Theseus's Ship of State: Confederated Europa Between the Scylla of Mere Alliance and the Charybdis of

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TEXT:

I. Introduction

Europe reminds me of the puzzle of the ship of Theseus. Once, a Greek named Theseus had a ship. He had to repair his ship, so he put it up into dry dock. Each day, he would remove a plank, and put it in a pile. He continued until he had removed and replaced all parts of the ship. Meanwhile, a stranger had taken each piece from the pile of old planks and used them to build a new ship. The question is then: Which is Theseus's ship?
This puzzle is a nice debate, not a true paradox like Zeno's; n1 Theseus's ship is used to highlight the questions of possession, ownership, and identity. What is the nature of being? The puzzle can also be used to illustrate the problem of legal formalism: Is the pile of lumber Theseus's ship? The puzzle also illustrates the problem of flux: n2 How could Theseus's ship disappear into a pile of lumber and then reappear therefrom? And what of the ship in the dry dock?

The question asked in this article is bit more complex. It is the question of identity and transformation. Imagine we have twenty-six dry docks, and twenty-five ships. Suppose we remove one plank from each of the ships-let's call it trade in coal and steel (European Coal and Steel [*29] Community). n3 Then we take a second plank, let's call it common customs (European Economic Community), n4 and a third plank (competition law). Then we take another plank, let's call it border controls (Schengen) n5 and we start taking the old planks and put them into a new dry dock (European Community). n6 We use some nails to join the boards in the new dry dock together (the Euro), we take some sails from the twenty-five ships and place them on the ship being built in the twenty-sixth dock (the common foreign and security policy) n7 and we take some rigging from the twenty-five ships and use the ropes to rig the twenty-sixth boat (European Union). n8 Next we add a flag and crew (Union citizenship). n9 When does the lumber pile in the second dry dock become a ship? And what of the other twenty-five ships?

Well, of course, we are talking about the European Union (EU) and its Member States. And the legal question we are looking at is whether the EU is a state. To try to answer this problem we will look at the law, but the author believes this puzzle will help you to see how the EU is a state in the making. You might disagree with the conclusion reached here, that the EU is a state, but the author hopes, however, that you will agree with the direction of the arguments, that Europe is at worst becoming a state. n10

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So, is Europe a state? To answer that question we must first address two others: "What is Europe?" and "What is a state?"

II. What is a State?

A. Sovereignty

Sovereignty may be defined succinctly as "the ultimate decision-making power within a legal system." n11 The literal meaning of sovereignty is the highest power, which is the idea that there is some rule-making body in a legal system that acts as a final authority. n12 Sovereignty is a polysemical term-it has many meanings. n13 However, the useful meanings [*31] of sovereignty are legal n14 rather than political, and the legal meaning of sovereignty is, in fact, "final authority." n15 But, if sovereignty is the idea of final authority then we must conclude that in fact no state is sovereign. All states are subject to international law, and specifically to the jus cogens obligations of international law. n16 No state may wage war n17 except in self defense, nor may any state engage in genocide, for any reason at all. n18 Therefore, no state is the final authority anywhere on earth and [*32] consequently no state is sovereign. If instead sovereignty means the ultimate domestic authority, then in many ways Europe is a sovereign.

Europe has final authority expressed in the doctrine of supremacy, n19 particularly over questions of trade and competition law. The fact that its final authority is limited by the doctrine of subsidiarity n20 is irrelevant. The United States government, like that of the EU, is also a government of limited powers n21 which do, however, serve as final powers in some cases. n22 This includes provisions which allow implication of necessary powers needed to implement
and enforce enumerated powers. For example, the U.S. federal government has no general police power, yet federal police power over internal affairs is implied from the Commerce Clause. Like Europe, all powers not delegated expressly to the U.S. federal government remain at the level of the member (federal) states. Each federal state in the United States is a sovereign as is true of the member states of the EU. The fact that the federal states can borrow money, raise militias, execute prisoners, build schools, and, with congressional approval, make pacts with foreign states is no argument against the international legal personality of the federal government. The parallels between the structure of European confederalism and U.S. federalism are, the author believes, greater than the divergences.

B. Political Definitions of a State

The state may be defined in legal terms or in political terms. In political terms, we know Aristotle considers the state a community capable of meeting the basic needs of life organized in order to attain a good life. Under that definition, we are already in trouble. Does that mean the state must be autarchic, producing all of its own goods? For, the essence of liberalism is free trade and economic interdependence as the basis of prosperity. Autarchy leads to independence but it also leads to poverty. North Korea is autarchic, independent, and poor. But social contract liberalism with its non-existent state of nature and its consequently impossible social contract is even worse than Aristotle at explaining the idea of the state. Maybe sociology would help. Max Weber told us the state has a monopoly of legitimate force. And once again, the political definition of the state is lacking. No state has a monopoly of legitimate violence because all states are subject to the international community and to other states. Furthermore, what is legitimate to mean? Legal? Who decides whether the violence is legal? Weber's model does not seem able to account for revolutionary changes whereby a group out of power comes into power. The splits between classical (Aristotelian) state theory, the social contract theorists, and the Weberians are simply some of the fundamental splits in the western conception of political life. Those rifts inevitably cloud any discussion of the state outside of its legal definition.

