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## Review Essay: Martin Van Creveld,\* *The Rise and Decline of the State* (Cambridge: Cambridge University Press, 1999)

Thomas D. Grant

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(Cambridge: Cambridge University Press, 1999)**

**Cover Page Footnote**

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REVIEW ESSAY: MARTIN VAN CREVELD,\* *THE RISE AND DECLINE OF THE STATE* (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 1999)

THOMAS D. GRANT\*\*

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I. THE RISE OF THE STATE

Martin Van Creveld is a military historian whose past works have established him as an authority, especially in the technical aspects of his field.<sup>1</sup> His latest contribution, then, is something of a departure. *The Rise and Decline of the State*<sup>2</sup> (Cambridge University Press, 1999) tackles issues of the widest implication, tracing as it does the history of human social and political organization from its earliest instances through the present and analyzing in conclusion where current trends might lead. The investigation, though focusing on Western Europe since the late Middle Ages, spans thousands of years, covers the globe, and implicates multiple subjects, including cartography,<sup>3</sup> religion,<sup>4</sup> economics,<sup>5</sup> monetary policy,<sup>6</sup> sociology,<sup>7</sup>

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1. Van Creveld's previous works include: *HITLER'S STRATEGY 1940-1941: THE BALKAN CLUE* (1973); *MILITARY LESSONS OF THE YOM KIPPUR WAR; HISTORICAL PERSPECTIVES* (1975); *SUPPLYING WAR; LOGISTICS FROM WALLENSTEIN TO PATTON* (1977); *FIGHTING POWER: GERMAN AND US ARMY PERFORMANCE, 1939-1945* (1982); *COMMAND IN WAR* (1985); *TECHNOLOGY AND WAR: FROM 2000 BC TO THE PRESENT* (1989); *THE TRAINING OF OFFICERS: FROM MILITARY PROFESSIONALISM TO IRRELEVANCE* (1990); *ON FUTURE WAR* (1991); *THE TRANSFORMATION OF WAR* (1991); *NUCLEAR PROLIFERATION AND THE FUTURE OF CONFLICT* (1993); *AIR POWER AND MANEUVER WARFARE* (1994); *THE SWORD AND THE OLIVE: A CRITICAL HISTORY OF THE ISRAELI DEFENSE* (1998).

2. MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* (1999).

3. See *id.* 55, 143-45.

4. See *id.* at 95-96

anthropology,<sup>8</sup> political theory,<sup>9</sup> cultural history,<sup>10</sup> military history,<sup>11</sup> the history of technology and science,<sup>12</sup> and law.<sup>13</sup>

Van Creveld's book is structured both chronologically and thematically. It traces over time how a number of factors impeding development of the state ceased to operate with meaningful force and how, conversely, factors contributing to that development came into their own. The basic exposition, backed by wide-ranging and rich detail, is thus: That the state, by the World Wars, might have seemed to those under its jurisdiction a timeless feature of human organization; but, in fact, the state was rooted in time (and to an extent place) and its transitory character is now becoming visible as the conditions for its flourishing disappear. In the opening fifty-eight pages, Van Creveld covers social forms that were not States and organizes these into a number of subjects, including "tribes without rulers,"<sup>14</sup> "tribes with rulers" or "chiefdoms,"<sup>15</sup> "city-states,"<sup>16</sup> and empires.<sup>17</sup> To the classical Greek cities, the author attributes the development, so critical to future forms of government, and particularly to the states, of a distinction between public and private property and public and private life.<sup>18</sup> But the formation of states, in their full sense, had to wait much longer. The fall of Rome and the ensuing fragmentation of Europe prepared the environment for the state. Europe was divided among numerous rulers of varying rank, viewing lands and persons under their jurisdiction as private possessions, interconnected to one another through a jumble of ties of fealty. The Holy Roman Empire claimed political authority over the old Roman Imperium but was in fact very weak. Its position was complicated by the non-coincidence of claimed political and claimed religious authority. Van Creveld suggests that in other places where feudalism prevailed there existed some political entity that combined both secular and religious claims and this, in Japan, India, and

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5. See *id.* at 55, 356.

6. See *id.* at 224-242.

7. See *id.* at 140.

8. See *id.* at 2-10, 12-13.

9. See *id.* at 170-184.

10. See *id.* at 108, 122-124.

11. See *id.*, at 337-354.

12. See *id.* at 250-53, 378-79, 379-80, 390.

13. See *id.* at 160-63, 349-50.

14. *Id.* at 2-10.

15. *Id.* at 10-20.

16. *Id.* at 20-35.

17. See *id.* at 35-52.

18. See *id.* at 23-25.

elsewhere, inhibited formation of states.<sup>19</sup> In Europe, the Holy Roman Empire and Papacy made competing claims for universal rule. Local rulers played one against the other and hindered centralizing projects. The local rulers' positions were thus enhanced *vis à vis* the two organizations seeking universal power, and an essential groundwork was set for the formation of states.

Van Creveld addresses, in turn, how in processes, overlapping in time and covering much of Europe, local rulers overcame the Church,<sup>20</sup> the Empire,<sup>21</sup> the nobility,<sup>22</sup> and the towns.<sup>23</sup> The towns were a particularly important competitor against the nascent States of Europe. As corporate bodies, the towns contained in their organization the element of abstraction that Van Creveld several times emphasizes as essential to the European State. Moreover, the persistence or eclipse of towns proved a litmus test for the success of states. Italian towns remained vital and, according to Van Creveld, their position hindered formation of a unified state on the peninsula.<sup>24</sup> By contrast, the prince of Prussia managed to subordinate his towns and country alike to centralizing objectives, and Prussia would develop into one of the most effective states of all. Yet, Van Creveld writes, even with these four impediments to the state removed—Church, Empire, nobility, and towns—the state had not yet acquired its most singular trait: status as an abstract persona independent of its ruler and seemingly unlimited in duration.<sup>25</sup>

If the period from the Middle Ages through the Thirty Years' War witnessed in the social, economic, and political environment changes that made the state a possibility, then it was, according to Van Creveld, the period from the Peace of Westphalia in 1648 to the French Revolution in 1789 in which that possibility was realized.<sup>26</sup> Van Creveld identifies during the latter period four components to the formation of the state. Exigencies of administration and war-making led to the creation of bureaucracies that in time emancipated themselves from royal control and from civil society.<sup>27</sup> Technical

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19. *See id.* at 50-51.

