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Functional Statehood in Contemporary International Law

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INTRODUCTION

Functional state-like entities are contributing to the shift of international legal personality from an objective to a subjective, functional regime. There are numerous situations where there are entities that, for one reason or another, cannot or will not be considered states. However, the international community needs to engage with those same entities in various functional ways for pragmatic reasons. For the lack of a distinct legal status for these territorial, quasi-states, the international community can only apply the status of statehood. Yet at the same time, the entity cannot truly be considered a state. As a result, the entity is treated as if it were a state on a case-by-case, functional and relative basis, while the international community continues to refuse it formal statehood. The difficulty with this pragmatic approach is that this treatment exposes relativity in perceptions of statehood and may bring the objective statehood regime into doubt. This practice in turn suggests that subjective statehood is increasingly the norm and that objective statehood is not, or is no longer, correct. This article will survey various ways that quasi-states are being treated as if they were states and identify emerging norms on functional statehood.

The scholarly consensus is that statehood is an objective international legal personality. Hersch Lauterpacht,[1] James Brierly,[2] and James Crawford[3] assert that, if an entity is a state, then it enjoys personality in its relations with any other international legal person, notwithstanding recognition or other relations. When an entity enjoys the status of statehood, it does so objectively and for all purposes; thus, a state's status is not subject to fragmentation in different legal regimes.[4] These au-

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1. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 34, 67 (1947).

2. *See* JAMES L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 138 (Humphrey Waldock ed., 6th ed. 1963).

3. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 21-22 (2d ed. 2007).

4. *See generally* Int'l Law Comm'n, Rep. of the Study Group of the International Law Commission on the Work of Its Fifty-Eighth Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 183–84, U.N. Doc. A/CN.4/L.682 (Apr. 13,

thors go so far as to argue that it is "grotesque"[5], "seems a violation of common sense"[6] and might violate legal certainty[7] to think otherwise.

On the other hand, Kelsen submitted that statehood was necessarily relative.[8] This conclusion is based on his view of the legal nature of statehood and recognition as a legal interpretation of facts.[9] Although his views are tolerated in the scholarship, the consensus shows they do not generally prevail. Even so, actual state practice seems to be more tolerant of subjective statehood than the scholarship on the matter would suggest.

As an example of the critical importance of this evolving practice, relative statehood is brought into sharp focus by the *Situation in Palestine* and the steps being taken by the Prosecutor of the International Criminal Court to investigate international crimes committed by Israeli and Palestinian individuals. On December 20, 2019, the Office of the Prosecutor filed a request pursuant to a ruling from the Pre-Trial Chamber on the Court's territorial jurisdiction in Palestine.[10] The primary issue in the request is whether Palestine may be treated as if it were a state.[11] Among other conclusions, this article will argue that it is possible for Palestine to be considered a state under the Rome Statute and yet also not a state under different treaty regimes or before other international organizations.

This article will begin to construct the evolving legal rules on quasi-state functional practice and, in so doing, consider whether the continuing existence of de facto states and regimes

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2006) ("These rules and principles include at least those concerning statehood . . . To press upon a perhaps self-evident point, there is no special 'WTO rule' on statehood"). *See also* Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J Reps. 42, para. 50 (July 20) (concerning the relativity of the local remedies rule).

5. *See* LAUTERPACHT, *supra* note 1, at 67, 78.

6. CRAWFORD, *supra* note 3, at 22.

7. *Id.* at 21.

8. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 609 (1941) ("[T]he legal existence of a state . . . has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.").

9. *See id.*

10. *See generally* Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, Case No. ICC-01/18 (Dec. 20, 2019), https://www.un.org/unispal/wpcontent/uploads/2020/01/ICCANNEX_201219.pdf.

11. *Id.*

forces us to shift our perspective to contemplate an increasingly subjective, relative nature of statehood itself.[12] This article does not contemplate situations where a quasi-state might be recognized as a state against its will.[13] The cases in this study focus on quasi-states that have sought treatment as a state, at least for certain purposes. This article will also only consider statehood insofar as it is a legal phenomenon. It is certainly much more. In order to act within the legal sphere and enter into legal relationships, however, a territorial entity needs to be a state *in law*. Thus, this article will limit itself to the question of the legal personality of quasi-state entities and its relation to objective statehood.

I. INTERNATIONAL LEGAL PERSONALITY

International legal personality is a fluid concept. The classic position is that an entity is an international legal person when it has the capacity to conclude international agreements, conduct diplomatic relations, and bring international claims.[14] In the *Reparations* advisory opinion, the International Court of Justice (ICJ) demanded only two of these capacities: capability of possessing rights and duties under international law and capacity to maintain those rights by bringing international claims[15] In essence, these aspects can be reduced to the capacity for international rights.[16]

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12. This analysis is excluding Kofi Annan's submissions on the relatively of sovereignty. *See generally* U.N. SECRETARY GENERAL, WE THE PEOPLES: THE ROLE OF THE UNITED NATIONS IN THE 21ST CENTURY, U.N. Sales No. E. 00.I.16 (2000).