What is the result of these theoretical rifts? Any attempt to determine whether Europe is a state from the political perspective is doomed to incoherence, especially where the splits in liberalism are ill recognized or unarticulated. Asking the question whether Europe is a state from the political perspective leads to no clear answer because of the sketched theoretical splits within liberalism.

Europe and its Members: A Constitutional Approach ends with ruminations over the nature of the European Union. Is it a state? a federation? an inter-governmental entity? a hybrid? No one has offered the definitive answer to these questions, and any answer could be provisional only, since the entity continues to evolve. The Member States of the European Union enjoy constitutionalist traditions and it is important that the virtues of this tradition not be lost in the process of integration.

But this confusion results largely from focusing on the political questions of how the European state is building itself, and when and whether it achieves statehood and why. If we look at the legal definition of the state in international law, several questions-whether a European demos exists, whether the institutions of Europe are sufficiently democratic-simply disappear. For, unlike the splits within liberalism, international law does provide a clear definition of the state-and Europe meets the terms of that definition.

The fact that the political approach does not yield a clear answer results in legal confusion. For example, an astute political analyst notes that "[i]n political science, complex theoretical constructions have been developed in an attempt to explain the relationship between the Union and its Member States, notably the so-called 'multilevel analysis'
and 'network analysis.' This is a perfectly valid political analysis. Europe does have a variable geometry (Euro countries and non-Euro countries; Neutrals and NATO members) and is sometimes less accurately described as "two speeds" with a "core" (France, Germany and all of the Low Countries) and a "periphery" (United Kingdom and the neutrals). However, by losing sight of the legal significations, the analyst reaches an incorrect conclusion about the legal structure of the EU and argues that "[d]espite these innovations, one has to withstand the temptation of interpreting the evolution of the Union as the emergence of a state." In fact, the EU is a state in statu nascendi. "The term 'political union' certainly means different things to different people, but for many it amounts to little less than a modified replacement for the aim of a 'United States of Europe.'"

The clearest political analysis focuses on the legal internal structure and organization of the European state, rather than on constitutive elements needed to create a state. Of course, a political analysis can lead to the conclusion that the EU is a state.

The [European Union] after the Maastricht Treaty has acquired certain characteristics of a federal state: the Treaty seeks to foster a Union citizenship; subsidiarity governs the vertical distribution of powers; the Treaty attempts to coordinate the vertical and horizontal distribution of power; and the federalist structure provides for limited governance.

But the political analysis really doesn't help us to understand the legal status of the Union. It might tell us how the Union has developed or how it will develop but it does not and really cannot tell us the Union's legal status under international law. At best, the political arguments are evidence of the factual elements of a claim to statehood, and at worst-inevitably so-a source of confusion due to theoretical inconsistencies within the liberals' conceptions of the state.

The divergent political views display the problem with the political perspective. Some even argue (inexactly) that Europe is a nation. That view perhaps goes too far, because while there is a common culture and heritage of the European people, there are several European languages, diverse nuances to the common culture, and different roles within the common history. If "nation" is meant to mean an "ethnic" group with common features, then there is a European people. If "nation" is defined as a common language group, then it isn't. This is the inverse of the United States where many people have a common language despite diverse racial origins, but at times divergent cultures. But these political inquires are, from the perspective of international law, simply irrelevant. The internal organization or ethnic composition of the EU is not relevant to the inquiry of whether the EU is a state under international law. Multinational states have long existed in the international legal system. The international system also recognizes diverse state forms such as democracies, theocracies, dictatorships, monarchies, and just about any other form of government. The political organization of the EU is not terribly relevant to its legal status under international law.

C. Legal Definition of a State

If the political definitions of a state are inadequate to describe the phenomenon of collective behavior, then what about the legal definition? Thankfully, the law is much simpler. International law does not ask about the internal organization of the state, nor does it insist on any constitutional form or on some minima of democracy. Common culture, customs, language and/or religion are not required of the people of a state under international law. The permanent population does not have to constitute a homogenous ethno-linguistic group (nation). Legal doctrine (scholarship) defines the state as follows: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." The scholars' answer is also seen in the practice of states. Case law applying the Montevideo convention asks "whether the putative state (i) has a defined territory and (ii) a permanent
population, which (iii) is under the control of its own government, and (iv) has the capacity to engage in foreign relations." n44

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Looked at from the perspective of international law then, is Europe a state? To answer this question we must also know what is meant by "Europe."

III. What is Europe?

A. The European Union and the European Community

What does this article refer to by the term "Europe?" When "Europe" is used in this article, it refers to the European Union. The EU, like the United States, is based on a federal structure, with limited but supreme powers. n45 Is the EU an international legal person? Though "[T]he Amsterdam and the Nice Treaties did not determine whether the EU had a legal personality," n46 it is certainly the case that the European Community (EC) is an international legal person. n47 Further, the "[European Community and European Union] policies are considered to form part of a single legal system." n48 Thus, "[T]he European Union and [\*39] the European Community, although separate legal persons, form a single political and legal entity." n49 The United Nations has recognized the international legal personality of the European Union. n50 State practice recognizes the international legal personality of the EU. n51 Other States treat the EU as an international legal person and thus it is. The best view then is that the EU has implicit international legal personality. n52 But, simply because the EU is an international legal person does not mean it is a state. The usual answer is that Europe is a set of international organizations. However international organizations do not have citizens, grant recognition to states, or have a constitutive role in creation of customary international law; those qualities are all unique to states-and Europe does all of that. n53 The usual answer is not the correct answer.