20. *See id.* at 62-75.

21. *See id.* at 75-87.

22. *See id.* at 87-104.

23. *See id.* at 114-117.

24. *See id.* at 108.

25. *See id.* at 109-110.

26. *See id.* at 86-102.

27. *See id.* at 128-143. This seems closely related to the proposition that "wars make the state, and states make war." *See, e.g.,* CHARLES TILLY, *THE FORMATION OF NATIONAL STATES IN*

controls, especially involving the gathering and analysis of information about the land, people, and their resources, allowed government to tighten its hold on society and to extract resources from it through taxation.<sup>28</sup> Thus enriched, government could afford to assemble armed formations to monopolize violence at home and to exclude external actors from infringing on its' claimed jurisdiction.<sup>29</sup> Political theory evolved in tandem with these developments and supported them.<sup>30</sup>

## II. LEGAL DEVELOPMENTS ASSOCIATED WITH THE STATE

Kelsen's view that the state is in essence a system of law,<sup>31</sup> the former necessarily had profound effects on the latter. Van Creveld identifies as central in the rise of the state the consolidation of the states as the exclusive jurisdiction.<sup>32</sup> Judicial processes independent of the state were one by one eradicated or reduced to comparative

WESTERN EUROPE COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1990 (1990); and Charles Tilly, Reflections on the History of European State-Making, in CHARLES TILLY, THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE, 3-83 (Charles Tilly ed. 1975).

28. See Van Creveld, *supra* note 2 at 143-155.

29. See *id.* at 155-170. Van Creveld does well in drawing attention to the role that state monopoly on violence plays in vindicating the state's claim to exclusive jurisdiction, as against external claimants. This involved, during the formation of states in Europe, severing of bonds that had once linked the political communities of Europe. See *id.* at 187. It has been noted that a characteristic of the state is that it claims to possess borders of a quality hermetic against outside influences. John Keegan, like Van Creveld a military historian, describes the French colonial empire in North America as one having been based not so much on control of territory as on exclusion of non-French traders. See JOHN KEEGAN, WARPATHS: TRAVELS OF A MILITARY HISTORIAN IN NORTH AMERICA 95-99 (1995). International lawyers have made observations consonant with this. Baty wrote of a form of self-containment being an essential attribute of statehood, calling it "the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world." THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 13 (1930). According to Henkin, statehood involves "privacy" or "impermeability." LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10-12 (1995). And Kelsen wrote of "impenetrability" in connection with statehood: "The principle that the national legal order has exclusive validity for a certain territory, the territory of the State in the narrower sense, and that within this territory all individuals are subjected only and exclusively to this national legal order or to the coercive power of this State, is usually expressed by saying that only one State can exist on the same territory, or—borrowing from physics—that the State is 'impenetrable.'" HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 212 (Anders Wedberg trans., 1949)

30. See Van Creveld, *supra* note 2 at 170-184. Van Creveld throughout shows a welcome sensitivity to the ways in which ideas at times can be reactions to developments outside the world of thought but at other times influences on that world.

31. Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 69-70 (1941-42).

32. See Van Creveld, *supra* note 2 at 66.

insignificance. So-called benefit of clergy, under which church officers had been immune from the jurisdiction of secular authorities, came to an end, if not all at once.<sup>33</sup> The rise of a state-centered jurisdictional monopoly also took place *vis-a-vis* the Empire. Numerous secular and ecclesiastical lords in the German lands had enjoyed the right of direct appeal to the Holy Roman Emperor; the Golden Bull of 1356 ended that right (and also transferred various resources and rights, including certain rights to tax, to local rulers).<sup>34</sup> As a once highly variegated map of jurisdiction was smoothed out into a uniform contour, organs incorporated by and maintained as part of the state acquired a monopoly on adjudication within the state territory.

Throughout the exposition, Van Creveld is attentive to a number of themes. The politics of bureaucracy<sup>35</sup> figures prominently in the analysis.<sup>36</sup> So too, unsurprising in a work by a military historian, does military technology and the organization of armed forces.<sup>37</sup> Van Creveld's attention to legal institutions, including those of public international law, is noteworthy, and he makes a number of interesting observations in that field.

Warfare, according to Van Creveld, was made a professional activity and impersonal by the state, and this in turn led to changes in legal thought about warfare.<sup>38</sup> The establishment of the wounded as a legally protected category of person is attributed to this general development by Van Creveld.

[T]he move toward regular forces during the last years of the seventeenth century gave rise to the idea that the troops on both sides were not criminals fighting for some nefarious ends but simply men doing their duty to their respective sovereigns, or states. Once such men had become incapacitated, there was no sense in punishing them further. . . .<sup>39</sup>

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33. *See id.*

34. *See id.* at 78-79.

35. Bureaucratic politics is a model for studying international relations and perhaps to a lesser extent general, domestic affairs. Works containing typical applications of the model include G.T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971) and G.J. Clifford, "Bureaucratic Politics," in M.J. HOGAN & T.G. PATTERSON EDs., *EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS* (1991).

