which a vibrant debate continues. The questions raised – and mostly left unanswered – by the Court reveal yet again the contested role of international law in governing many communities' desires for autonomy and self-government, either within their state or beyond it.

This volume explores these issues through a wide-ranging discussion of many of the principal challenges, including the disputed doctrine of remedial secession, the rights of indigenous peoples, continued concerns over the diplomatic tool of recognition, and ongoing difficulties with self-determination. Equally, the volume balances general principle with instances of local circumstance and historical example. As the introduction notes, international law is enriched (if not made any more certain) by connection with the complexities of individual situations. Ultimately, the law on statehood and self-determination must be viewed as being in a

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constant process of change, seeking to balance the precepts of the past with the diverse claims of peoples and communities.

The essays assembled by Professor French represent an ambitious attempt to resolve some current issues surrounding self-determination and sovereignty, including the disputed doctrine of remedial secession, the rights of indigenous peoples, the role of non-state entities and the unresolved, protean difficulties within self-determination itself. The result is a volume of some significance, assembling an array of problems concerning statehood and self-determination to be solved by reference to a central idea – the shared belief in the capacity of international law to evolve, adapt and provide principled solutions. The result is a work in which the value of the whole exceeds that of its (already worthy) constituent parts.

James Crawford
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Cambridge
26 June 2012

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PREFACE

Issues of statehood, territory and self-determination continue to provide both a framework for, and the broad narrative of, international law in the twenty-first century. Though international law's capacity to regulate ever more complex areas of state, individual and even corporate activity (at least indirectly) is remarkable and has often been noted, continued disputes over such a foundational matter as territorial sovereignty, and the increasingly persistent assertion of further, more limited, rights within and without such sovereignty should themselves not go unnoticed. Though international law now plays an undoubtedly more flexible, adaptive and technical role in the political, social and economic life of states, some of the core principles and assumptions on which international law rests remain open to significant debate and challenge.

Perhaps this has always been the case. Nevertheless, as political situations arise, new complexities in international law emerge. As the International Court's 2010 Advisory Opinion in *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* revealed – partially by way of its reasoning, but principally by what it did not say – there remain many aspects of international law for which we have little in the way of consensus; in this case, unilateral declarations of independence, remedial secession and the outer parameters of self-determination in a post-colonial setting, *inter alia*.

Within this context, there are several sub-themes that one might mention, and to which this preface can only briefly allude. These include, in no particular order, the doctrine and practice of recognition, the rights of indigenous peoples and other minorities, the role of third parties (including international organizations) in matters of state creation and state building, the symbiosis between culture, identity and nationhood in both concurrently upholding and undermining the fundamental basis of the 'nation state', and the countervailing (though certainly not conflicting) pressures of federalism, regionalism and supranationalism. Perhaps above all, there is the matter of the overarching relevance, application

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and implementation of legal principle in shaping, determining and resolving complex factual situations.

This volume – as full as it is – cannot hope to do justice to all these issues in the same depth. Nevertheless, what it can (and hopefully does) do is to provide the reader with detailed and reasoned analyses of many of the key debates, as well as highlighting examples from across the globe of various instances of where international legal principle is affecting (and is potentially being affected by) local circumstances. It has often been said that facts shape the law, and indeed one of the most noticeable things is the interplay of local and global politics in framing issues of territorial sovereignty.

Moreover, what this volume reveals, above all else, is a truth that international lawyers would be wise not to ignore; namely, that to be meaningful, international law needs to continue to make a difference. Consequently, international lawyers must be aware not just of the global *locus* of the discipline, but also of the many diverse, and often local, settings in which ‘our’ rules and processes potentially impact. With discussion of situations as far afield as Greenland, New Caledonia, Somaliland, Taiwan, as well as Kosovo, amongst others, the collection is hopefully both contextual in content as well as being international in focus. Equally, as numerous chapters reveal, the past is not a foreign country but, if understood correctly, it can help us to reflect on – often very similar – issues that still resonate in the present day.

The chapters in this collection were amongst those presented at the 2011 International Law Association British Branch annual conference held at the University of Sheffield, when I was there as Professor of International Law and Director of the Sheffield Centre for International and European Law. It thus seems only fitting that I should thank Sarah Beedham, Lisa Burns and Harriet Godfrey of that School of Law’s research support office, who worked so hard to ensure that the conference occurred efficiently. Equally, I would like to acknowledge the support of Tawhida Ahmed, Ali Bohm, Russell Buchan, Paul James Cardwell, Richard Collins, Nathan Cooper, Scarlett McArdle, Andreas Rühmkorf, and Kate Wilkinson, both prior to, and during, the conference.

Particular thanks need to go to the contributors who have worked remarkably steadfastly in meeting the deadlines that I imposed, responding to my many demands on their time. But ultimately, this collection would not have been completed without the support of the staff at Cambridge University Press. Such thanks is not given as a matter of polite protocol, but out of real and sincere gratitude; completing this

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collection whilst at the same time taking up post as a head of school would have not been possible otherwise.

This book is dedicated to my children, Anna, Jacob, Matthew and Rebecca, whose interaction so often reminds me of the diplomacy, negotiation tactics and the occasional use of force of states.

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