B. Is Europe a Condominium?

If we think of Europe in terms of law, we see twenty-five sovereign states and one overarching government. When we think of systems where multiple sovereigns jointly govern one territory, one such structure that comes to mind is the condominium. Is Europe a condominium?

The condominium is analogous to a joint ownership. A condominium is territory "under the joint tenancy of two or more states, these several states exercising sovereignty conjointly over it, and over the individuals living thereon." n54 That is, "[c]ondominium refers to the joint [\*40] control of a territory by foreign powers. International law authorities, though differing in details, agree that the condominium envisions the joint exercise of sovereignty over a single piece of territory . . . ." n55 Therefore, sovereignty is exercised jointly by the parties to the condominium. n56

The condominium is an interesting analogy, as it demonstrates that international law does not demand exclusive control of a territory by a state, however the condominium is not itself analogous to an international legal entity like the EC or EU; n57 "condominia, unlike states under protectorates, are not international legal personalities. Instead, the participants in the condominium are." n58 Moreover, "[p]arties to condominia can act only through the collective intermediate organs created by the condominia. They cannot exercise their own sovereignty directly in the condominium territory, because that would prejudice the position of other members of the condominium and would be inconsistent with the idea of joint administration." n59 This is also problematic since each member state exercises sovereignty not over the entire territory of the putative condominium but only within their own territory, and each does
so directly.

If the EU were a condominium it would be either a condominium of twenty-five member states alone, or a condominium of twenty-five member states and one federal state. And although the condominium might seem like a useful concept to illustrate the idea of joint sovereignty and to help illuminate the sui generis institution which is the EU, that categorization deprives Europe of its legal personality. Europe is clearly not a condominium.

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C. Is Europe an International Organization?

Europe is not a mere international organization because the EU plays a constitutive role in the formation of international laws, has citizens, and performs state functions such as trade, currency, and conducts foreign policy including giving recognition to other states. The competencies of Europe go well beyond those of a mere international organization.

IV. Is Europe a State?

If Europe is not a condominium or an international organization, then by process of elimination it is a state. That is an argument reached by reductive inference. However, we might learn more about the nature of the European Union by examining the question dialectically. The best way to determine whether Europe is a state is to look at the legal arguments for and against EU statehood and then determine which is most persuasive. This dialectical method (thesis, antithesis, synthesis) may seem simplistic, but is effective and does lead to an answer; though it may not lead to the answer you expect.

A. Arguments in Favor of European Union Statehood

Some scholars just assume that the EU is a state or are forced by the facts to treat it as if it were, which is evidence that Europe is a de facto state. Indeed, the nomenclature "European Union" does support the argument that the EU is a state. A more analytical approach, taken by Rainer Arnold, looks at each of the elements of statehood under international law and concludes that the EU meets each of the criteria: (i) definite territory; (ii) population; (iii) organs of internal control; and (iv) capacity to engage in foreign relations. In legal terms, the author agrees with the direction of Arnold's argument; Europe meets all the conditions to be a de facto state.

One significant argument in favor of seeing the EU as a de facto state is the fact that the EU does not act as a mere object of international law, but rather subject to it. While individuals have directly enforceable rights and duties under international law, they do not create customary or treaty law. Only states are constitutive of international law. The EU contributes to the creation of customary international law by creating rights and duties of member states, influencing the general principles of international law, and also by exercising its power to recognize other states as international legal persons. The power to recognize other states has been de facto transferred from the Member States to the Union: "The member states of the European Union are very reluctant to afford an entity any of the rights and obligations pertinent to statehood until that entity has been formally recognized by the European Union." In practice, the Member States have transferred one of the key competences of an international legal subject. Moreover, the EU has a common currency, common customs, trade policy, Union citizenship, and a common foreign and security policy. In short, it does all the things a state does. According to the Court of Justice of the European Communities, the European Economic Community treaty (now the Maastricht treaty) "constitutes the constitutional
A constitution is the grounding document of a state. The arguments in favor of seeing Europe as a de facto state are persuasive.

B. Arguments Against Viewing Europe as a State

The arguments against the EU being viewed as a de facto state are unpersuasive, however, arguments that the EU is not a state may be found within the case law of the Member States. Nevertheless, the EU is in constant evolution and is continually becoming more politically integrated. Even those who believe that the EU is not yet a state admit that it is moving in that direction.

One argument against the de facto statehood of the EU is that the Member States are sovereigns and "do not plan to yield all their sovereignty to the [European Union]." So what? The U.S. federal states never yielded all of their sovereignty to the federal government. The joint sovereignty argument is not a very good one. A related argument is that although the Member States have ceded some of their sovereignty to the EU, they are still independent international legal persons. But the issue is the international legal personality of the EU itself, not of the Member States. The EU is, in fact, a sovereign international legal person, and not a mere object of international law. Others focus on the political questions of internal order, but that misses the point—we are not looking at a political question, but rather a legal one. These counter-arguments are essentially irrelevant. If Europe is a state, then what type of state is it?