36. *See* Van Creveld, *supra* note 2 at 128-143.

37. *See id.* at 155-170.

38. *See id.* at 160-170.

39. *Id.* at 161-62.

The abstraction so central in Van Creveld's view of the state also led to the immunity of government figures (especially the head of state). Perhaps of concern to the greatest number of persons potentially implicated in armed hostilities, it led for the first time to formal requirements for the protection of non-combatants. Military uniforms were adopted in this connection—not to distinguish members of one army from those of another but to distinguish combatants from non-combatants.<sup>40</sup> The increased specialization of military activity (to which Van Creveld attributes the development of modern legal rules governing certain aspects of warfare) also involved the isolation of members of the armed forces from society at large, and thus promoted the establishment of systems of military justice separate from the civilian judiciary.<sup>41</sup>

The other legal development that Van Creveld argues was connected to the state was the prohibition against acquisition of territory by force. The state, as an abstract and enduring entity—and, moreover, one which since the late eighteenth century became a channel for nationalist sentiments—was not as likely as an individual monarch or council of elders to 'forget' about or abandon a claim to territory. The close nexus between territory and state, and the close identification of its citizens with the state, made the state's territorial parameters far less flexible than those of the early modern kingdoms or earlier empires. Citizens of the French state, in the most characteristic example of the phenomenon, turned a territorial claim after 1871 into something like a holy cause. Severance of Alsace-Lorraine from France by Germany was to be felt by every citizen as a derogation of the self, and the claim to rectify the harm would not lapse through simple change of government personnel or passage of time. The state, coupled with the dynamic of nationalism, made changes in title to territory very difficult, and no state would readily permit such changes without consent.

Moreover, the state, marshaling economic resources behind military activity as no social organization had ever before been capable, deterred attempts to take its territory by force. As the era of the state went on, any state contemplating acquisition of territory by force would have to overcome fierce resistance from the state of the territory of which it aimed to acquire. The advent of nuclear weapons (which itself Van Creveld identifies as something

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40. See *id.* at 163.

41. See *id.* at 161-64.



intimately associated with the organizational and material resources of the state)<sup>42</sup> perfected territorial status. The world wars illustrated that using force to effectuate changes in title to territory was in many cases more costly than any return likely to be extracted from the territory annexed, and atomic weaponry made the calculus even less favorable. Any state with nuclear weapons and adequate delivery systems could destroy its opponent's home territory, wherever that might be, and the force necessary to defeat a nuclear-armed country would substantially reduce, if not eliminate entirely, the economic value of the territory of that country.<sup>43</sup> Summarizing the record for the United Nations era, Van Creveld writes:

[I]t could be argued that the attempt to prevent states from enjoying the fruits of aggression in the form of territorial aggrandizement has been remarkably successful. The last time international war led to the annexation of territory on any scale was in 1945 when the USSR took over lands belonging to Poland (which itself annexed German lands), Germany, Czechoslovakia, and Japan; since then, though, international borders have become all but frozen. Remarkable as it seems, neither the Korean War, nor the three India-Pakistani wars, nor the India-Chinese war, nor any of the Arab-Israeli wars, ended with important pieces of territory being ceded by one side to another; indeed the great majority did not lead to any territorial changes at all. At most, a country was partitioned and a new international border created. This, for example, was what took place in Yugoslavia between 1991 and 1995. This, too, was what happened in Palestine in 1948-9 when Israel, having been established by means of a United Nations Resolution, occupied somewhat more territory than had been allocated to it by the Partition Plan. At that time King Abdullah of Jordan, who may have been acting in concert with Israel, used the opportunity to take over some 2,000 square miles known as the West Bank. However, in the whole world the only two countries

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42. *See id.* at 346.

43. *See id.* at 349-354.

to recognize the annexation were Britain and Pakistan; and in any case it has since been formally annulled.<sup>44</sup>

And following this change in practice, the rules (or at least the terminology) in international law changed. "All but gone," Van Creveld writes,

are a whole series of terms, such as 'subjugation' and 'the right of conquest,' which even as late as 1950 or so formed a normal part of legal discourse in a work on international law written by such a highly civilized authority as His Britannic Majesty's Government's official adviser. Of the two, the former has acquired an archaic, not to say outlandish, ring. The latter is regarded almost as a contradiction in terms; given that might, as exercised by one sovereign state against another, by definition can no longer create right.<sup>45</sup>

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44. *Id.* at 351-52. International lawyers may well wish to clarify one or two points here. For example, the fate of the former Yugoslavia was perhaps, generally speaking, "partition," but a more precise characterization is that the federal organs at the heart of the Socialist Federal Republic of Yugoslavia (SFRY) ceased to function in 1991 and, consequently, Yugoslavia dissolved. The situation in Yugoslavia is therefore to be distinguished from that in India—the case most evoked by the term 'partition.' In India, part of the former British Raj separated to form Pakistan (East and West). The international legal personality of the once-unified entity, India, continued—as represented by the government of India at New Delhi. The Federal Republic of Yugoslavia—constituted by the 'remaining' Yugoslav republics of Serbia and Montenegro—was not recognized as a continuation of the SFRY, despite its claims to be such. See Arbitration Commission on Yugoslavia, Opinion No. 1 of 29 November 1991, 92 ILR 162-163 (stating that Yugoslavia was "in the process of dissolution."); Arbitration Commission on Yugoslavia, Opinion 8 of 4 July 1992 (concluding that the process of dissolution was complete). For analysis of the Arbitration Commission and its opinions, see Matthew C.R. Craven, "The European Communities' Arbitration Commission on Yugoslavia," 66 BYIL 333 (1995); Alain Pellet, "L'Activité de la Commission d'Arbitrage de la Conférence Européenne pour la Paix en Yougoslavie," 38 AfDI 220 (1992) (Pellet is said to have drafted the Badinter Commission Opinions, with the exception of those relying on *uti posseditis juris*—the principle of inviolability of borders); THOMAS D. GRANT, RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 159-66 (1999). The partition of India may be likened more aptly to (and the term 'partition' perhaps more aptly applied to) the establishment of new states in the space of the former Soviet Union in 1991-92. Russia—much the largest segment of the former Union—was recognized as the legal continuation of the USSR, and the other republics (with the possible exception of the three Baltic Republics) 'broke away' to become new states. In the analogy, Russia took the role of India, the other republics of Pakistan. See M. Bothe, "Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie," 96 RGdIP 811 (1992); Rein Mullerson, "The Continuity and Succession of States, By Reference to the Former USSR and Yugoslavia," 42 ICLQ 473 (1993); Blum, "Russia Takes Over the Soviet Union's Seat at the United Nations," 3 EJIL 354 (1992).