C. Europe is a Confederate Republic

The precise term for a confederated state is a confederate republic. Sometimes the term "confederacy" is used wrongly; to refer to what is in fact a mere alliance. That inaccurate description leads to confusion. Black's Law Dictionary defines "confederacy" as:

A league or agreement between two or more independent states whereby they unite for their mutual welfare and furtherance of their common aims . . . . [I]t is more commonly used to denote that species of political connection between two or more independent states by which a central government is created, invested with certain powers of sovereignty (mostly external), and acting upon the several component states as its units, which, however, retain their sovereign powers for domestic purposes and some others.

A confederated state (a modern synonym for Montesquieu's confederate republic) is an international legal person constituted of states that have revocably ceded some of their sovereign powers to the confederacy. As one scholar has noted, a confederated state is formed by a treaty, not a constitution. The only parties to a confederation are states, not peoples. Though a confederacy is itself an international legal person, its member states retain (in theory) unlimited international legal personality, due to their right of succession. Until the 20th century only states enjoyed international legal personality. Thus, by definition, a confederation is a state—there is no other possibility.

Some conflate federation and statehood. However, not all composite states are federations, some are confederations. Federated states do not have a right of secession whereas confederated states do. Though the confederacy is itself an international legal person, its member states retain their own international legal personality.
as well—which is generally not the case in a federation. A confederated state is a type of state, but a state nonetheless. It has a definite territory, a fixed population, a government which can and does engage in foreign relations as well as maintain domestic order.

The more famous historical examples of confederacies include Serbia-Montenegro (2003-2006) (confederated state), the United States under the Articles of Confederation (which were concluded between the several states, unlike the Constitution which was formed by the people), Switzerland (1291-1848), the Confederate States of America (de facto state, recognized as a "belligerent state"), and the North German Confederation (1866-1871).

To summarize: A confederated state is an international legal person, constituted of states which revocably cede some of their sovereign power to the confederation, and which retain their own international legal personality. The member states to a confederacy have a right to secede from it. This definition is cogent and supported by long standing customary state practice and legal scholarship (doctrine). It also corresponds exactly to the facts in the European Union. Europe is clearly a confederation. The Union government is an international legal person, and the Member States are also international legal persons. The Union was formed by constitutional treaties. The Member States can in principle exit the confederation. Both scholarly doctrine and case law state that the EU, though sui generis, is a confederation. European Statehood can be inferred, de facto, from Europe's internal structure: There is a citizenship of the Union-and only states have citizens. The laws of the EU can have direct effect on its citizens, which is one attribute of statehood, and a confederation is, or can be, a type of state.

V. Conclusion

What are we to conclude from the practical facts, legal standards, and arguments? Europe presents a hybridized version of the state "on the brink of federal statehood." Europe is a state-a confederacy to be exact. Confederacies may be weak and highly decentralized, but they nonetheless can be states. Some confuse federalism and statehood. It is true that Europe is "more than an international organization," but Europe is not "less than a state," or "not quite a state." Europe has a definite territory, stable population, a government capable of maintaining internal order, and can and does engage in foreign relations, including the constitutive roles of recognition of foreign states and shaping of international law. It has citizens and constitutional treaties. Europe is neither just an international organization, nor a mere alliance. It is not a condominium. Europe is a weak, highly decentralized confederated state—but a state nonetheless. Theseus has two ships.

Legal Topics:

For related research and practice materials, see the following legal topics:
International LawSources of International LawInternational LawSovereign States & IndividualsHuman RightsGenocideInternational Trade LawGeneral Overview

FOOTNOTES:

n1 See http://classics.mit.edu/Plato/parmenides.1b.txt (last visited Jan. 12, 2007).

n2 By flux, the author refers to the flow of time. Thus, the puzzle also highlights Heraclites dynamic view of reality as constantly changing as opposed to the static view of reality as fixed and unchanging proposed by
Recognizing that reality is constantly changing is one of the basic points of dialectical materialism. Life is not like a series of snapshots; it is cinema.

n3 Treaty of Paris Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. The European Coal and Steel Community was the forerunner of the European Economic Community (EEC) and has since merged into the European Community (EC).

n4 Treaty of Rome Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3. The EEC was the forerunner of the EC.

n5 Schengen Agreement on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, 30 I.L.M. 68 (1991) (providing for open borders within the territory of the European Union).


n7 Id. tit. V (setting forth provisions on a common foreign and security policy (CFSP)).

n8 Id. (treaty in general). Both the European Union (EU) and EC coexist, however the two can be seen as one entity. See infra.


n10 “There is little argument that the EU has evolved into a state of its own, or is even in the progression toward becoming a state.” Andrew C. Snavely, Should We Leave the Backdoor Open? Does an Agreement Unitng States Need a Withdrawal Provision: The European Union Draft Constitution, 73 UMKC L. Rev. 213, 225 (2004).


n12 Sovereignty is defined as: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent. Black’s Law Dictionary 1396 (6th ed. 1990).

n13 See, e.g., Cherokee Nation v. S. Kan. R.R. Co., 33 F. 900, 906 (W.D. Ark. 1888) (“Wheaton defines sovereignty, ‘the supreme power by which any citizen is governed.’ Hurd says: ‘The supreme power in the state must necessarily be absolute, in being subject to no judge.’ Jameson says: ‘By the term ’sovereignty’ is meant the person or body of persons in a state to whom there is politically no superior.’ Leiber has said: ‘The necessary
existence of the state, and that right and power which necessarily follow, is sovereignty.' Story says: 'By sovereignty, in its largest sense, is meant supreme, absolute, uncontrollable power; the jus summi imperii; the absolute right to govern.' Yeaman, in his Study of Government, says: 'This sovereignty is the last and supreme will in the direction and control of the affairs of society, and beyond or above which there is no political power, and no legal appeal. The word which by itself comes nearest being the definition of sovereignty is will or volition, as applied to political affairs. Government is not sovereignty. Government is the machinery or expedient for expressing the will of the sovereign power.' Definitions of sovereignty might be almost indefinitely multiplied, but these which have been given I believe to be sufficient to give an accurate idea of its nature. This sovereign power in our government belongs to the people, and the government of the United States and the governments of the several states are but the machinery for expounding or expressing the will of the sovereign power." (internal citations omitted)).

n14 See Morgan Guar. Trust Co. of N.Y. v. Republic of Palau, 639 F. Supp. 706, 712 (S.D.N.Y. 1986) ("The Supreme Court has often attempted to define sovereignty by listing its attributes, or the powers which indicate that a nation is recognized as foreign and independent. For example in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-319 (1936) the court listed the following indicia of sovereign statehood; the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties. The power to exclude or expel aliens is also a recognized prerogative of a sovereign nation, Chae Chan Ping v. United States, ("The Chinese Exclusion Case"), 130 U.S. 581 (1889). Also included are the more general administrative tasks of self-governance such as regulation of coinage systems, patents, copyrights, postal services, Id. at 586, and the selection of a flag or other national symbol, United States v. Ferguson, 302 F.Supp. 1111 (N.D. Cal. 1969).") (parallel citations omitted).

n15 See Gherebi v. Bush, 352 F.3d 1278, 1296 n.21 (9th Cir. 2003) ("Black's Law Dictionary defines sovereignty, in pertinent part, as: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will . . . The power to do everything in a state without accountability . . . It is the supreme power by which any citizen is governed and is the person or body of persons in the state to whom there is politically no superior. By sovereignty in its largest sense is meant supreme, absolute, uncontrollable power . . . the word by itself comes nearest to being the definition of 'sovereignty' is will or volition as applied to political affairs. Black's Law Dictionary 1396 (emphasis added).")).


n17 See, e.g., U.N. Charter art. 2, para. 3-4; Kellog Briand Pact art. 1, Aug. 7, 1928.


n20 See EC Treaty, supra note 8, art. 5 ("In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the
objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.


n22 U.S. Const. art. VI, cl. 2.

n23 See U.S. Const. art. I, § 8, cl. 18; EC Treaty, supra note 8, art. 308.


n26 See EC Treaty, supra note 8, art. 5 (referencing subsidiarity).

n27 U.S. Const. amend. X.

n28 See EC Treaty, supra note 8, art. 5 ("The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.").

n29 U.S. Const. art. I, § 10, cl. 1.

n30 Id. cl. 3.

n31 Aristotle, Politics, at bk. One, pt. I (Benjamin Jowett trans.)(350 B.C.), http://classics.mit.edu/Aristotle/politics.1.html (last visited Aug. 9, 2006) ("Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.").


n36 Id. at 36.

n37 See Ian Brownlie, Principles of Public International Law 63 (5th ed. 1999). Brownlie uses the term "in statu nascendi" (literally in the state of being born) to describe the legal state of an emerging national liberation movement. Id. Brownlie is skeptical about this concept but admits the legal acts of the successful rebels are given retroactive effect. Id. at 77-78. According to Brownlie, “[a] political community with considerable viability, controlling a certain area of territory and having statehood as its objective, may go through a period of travail before that objective has been achieved.” Id.

n38 Bogdandy, supra note 35, at 36.

n39 See J.A. Weir, Human Rights and Damages, 40 Washburn L.J. 413, 415-16 (2001) (“Although it has diplomatic representation and power to conclude treaties, the European Union is not quite a state. It has, however, many of the features of a state. It has a legislature, indeed two. The powers of the unicameral Parliament with its 626 members are no longer negligible—it used to be no more than a talking-shop and gravy train, but the effective legislature is the Council of Ministers. It acts increasingly by qualified majority rather than unanimity, the member states having given up their veto on most matters, but it can legislate only on the proposal of the Commission, the civil service and executive, consisting of twenty Commissioners, most of whom have been invalided out of political life in their own country.”).

n40 “[T]he state must be construed as the ultimate political body that meets basic liberal democratic criteria and can enforce its laws. The European Union, although not a ‘state’ in the traditional sense, fits this definition . . . .” Michael A. Becker, Note, Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals, 7 Yale Hum. Rts. & Dev. L.J. 132, 179 n.227 (2004).


n42 “Whether or not the European Union ‘is’ a ‘state,’ it embodies the national paradigm, largely owing to central institutions like the Court of Justice.” Ralf Michaels, Three Paradigms of Legal Unification: National, International, Transnational, 96 Am. Soc'y Int'l L. Proc. 332, 335 (2002).