45. Van Creveld, *supra* note 2 at 352 (citing HERSCH LAUTERAPFCHT, INTERNATIONAL LAW: A TREATISE (1947).

## III. DEFINING 'STATE'

Van Creveld examines other matters of interest to international lawyers. A particularly useful exploration is that into the definition of the state. Defining statehood, as noted elsewhere, has been a troubled exercise,<sup>46</sup> and recent practice in the area has not simplified matters. For international lawyers, the Montevideo Convention of 1933<sup>47</sup> for a time served as a semi-authoritative source on the definition of "state," but deficiencies in the definition put forward in the Convention have rendered it less useful than the frequency of writers' references to it imply.<sup>48</sup> The Convention furnishes a quadripartite definition of 'state,' including, *inter alia*, (1) a territory; (2) inhabited by a permanent population (3) owing habitual obedience to a government enjoying effective control over the territory; (4) which government is capable of engaging in international relations.<sup>49</sup> In brief, however, this definition is at once over-inclusive and under-inclusive. The element of effectiveness, from the standpoint of international law, is not absolute, a number of states having endured displacement from the territories to which they claim title (*e.g.*, France and Poland in World War II and Kuwait in 1990). Nor are the purported criteria of territory or population absolute or precise, there being, for example, no minimum requirements as to size of territory or number of inhabitants and the exact location of boundaries and identity of citizens need not be static or even clearly ascertained at a given moment. The definition proposed by the Montevideo Convention is under-inclusive, particularly in that it fails to account for developments that some have grouped generally under the rubric of international "legitimacy." Putting aside whether the term legitimacy is the appropriate one, there has arisen in the last forty years of state practice an expectation that a community claiming to constitute a state meet certain minimal requirements in its international relations and in the way it governs itself. Rhodesia failed to meet the

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46. See, *e.g.*, JORRI C. DUURSMAN, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD, n. 5 at 112-13 (1996) (noting the International Law Commission political obstacles to formulating a definition of 'state'); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 21, 35 (1979).

47. Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19, 28 AM. J. INT'L L. (Supp.) 75 (1934) (reprinting text of Montevideo Convention).

48. See Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. OF TRANSNAT'L LAW 403, 414-16 (1999).

49. See *id.* at 414. See also Conventions on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19, 28 AM. J. INT'L L. (Supp.) 75 (1934) (reprinting text of Montevideo Convention).

expectation, basing itself as it did on the systematic deprivation of political rights to the majority of its inhabitants. Rhodesia was not recognized as a state. The Turkish Republic of Northern Cyprus (TRNC), declared as such in 1984, came into being through a chain of events beginning in July 1974 and connected with use of force by Turkey. The use of force has been widely, if not universally,<sup>50</sup> characterized as illegal, and changes in the disposition of territory effectuated by illegal force are certainly not to be recognized.<sup>51</sup> No state recognizes the TRNC as a state. Conditions attached to the recognition of new states in the space of the former Socialist Federal Republic of Yugoslavia included accession to international arms control treaties and promulgation of constitutional texts guaranteeing the rights of minorities. It has come widely to be accepted that a new state must conform to certain standards of international conduct and domestic governance and not come into existence in contravention of those standards. The traditional definition of the state furnished by the Montevideo Convention does not reflect this development. New input toward defining 'state' is therefore needed and welcome.

Van Creveld comes to the question of the definition of the state from the perspective of a military historian, rather than that of a lawyer. Nevertheless, Van Creveld's analysis should interest people in diverse disciplines who are interested in the state and its future. "The state," the author writes,

being separate from both its members and its rulers, is a corporation, just as universities, trade unions, and churches *inter alia* are. Much like any corporation, it too has directors, employees, and shareholders. Above all, it is a corporation in the sense that it possesses a legal *persona* of its own, which means that it has rights and duties and may engage in various

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50. Arguing that Turkey acted in accordance with the 1960 Treaty of Guarantee constituting the Republic of Cyprus and providing for international intervention in event of breakdown of the Republic. See ZAIM M. NECAGIGIL, *THE CYPRUS QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW* (1993). See also Christopher Greenwood & A. Vaughn Lowe, *Unrecognized States and the European Court*, 54 *CAMBRIDGE L.J.* 4 (1995). For a judicial result consistent with the majority view (*i.e.*, that use of force by Turkey in Cyprus in 1974 was illegal), see *R. v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others*, 100 *ILR* 257 (Court of Justice of the European Communities 1994).