n44 John R. Crook, First Circuit Rejects Sovereign Immunity Claim by Palestinian Authority, 99 Am. J. Int'l L. 696, 697 (2005). Whether or not we accept that the EU is a state, we must admit that for some time now, we have been dealing with citizen-state issues. This, in turn, demands that we take into account the established norms of democratic decision-making that lie at the core of each democratic nation-state's legitimacy. See Toomas Hendrik Ilves, Minister of Foreign Affairs, Estonia, Lecture at Humboldt University, Berlin (Feb. 5, 2001) (on file with Florida Coast Law Review), available at http://www.vm.ee/eng/euro/kat314/815.html ("No, I am not arguing against moves toward greater European integration. I am saying, however, that both candidates and Member States share a suspicion that, in turn, is at the root of much of the euro-scepticism we see. This is the suspicion that fundamental decisions, previously made in a transparent and legally understandable way at the level of the democratic post-Westphalian nation-state, are now being transferred to a higher body. Moreover, decision-making in this higher body is not always clear and transparent, or even understandable from the standard of parliamentary procedure. In this body, the Montesquieuan division of powers is muddled. Finally, in this body, the link between the opinions of an individual and his opportunities to express them through established means (such through a political party or pressure on his parliamentary representative) is no longer clear.").


n47 See EC Treaty, supra note 8, art. 5.

n48 Chaibi, supra note 46, at 385.


n51 See Chaibi, supra note 46, at 363; see also id. at 384 ("Member States and non-Member States alike adopted a new name for their Embassies to the European Institutions: Permanent Representations or Embassies to the European Union. In this regard, passive legislation would tend to indicate the existence of international legal personality.").


n56 1 Oppenheim, supra note 54, at 351-56.

n57 Perritt, supra note 55, at 417-18.

n58 Id. at 417.

n59 Id. at 417-18.

n60 See Snavely, supra note 10, at 224 ("[T]he European Union often is described as a sui generis form of an organization that does not parallel any other organization in the international community.").

n61 "As the ongoing experiment of the European Union suggests, a state can be successful and vigorous without traditional 'sovereign' prerogatives like legal supremacy, coinage of money, and genuinely independent military forces." Timothy Zick, Are the States Sovereign?, 83 Wash. U. L.Q. 229, 331 (2005). Of course, since this writing, the EU has acquired the power of coinage money and has had legal supremacy but in limited fields. See also Stephen C. Sieberson, The Proposed European Union Constitution - Will it Eliminate the EU's Democratic Deficit?, 10 Colum. J. Eur. L. 173, 186 (2004) ("The unusual structure of the EU is not the only feature that distinguishes it from a typical nation-state.").

n62 "While the European Union is not a 'State,' I will treat it as one for the purposes of this discussion, as it has its own body of cohesive antitrust law." Jennifer R. Johnson, It's a Small World After All: Proposed Solutions for Global Antitrust in a System of National Laws, 1 Santa Clara J. Int'l L. 118, 143 n.158 (2003).


n64 Id. at 114-16.

n65 Id. at 115 ("[T]here are states with not one but several, and even many, peoples on their territory . . . . The fact that statehood does not require a single people is shown by the example of Switzerland . . . . [T]radition and cultural attitudes do not differ to such a degree that a common basis for homogeneity could not be found. The common origins in Roman civilization, including its legal system, have established a foundation, implicit or explicit, in life and attitudes all over Europe.").

n66 See id. at 116 ("With respect to organization, there exists a very powerful structure for a European state in Brussels, Strasbourg and Luxembourg.").
n68 Individuals today can have rights and duties under international law. However, individuals, corporations, and non-governmental associations are mere objects of international law in that they play no role in determining whether a norm is international law. For the basic proposition that individuals are mere objects of international law, see, for example, Richard B. Lillich & Hurst Hannum, International Human Rights: Problems of Law, Policy, and Practice 92-94 (3d ed. 1995).

n69 States are the only subjects of international law in that states play the constitutive role of international law. Customary law and treaty law are created by states and states alone. The EU clearly contributes to the formation of customary international law and not merely in governing the relations among its Member States. See Nico Krisch, International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order, 16 Eur. J. Int'l L. 369, 378 (2005) ("[L]aw-makers and subjects of international law are usually identical.").

n70 See Lillich & Hannum, supra note 68, at 94.

n71 "[F]or the present, sovereign states continue to be 'the primary subjects of international law,' while individuals continue to be 'merely objects of international law.' In other words, although the balance may be shifting, individual rights remain secondary to state interests." Thomas Rose, Note, A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada, 27 Yale J. Int'l L. 193, 196 (2002) (quoting Sharon A. Williams, Human Rights Safeguards and International Cooperation in Extradition: Striking the Balance, 3 Crim. L.F. 191, 222 (1992)).


n74 Id.


N78 E.g., Keith Hight et al., Decision Concerning the Maastricht Treaty of October 12, 1993, 88 Am. J. Int'l L. 539, 542 n.18 (1994) (“[T]he [German Constitutional] Court analyzed the status of the Union and came to the conclusion that the European Union is not a state and that the member states are still sovereign entities, because the Union is mainly an economic community (internal market, monetary union, etc.) and because the cooperation in the fields of justice and home affairs and the common foreign and security policy are structured intergovernmentally.”). Since that decision, however, the EU has achieved a single currency and a common foreign and security policy.

n79 E.g., Kugelmann, supra note 76, at 348 (“The Treaty shifts the Community towards the federal nation-state, but it does not constitute a federal state . . . . However, the Treaty does create and define certain elements of a federation . . . . The EC Treaty creates Union citizenship.”).

n80 “The European Union cannot be assimilated to a State, nor can its institutions be compared with national ones . . . . Although it may be a new form of integration among States, clearly distinct from the classical model of international organization, the European Union still remains a union among sovereign States.” Jean-Claude Piris & Giorgio Maganza, The Amsterdam Treaty: Overview and Institutional Aspects, 22 Fordham Int'l L.J. S32, S47 (1999).


n82 See, e.g., Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1006 (2006) (Thomas, J., dissenting) (“The majority does not appear to question the established framework for examining the question of state sovereign immunity under our Constitution. The Framers understood, and this Court reiterated over a century ago in Hans v. Louisiana, 134 U.S. 1 (1890), that 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states . . . . ’”) (parallel citations omitted).

n83 See, e.g., Acquaviva, supra note 75, at 357 n.19 (“It is sometimes suggested that, for example, Member States of the European Union are not fully sovereign in that decisions of organs such as the European Commission or the European Court of Justice have supremacy and direct effect within their territories. But because a state has given its consent to be bound by treaties or by decisions of other subjects of international law and can withdraw its consent, it remains a subject of international law regardless of these self-imposed limitations.”) (citation omitted).

n84 And the argument is made ambivalently: Though successive stages of European economic integration have foreshadowed a “United States of Europe,” the customs regime established by the Treaty of Rome and the program for economic and monetary union adopted at Maastricht have not been deemed to extinguish the independence or international legal personality of the European Union's Member States. Chim ne I. Keitner & W. Michael Reisman, Free Association: The United States Experience, 39 Tex. Int'l L.J. 1, 10 (2003).

n85 See, e.g., O'Neill v. St. Jude Med., Inc., No. 04- 1211 (JRT), 2004 U.S. Dist. LEXIS 15203, at *15 (D. Minn. Aug. 05, 2004) (“It therefore appears to the Court that this case does not present a risk of unduly or inappropriately impacting the sovereign interests of the countries of Europe or of the European Union.”); David
The European Union, as a sovereign body, has the right and authority to consider business interests . . . .

See, e.g., Sieberson, supra note 61, at 175-88 (providing a good list of the various political arguments in favor of and against seeing Europe as a state).


A confederate republic is a composite state with a confederated government and an international legal personality. See The Federalist No. 9 at 52 (Alexander Hamilton) (William S. Hein & Co., Inc. ed., 2002).

Black's Law Dictionary, supra note 12, at 296.

See Montesquieu, supra note 88 at 131.

Thus "Holland, Germany, and the Swiss cantons are considered in Europe as perpetual republics" and not alliances! Id. (emphasis added). Moreover, Montesquieu makes clear that the member states of a confederacy are also states. Id. "The definition of a Confederate Republic seems simply to be, 'an assemblage of societies,' or an association of two or more States into one State. The extent, modifications, and objects of the Federal authority, are mere matters of discretion." The Federalist No. 9 (Alexander Hamilton), supra note 89, at 52.

See 1 St. George Tucker, Blackstone's Commentaries app. note D 292 (photo. Reprint 1996) (Phila., William Young Birch & Abraham Small 1803) ("That, a number of independent states may unite themselves by one common bond or confederacy, for the purposes of common defence and safety, and for the more perfect preservation of amity between themselves, without any of them ceasing to be a perfect, independent, and sovereign state, retaining every power, jurisdiction and right, which it has not expressly agreed shall be exercised in common by the confederacy of the states; and not by any individual state of the confederacy."); see also Emmerich de Vattel, The Law of Nations bk. 1, ch. 1, §10 (Joseph Chitty ed. & trans., Phil., T. & J.W. Johnson 1852) (1758) ("Finally, several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state . . . . [T]heir joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.").

Yet, as so often is the case, Saxer makes interesting points about the confederacy without citing authority. See generally Saxer, supra note 87 at 603. Although scholarship is a source of international law and
most of Saxer's arguments are logical, it is still prudent to provide as support for one's arguments some evidence of customary state practice, general principles of law, treaties or international decisions.

n95 See id. at 605.

n96 But see State v. Hunt, 20 S.C.L. (2 Hill) 1, 192 (Ct. App. 1834) ("The parts of the constitution from which it is concluded the states have abandoned their sovereignty, seem to be the following: The introductory words of the constitution 'We the people of the United States:' importing that it was adopted by the people of the United States as one people, or that they thereby constituted themselves one people.").

n97 See John Bouvier, Bouvier's Law Dictionary (6th ed. 1856), http://www.constitution.org/bouv/bouvier c.htm (last visited Aug. 10, 2006) (defining confederacy in terms of international law as a union and making clear that a new legal entity is created). Specifically, Bouvier states that a confederacy is: An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such agreement between two independent nations, but it is used to signify the union of different states of the same nation, as the confederacy of the states . . . . The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the States," which continued in force until the present constitution of the United States went into full operation, on the 30th day of April, 1789, when president Washington was sworn into office. Id.

n98 See Saxer, supra note 87, at 606.

n99 The term "composite state" is used here as a modern synonym for compound state.

n100 See Montesquieu, supra note 88 at 131 ("It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic. This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations . . . .").