51. See U.N. CHARTER, art. 2, para. 4. Whether a change in the disposition of territory may be recognized when effectuated by a *legal* use of force is a more controversial question. It is at the heart of claims by the State of Israel to the West Bank and Golan Heights.

activities *as if* it were a real, flesh-and-blood, living individual. The points where the state differs from other corporations are, first, the fact that it authorizes them all but is itself authorized (recognized) solely by others of its kind; secondly, that certain functions (known collectively as the attributes of sovereignty) are reserved for it alone; and, thirdly, that it exercises those functions over a certain territory inside which its jurisdiction is both exclusive and all-embracing.<sup>52</sup>

Van Creveld notes that the conceptualization of state territory came late in the day, due to technological hurdles having prevented governments from mapping what was theirs until the eighteenth century.<sup>53</sup> However, once the art of cartography permitted the state to define its geographic limits with some precision, states recruited the art to an accelerating process of consolidation, which was also to involve the gathering of all manner of statistics about who and what lay within its boundaries.<sup>54</sup> Van Creveld reflects that “[p]erhaps the most important characteristic of the modern state is its territoriality.”<sup>55</sup> The nexus of the state to territory, however, is one of the traditional criteria of statehood under international law that has been made relative by twentieth century practice. As noted above, states have survived deprivation of all the territory they claimed. Van Creveld’s proposition may nonetheless be accurate in one respect: it is a necessary characteristic of the state that it at least *claims* title to a certain territory. There is indeed no minimum amount required—and the claim need not be vindicated in fact. A state may exist without territory, as did France and other occupied countries during World War II, but there does not appear to be on record any entity recognized as a state that made no claim to legal title over a part of the earth’s surface. In at least this sense, the nexus between state and territory may be indispensable.

The proposition that a state is distinguished by the absoluteness and completeness of its claims of right over its territory is central to Van Creveld. In addition to arguing, as in the quotation above, that the jurisdiction of the state is “both exclusive and all-embracing,”<sup>56</sup> Van Creveld explains that the goal of the state was “creation of the

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52. Van Creveld, *supra* note 2 at 1.

53. *See id.* at 143-155.

54. *See id.*

55. *Id.* at 133.

56. *Id.* at 1.

instruments that would enable the state to do away with various intermediaries and squeeze its citizens as never before" and that "[t]o make good on its pretensions the state had to increase the instruments of violence at its disposal until there was nobody left capable of talking back."<sup>57</sup> Discussing technology, Van Creveld writes that the state came "to impose its power over every square mile of territory and every individual in the population."<sup>58</sup> Totality, to Van Creveld, forms an essential attribute of the state. Yet it is not altogether clear that every instance of what in practice states have called 'states' has exercised total control in the unqualified fashion Van Creveld describes. Some entities widely or universally called states have not been "total" in their geographic reach or in their claims on their subjects. The tolerance within the Russian state for zones largely or partly outside state guidance, for example, through both the tsarist and Soviet eras may have been quite substantial—even relegating the state in certain areas to an essentially "negative" sovereignty.<sup>59</sup> Conversely, entities have existed that, over their members, have made quite sweeping claims yet have not been regarded widely as states. Certain fundamentalist religious organizations provide salient examples. Van Creveld himself notes that many entities claiming to be (and recognized as) states have not been particularly successful in extending their hold in the complete manner that elsewhere he identifies as an essential attribute of

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57. *Id.* at 154-55.

58. *Id.* at 377.

59. By 'negative sovereignty,' I mean the aspect of the power of a state preventing interference by other states in a territory—but not the aspect of the power of a state involving positive administrative acts or exercises of jurisdiction. See, *supra*, note 28 (discussing Keegan and Baty). A partial illustration of negative sovereignty may be afforded by a *Treaty of Submission of the Cossacks to the Emperor of Russia*, signed at Periaslawl, 6 January 1654 (ratified by Russia, 17 February 1654). By that instrument, the Cossacks were exempted from Russian jurisdiction as far as taxation and religion were concerned. The Tsar even undertook to subsidize six thousand Cossack horsemen. However, the Cossacks, for their part, pledged neither to send nor to receive ambassadors. They pledged further to enter into no communications with their neighbor, the Khan of the Crimea, and the Cossack Hetman, though elected locally, would be invested by the Tsar. Russia, thus, did not exercise state authority over the Cossacks in the classic sense of a full panoply of administrative and jurisdictional activities but, rather, prevented their territory from being acquired by any third party. *Treaty of Submission* reprinted at 3 CTS 189 (1653-1655). The limits of central power in the Russian empire were also noted in Soviet times. See Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 130-31 (1999) (quoting Victor Spolnikov, *Impact of Afghanistan's War on the Former Soviet Republics of Central Asia*, in CENTRAL ASIA: ITS STRATEGIC IMPORTANCE AND FUTURE PROSPECTS 95, 109 (1994) (former KGB major general specializing in Islamic affairs reporting that "[i]n 1980 Yuri Andropov, then the chief of the KGB, told me that Soviet power in many mountainous regions of the Caucasus did not exist at all.").

statehood.<sup>60</sup> The author deals with this inconsistency by distinguishing between a 'formal' notion of statehood and what might be termed a functional one—"Formally," Van Creveld writes, "all [states] are equal; in practice the differences among them are enormous and many, indeed, never have been greater."<sup>61</sup> In public international law, however, the formal equality of states is an assumption carrying some weight. One may wonder whether totality is as central to common understandings of the state as Van Creveld suggests. It may be that Van Creveld comes closer to the mark when he identifies its abstract legal personality as a necessary attribute of the state—indeed, by his reckoning, the most important attribute of the state.<sup>62</sup>

It is in this aspect of statehood that Van Creveld identifies a force impelling the state's decline. The corporate form so central to the state is also the prevailing form taken by private enterprise. Van Creveld writes,

In the main, the threat to the state does not come either from individuals or from groups of the kind which exercised the functions of government in various communities at various times and places before 1648. Instead it comes from other corporations: in other words, from such 'artificial men' as share its own nature but differ from it both in respect to their control over territory and in regard to the exercise of sovereignty.<sup>63</sup>

Many corporations, Van Creveld notes, are "much richer than most states."<sup>64</sup> Being free from the expectation that they will take care of a particular territory and its inhabitants, corporations enjoy greater flexibility than states in the deployment of their resources. And many individuals, especially in the most economically developed states, view the goods and services furnished by private enterprise as preferable to those furnished by states.<sup>65</sup> Even one of the characteristic functions of the state—military activity and the provision of forces for internal order—may be going over to private

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60. See Van Creveld, *supra* note 2, at 329–335, 264–329.