n101 See Saxer, supra note 87, at 603 (noting that not all confederations are perpetual). Unfortunately, Saxer does not provide authority in the form of confederation agreements or historical experience to support his position that confederated states have a right of secession unlike federated states.

n102 See Bouvier, supra note 97.

n103 See Saxer, supra note 87, at 606. While the author agrees with Saxer that a confederated state is an international legal person and a federated state is not, Saxer does not present proper authority to support his position.

n104 See The Federalist No. 9 at 52 (Alexander Hamilton) (William S. Hein & Co., Inc. ed., 2002) ("The definition of a CONFEDERATE REPUBLIC seems simply to be 'an assemblage of societies,' or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere
matters of discretion. So long as the separate organization of the members be not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy.

n105 Compare U.S. Articles of Confederation pmbl. ("To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting. Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.") with U.S. Const. pmbl. ("We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

n106 United States Holds Title to Property Cynthia Hahn, International Law-State Succession-The United States Holds Title to Property Recovered from a Sunken Confederate Vessel, Suffolk Transnat'l L. Rev. 266, 269 (1994).

n107 But see Mathieu Deflem, Bureaucratization and Social Control: Historical Foundations of International Police Cooperation, 34 Law & Soc'y Rev. 739, 749 (2000) (erroneously characterizing the North German confederation as a federal state). Possibly this confusion arose from a translation of the term Bund as "federation." In the opinion of the author, the German Confederation was a mere alliance whereas the North German Confederation was a confederate state.

n108 Hunt, 20 S.C.L. at 190 ("The essential character of a Confederacy is that the States remain sovereign . . . ").

n109 See id. ("[T]he test of that sovereignty would be, to enquire whether if one State should think proper to withdraw from the confederacy, all citizens and constituted authorities within its territorial limits would be legally bound to obey and sustain that act, or would owe a higher obedience to some other power. If such higher obedience would be due elsewhere, the State (improperly so called) would be in no degree sovereign; it would be but a department of a larger consolidated State. If the State would be thus entitled, in the last resort, to command the obedience of its citizens and constituted authorities, it is a perfect sovereign according to the view I have taken of sovereignty.").

n110 See 2 Jean-Jacques Burlamaqui, The Principles of Politic Law, at pt. II, ch. I, XLIII-XLV (Nugent trans., University Press 5th ed. 1807) (1748), available at http://www.constitution.org/burla/burla 2201.htm (last visited Aug. 11, 2006) ("As to the compound governments, formed by the perpetual confederacy of several states, it is to be observed, that this is the only method, by which several small governments, too weak to maintain themselves separately against their enemies, are enabled to preserve their liberties. These confederate states engage to each other only to exercise, with common consent, certain parts of the sovereignty, especially those, which relate to their mutual defence against foreign enemies. But each of the confederates retains an entire liberty of exercising, as it thinks proper, those parts of the sovereignty, which are not mentioned in the treaty of union, as parts, that ought to be exercised in common. Lastly it is absolutely necessary, in confederate states, to ascertain a time and place for assembling, when occasion requires, and to invest some member with a power of convening the assembly for extraordinary affairs, and such as will not admit of delay. Or they may establish a perpetual assembly, composed of the deputies of each state, for dispatching common affairs . . . ").
according to the orders of their superiors.

n111 See, e.g., Bundesverfassungsgericht [BVerfG 2d Sen.] [Fed. Constitutional Ct., 2d Chamber] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.), translated in 1 C.M.L.R. 57, 89 (1994) (Brunner v. European Union Treaty). Staatenverbund (literally a “union of states”) is a neologism coined to express the sui generis character of the Union. Reimer von Borries & Malte Hauschild, Implementing the Subsidiarity Principle, 5 Colum. J. Eur. L. 369, 370 (1999). In fact, the German Constitutional Court's decision makes clear that (1) the Union does have sovereign powers and (2) that the Union is more than a confederacy but less than a federation. Brunner, 1 C.M.L.R. at 90-91. The author would suggest a “sovereign association of states” as the best translation, though that ignores the fact that the EU is constituted not only by the Member States but also by the people's of Europe; See generally Case 26/62, NV Algemene Transp. v. Neth. Inland Revenue Admin., 1963 E.C.R. 1,1963 C.M.L.R. 105.

n112 Borries & Hauschild, supra note 111, at 370 (“T[he European Union is neither a federal state nor a mere confederacy but rather a construction sui generis somewhere between the two.”). The EU is more than a mere alliance (“simple confederacy”), but less than a federated state-it is, de facto, a confederated state (“compound confederacy”), a type of compound state. Both federations and confederated states are composite states composed of sovereign states.

n113 Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 Cal. L. Rev. 1, 56 (2005); Ariel Meyerstein, Comment, Retuning the Harmonization of EU Asylum Law: Exploring the Need for an EU Asylum Appellate Court, 93 Cal. L. Rev. 1509, 1526 (2005).


n115 Dahm, supra note 124 at 127.


n119 Jan Miller, Carl Schmitt and the Constitution of Europe, 21 Cardozo L. Rev. 1777, 1789 n.54 (2000).

n120 Id.
n121 Contra Weir, supra note 39, at 415-16 ("Although it has diplomatic representation and power to conclude treaties, the European Union is not quite a state.").