61. *Id.* at 332–33.

62. See *id.* at 416.

63. *Id.*

64. *Id.* at 417.

65. See *id.* at 415–21.

hands.<sup>66</sup> The view from international law again, however, raises some questions. Any given corporation continues to exist as a function of the law of a particular state. A so-called multi-national corporation may appear from the standpoint of its enterprise operations to exist across borders, and it would indeed be formalistic to deny that such a corporation is in some important sense a transnational creature. However, corporations are legal fictions, and even the most highly integrated and cosmopolitan multi-national corporation is for many important purposes only to be conceived of as an aggregation of entities, each incorporated under the laws of a single state. There is no international body that incorporates business organizations.<sup>67</sup> If authority to incorporate business organizations did vest in an international organization, then a situation might arise in which the corporation became a more powerful competitor against the state—though the extent to which international organizations have remained agencies of their member states might well yet mitigate against such hypothetical enterprise structures gaining the upper hand in a contest between state and ‘true’ international corporation. A similar mitigating factor exists in connection with the view that certain modes of alternative dispute resolution herald the decline of the state. Van Creveld, identifying the rise of a uniform judicial system as a key feature in the rise of the state, identifies the rise of new adjudicatory methods not institutionally part of a state as a signal of the decline of the state. Alternative dispute settlement mechanisms, termed by Van Creveld “rent a judge,”<sup>68</sup> include international commercial arbitration. Yet international commercial arbitration owes its satisfactory operation, at least in some part, to the willingness of states, as formalized through treaty,<sup>69</sup> to give effect to arbitral agreements and awards. The continued rooting of human activities on state territory and in state legal structures is in fact one of the countervailing considerations against the ‘decline-of-the-state’ thesis as espoused by Van Creveld and others.

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66. See *id.* at 419.

67. Writers have proposed that the United Nations should establish an international registration system for corporations and that, under this system, corporations be conceived of as international legal persons. The idea has not found adherents among any critical mass of policy-makers. IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 22-23 (1987).

68. VAN CREVELD, *supra* note 2, at 417.

69. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517. See also *Scherk v. Alberto Culver*, 417 U.S. 506 (1974), (United States Supreme Court giving effect to an international arbitration agreement).



## IV. COUNTERVAILING FACTORS

The thesis of the 'decline of the state' may be assessed through an approach that mirrors Van Creveld's in describing how the state got its start. Van Creveld narrates the rise of the state by showing how a general environment arose that was conducive to states and then how, with that environment in form, specific events and the outcome of several contests led to states. Carrying the analysis forward, one might just as well ask today whether factors exist which may make the contemporary environment of global politics, society, and economics conducive to the preservation of the state. To do so sets at least part of the groundwork for a counter-thesis.

A number of features of world order in the early twenty-first century may serve as counterpoises against the forces disfavoring the state. First, a set of new (or renewed) threats may induce continued reliance on states. Second, certain factors produce inertia that may preserve states. Finally, the intellectual environment, though ever-evolving and perhaps less conducive to the 'state worship' that Van Creveld identifies as an underpinning of the state at its high-water mark, nonetheless may continue to support some of the conceptions necessary to the state.

Broadly, one might class the threats facing international society as human or social on the one hand and natural or environmental on the other.<sup>70</sup> Environmental crises such as soil degradation, desertification, rising sea levels, and ozone depletion have attained high profiles in public awareness, at least in the economically developed democracies. Disease, especially disease arising from bacteria seemingly put in abeyance in the mid-twentieth century but now evolved into antibiotic resistant strains, might be added to the litany of environmental crises. International initiatives that may seem to by-pass the state notwithstanding, most if not all environmental initiatives having substantial impact have been state-initiated and state-enforced. Consider the establishment of protected lands, fossil fuel emissions standards, and rules on disposal of hazardous waste. Where environmental and health problems have been addressed through international organizations, it must again be recalled that those organizations remain very much tools of the states constituting them. Not only have environmental initiatives, where successful, stemmed from states, but it remains at best a matter of

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70. This is not to ignore that some environmental problems may well arise in connection with human activities and that some human or social crises may well arise in connection with environmental problems.

speculation whether policies, even in the states containing the strongest environmental movements (e.g., the United States, Germany, other West European countries) would admit much extra-state regulation of such matters. A constellation of amorphous political and social threats forms a further set of problems that require organized response. Criminality, terrorism, and mass migration may not be sponsored by states yet may pose threats to world order as serious as those posed in the twentieth century by state-sponsored aggression. Like environmental problems, these have been addressed by states, either individually or, increasingly, through international organizations created by and managed by states. It may be, as Van Creveld and others who have developed the decline-of-the-state thesis posit, that alternative social and political structures will address such problems as those noted here.<sup>71</sup> The multinational scope of many of the problems may well militate in favor of multinational approaches, but for states to surrender certain limited competences to multinational processes for the purpose of solving discrete problems is a far cry from the decline of the state.

It may seem apposite to compare the emerging situation as similar to that in the middle ages, when nascent states (or the feudal jurisdictions that later became nascent states) competed with two organizations making claims to universal power, the Papacy and the Holy Roman Empire. Analogies that compare present international society to Europe in the age when the Empire, Papacy, and nascent states were in competition however may miss crucial differences. The Papacy and Empire did not exist at the sufferance of 'member states.' They were not governed by constitutions framed by 'member states.' Though in part reliant on lesser political organizations for funds, they were not wholly without territorial bases susceptible to material exploitation (consider the Papal States and the household lands of the Holy Roman Emperors). They were, in contrast with the United Nations and other modern international organizations, autonomous and antedated the nascent states with which they competed for primacy. Relating to their constitutional independence, the two great medieval powers in Europe possessed theories of legitimacy substantially independent of the communities they claimed to govern—another aspect of their situation not exactly congruous with that of modern international organizations. It is too early to say that states will not prove the primary innovators in the

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71. See Van Creveld, *supra* note 2, at 417-418.

problem-solving that lies ahead and in turn use the leverage they gain as problem-solvers to preserve themselves.

Van Creveld discusses at some length how the advent of states in Europe impelled societies elsewhere either to bow to those states and become colonies or protectorates—or to adopt the state form and undergo the radical social and political re-organization that such adoption entailed. So successful were the European states in channeling resources into expansionary projects that non-European societies were left with little choice.<sup>72</sup> Much as a new industrial technology might so improve upon a manufacturing process that enterprises without the technology must either adopt it or fail, the state was such an effective social-political technology that societies without states had either to form states or be rendered tributary to societies with states. States, in this view, proliferated in response to states. Though he recognizes the role of this dynamic in impelling societies as diverse as Russia, Persia, Korea, and Japan to organize themselves into states, Van Creveld does not entertain the possibility that the persistence of states outside Europe and North America may impel those societies in which the state originated to maintain states. If the effectiveness of the state in its place of origin forced others to adopt its form, could not there occur a backwash? From those quarters of the globe to which Europe 'exported' the state, pressures may well emanate today similar to those which, in the nineteenth and twentieth centuries, emanated from Europe. It may be, unlike Europe in the past, that states such as Iran, China, and North Korea today offer no values that any substantial part of the world wishes to acquire. However, much like Europe in the past, those societies which maintain strong states and earn or force allegiance to the state from their people may pose a threat to other societies. In face of that threat, those other societies may well find, as did societies outside Europe in the last century, that the state is a technology indispensable to survival.

Even if impetus were lost for the maintenance of states, it is not altogether clear that states would decline. Societies seem to favor forms with near-stereotypic stability. Patterns of conduct arising for a particular reason may well continue even after the reason for them has faded. Once their reason fades, it may not take a great deal of impetus to displace those patterns—but they seldom if ever give way only for want of a good rationale for continuation. Something must overcome the inertia of established patterns of conduct for those

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72. See, VAN CREVELD, *supra* note 2, at 263-332.

patterns to be displaced. At the very least, it would seem, public discourse conducive to ending the state must be in train. Proponents of the decline-of-the-state thesis draw attention to welfare reform, reduction of military expenditures, and decline in the percentage of gross domestic product committed to state projects. However, political leaders in the west have not yet adopted a rhetoric that goes beyond incremental reductions in public spending—and much of the rhetoric that they have adopted is quite closely linked to the assumption that the state can and will remain a vital institution; budget reductions most often are advocated as a means to keep the state viable, not as a first step toward ending the state. One of the most radical reductions of the state was arguably that undertaken by a Conservative government in the United Kingdom in the 1980s. Though the British government divested itself of holdings in various heavy industries, a core of social programs was kept intact, if somewhat reduced. More importantly, governments following that of Thatcher were unable to maintain the degree or tenor of anti-state rhetoric characteristic of Thatcher. The British polity simply did not display tolerance for such rhetoric on a long-term basis. If political leaders cannot for any extended duration discuss ending the state, it will indeed be difficult to overcome the inertia favoring the state.

And what of that inertia? Certainly its weight and sources must be considered before arriving at conclusions about the durability of the state. The constituencies that benefit from states form a considerable source of inertia. In particular among these are direct participants in state-related activities—elected officials, those who owe their employment to the patronage of elected officials, personnel of state bureaucracies, and owners and employees of industries deriving substantial parts of their profits from state contracts. Not only do such participants benefit from the continuation of the state, it may be that many of them flourish in a state-centered system to an extent that they could little hope to match in a society organized any other way. Put differently, the station that those participants realize through association with the state may be much higher than that that they would be likely to realize in other domains of activity. Alexis de Tocqueville was not the last to note that politicians in the United States were not, in the main, persons who had thrived (or could have thrived) in private enterprise.<sup>73</sup> It is not realistic to predict that a person (or class of people) enjoying high status will readily trade that

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73. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1966)(proposing that 'America's best' gravitated toward enterprise).

status for an uncertain, and possibly lower, status. Yet predicting that the persons who most benefit from the state will readily see away the state is to predict just that. The personnel of the state and their associates, broadly construed, generate a considerable inertia. Some measure of it may be gained by considering the slowness of stable systems to institute even incremental reforms that may alter the way in which officials are elected to and serve in public office. Opposition to campaign finance reform in the United States is but one case in point.<sup>74</sup>

Finally, the decline-of-the-state thesis involves changes in outlook, positing that the intellectual environment has shifted decisively against the state. The internet and world wide web are often discussed together as instrumental in contributing to the decline of the state (or accelerating a decline itself eventuated in the first instance by other factors), yet a central element in Van Creveld's understanding of the state, on reflection, could just as readily be strengthened as eroded by the internet and world wide web. As noted above, a central element in Van Creveld's understanding of the state is that the state differed from most or all previous forms of social and political organization in its abstraction.<sup>75</sup> To be sure, old-fashioned kingship rested on references (if often oblique during the Christian era) to the divine,<sup>76</sup> and few if any forms of political chieftency have been devoid of abstract symbolism, whether trophies, scepters, walking canes, or bodily adornments.<sup>77</sup> Van Creveld rightly characterizes the state, however, as relying upon a degree of abstraction so much greater than anything that came before that in this respect it must be seen as a transformative development. The state, Van Creveld explains, divorced the idea of supreme authority over society from any person or group of persons. The state, rather than being a single mortal being, was a corporate entity, impersonal and enduring. Van Creveld does not appear primarily concerned with how certain phenomena arose, focusing instead on describing the phenomena and their effects on those exposed to them. Yet at least one question about statehood begs explanation: how was it in the seventeenth century and later that European

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74. See Kevin Deeley, *Campaign Finance Reform*, 36 HARV. J. ON LEGIS. 547, 559 (1999) (noting "legislative entrenchment problems endemic to campaign finance reform"); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (positing that "every reform effort to constrain political actors produces a corresponding series of reactions by those with power to hold onto it.")

75. See VAN CREVELD, *supra* note 2, at 1.

76. See *id.* at 123-24.

77. See *id.* at 7, 15, 17.

society came to accept the notion that an abstract, corporate personality should receive allegiance, expressed in word, lucre, and life? In this connection, I wonder whether an exploration of the rise of the limited liability corporation and joint stock companies might have been illuminating. It would appear that these phenomena were roughly contemporaneous with the development of the state. Perhaps something like the following took place in Western Europe in tandem with other developments promoting the establishment of the first states: Western Europeans encountered corporate abstractions through commerce and trade with increased frequency; they accepted them as useful to their personal transactions and enterprises; they became accustomed to them; and, in turn, it became easier and easier to conceive of government in terms of such abstractions. A process of conditioning, located in the realm of private economic activity, thus eventually transformed public organization. Western Europeans were conditioned by the commercial success of the corporate form to accept the abstraction at root beneath that form, and the state, difficult to conceive for persons unaccustomed to such abstraction, became conceivable. Yet, even at the high-water mark of the state in the nineteenth and twentieth centuries, relatively few Western Europeans encountered the corporate form in such an involved way as a state bureaucrat or man of commerce. The point is, the groundwork for conceiving of an abstract governing entity was, demographically, quite narrow.

Today, however, in the economically most developed societies, the social sector is enormous and deals quite frequently, even daily, with matters of very high abstraction. The internet and world wide web, which are encountered regularly by over a quarter of the population in the United States, are very unlike the physical and finite things that were the main stuff of life in societies before the state. The modern internet user is indeed awash in abstraction. Another characteristic of contemporary life, related to the internet in as yet not exactly understood ways, is the growth in ownership by individuals of equity in publicly traded corporations. It has been reported that in the late 1990s, the amount of personal wealth represented by share holdings has exceeded the amount of wealth represented by the ownership of real property. There are now tens of millions of people in America and Western Europe who deal with the corporate abstraction in a most direct way. Rise in personal wealth has been identified as conditioning people to not want to sacrifice for the state as in the two world wars, and the rise of the internet has been identified as conditioning people to think of

themselves as parts of communities dispersed geographically and not rooted to any one state territory. Yet these developments enmesh more people than ever before in the type of abstraction that Van Creveld says is the very core concept of the state.<sup>78</sup> If how people think about things contributed at all to the susceptibility of Western Europe to the rise of the state, it may be that some of the changes in contemporary life so often argued to militate *against* the state in fact, by strengthening its conceptual core, are strengthening the state itself.

Insofar as the matters discussed above imply a counter-thesis, it is not only to Van Creveld but to much of the contemporary literature on the state and its alleged decline. The thesis that the state has neared its end and is soon to be supplanted or subordinated to new institutions may well come to be seen as the signal political science thesis of the immediate post-Cold War period. Van Creveld's *Rise and Decline of the State* belongs to a major trend in contemporary thought on international and municipal social organization, and any assessment of the ideas there can scarcely avoid addressing by implication other works in what may be characterized as a genre.<sup>79</sup> Van Creveld, perhaps more than most writers on the future of the state, has put flesh on the bones of the now-familiar decline-of-the-state thesis. Albeit not without averting every peril of an eclectic approach, Van Creveld draws valuable insights by synthesizing areas of learning diverse in the geographic, temporal, and substantive dimensions. All manner of policy makers may discover food for thought in this new contribution to the unfolding debate, which at its heart is about no smaller question than how human society is to organize—and to think about—itsself in the years ahead.

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78. See Van Creveld, *supra* note 2. The increase in and dispersal of wealth also gives rise to a larger class of persons with something that requires protection—and with the means to fund that protection. Historians have identified the upper middle classes as central to state formation. The number of persons with personal wealth requisite to characterize them as upper middle class is far higher than ever before.

79. For examples of the genre, consider SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996); JAMES N. ROSENAU, *ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD* 341-63 (1997). Distinguished international law writers, however, doubt the decline-of-the-state thesis in its strong form. Ian Brownlie, for example, expressed skepticism toward the view that the era of states has come to an end. "Seeking signs of the 'rebirth of statehood,'" Brownlie wrote, "is more than a little premature: there is no evidence that the State has died. It is an intellectual fashion to preach the end of the State and to attack sovereignty. But such iconoclasm has had no impact on the real world." Ian Brownlie, *Rebirth of Statehood*, in *ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE* 5 (1996).