13. For a discussion on recognizing an entity as a state against its will, *see* D. P. O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 AM. J. INT'L L. 405, 415 (1956).

14. *See* Christian Domince, *La personnalite juridique dans le systeme du droit des gens*, *in* J. MAKARCZYK, ED., THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 147–71 (1996); *See also* David Feldman, *International Personality*, RECUEIL DES COURS 358–59 (1985); P.K. Menon, *The Subjects of Modern International Law*, HAGUE Y.B. INT'L L. 30, 84 (1990); CHRISTIAN N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 19 (1974).

15. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J 174, 187–88 (Apr. 11) [hereinafter Reparations Advisory Opinion] (concluding that the UN has the capacity to make a claim against a non-Member State on behalf of an injured agent).

16. *See* 1 HERSCH LAUTERPACHT, *General Rules of the Law of Peace*, *in* INTERNATIONAL LAW: COLLECTED PAPERS 286–87 (E. Lauterpacht, ed. 1970);

The problem with this view is that it is difficult to speak of capacity without a person already existing in whom the capacity is vested. In *Reparations*, the ICJ first considered whether the United Nations (UN) was an international legal person prior to analyzing the rights it might have on the international plane.[17] This approach assumes that personality must first be held to exist and that it brings rights and duties with it. Strangely, the ICJ then considered whether the UN had certain rights and duties that necessitated personality, suggesting that personality was a consequence of rights and duties.[18]

The better view is that the ICJ looked to the UN's rights and duties as evidence of the intention to grant the entity personality. In this view, the award of rights and duties inherently brings with it an award of personality. Given the analysis above that personality is an aspect of rights and duties, enjoyment of state-like rights and duties should mean enjoyment of statehood for functional purposes. It is quite difficult to maintain that where an entity acts as if it were a state, that it is not a state,[19] albeit a state that might be limited to the functions it can undertake.

The question is then how to recognize which entities exercise the right functions to have international legal personality, and which rules of international law bind them. Following the ICJ's reasoning in the *WHO/Egypt* advisory opinion, it would normally be understood that customary international law should bind even some non-state actors[20] if the actors have the appli-

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See also Myres s. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, *in* MYRES S. MCDOUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 3, 25 (1960). Some authorities also demand some sort of acknowledgment of the person, *see, e.g.,* ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY 176 (1999).

17. Reparations Advisory Opinion, *supra* note 15, at 184.

18. *See id.* at 179.

19. Graeme Wood, *Limbo World*, FOR. POL'Y (Dec. 18, 2009) http://www.foreignpolicy.com/articles/2010/01/04/limbo_world ("These quasi-states . . . control their own territory and operate at least semifunctional governments, yet lack meaningful recognition . . . They start by acting like real countries, and then hope to become them.").

20. *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 463, at 73, 89–90, 92–93 (Dec. 20); *See also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 65–68 (2006); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 9, 135 (1999).

cable capacity. When it comes to states, however, it is not controversial that they have that capacity and are bound by international law. The difficulty is when the entity is being treated as if it was as state, though it is not universally acknowledged to be a state.

A. Ex Injuria Non Jus Oritur

Subjective statehood cannot be discussed within the context of the international legal system without also addressing one of the principal reasons why de jure statehood is frequently refused: *ex injuria non jus oritur*, the principle that a legal right cannot arise from an unlawful act.[21] The reasons why an entity might not mature on the international plane are varied. Some decisions are clearly political, and there is a well-entrenched political resistance to new states already,[22] but other refusals are necessitated by the obligations of non-interference in domestic affairs or *ex injuria.* When a state claims territory, or its personality on the international plane, as a result of the unlawful use of force or other violation of international law, especially jus cogens norms such as self-determination and apartheid,[23]

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21. *See, e.g.,* Patel v. Mirza [2016] UKSC 42 (appeal taken from Eng.).

22. Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RES. 747, 760 (2006) ("the community of recognized states has . . . been closed at both ends. While no members are thrown out, the entrance gate has been strictly guarded and new applicants are routinely turned away."); *See also* DE FACTO STATES: THE QUEST FOR SOVEREIGNTY (Tozun Bahcheli, Barry Bartmann & Henry Srebrink, eds., 2004) ("recognition is stubbornly withheld even though the realities on the ground themselves expose the legal fictions which the international community supports in the defence of the principle of territorial integrity"); Secretary-General's Press Conferences in Dakar, Senegal, 7 U.N. MONTHLY CHRON. 34, 36 (1970) ("As far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State."); Rep. of the Security-General, at ¶ 17, U.N. Doc A/47/277 - S/24111 (1992) ("if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.").

23. *See* E. Timor Case (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. ¶ 29 (June 30); *See also* Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory*,* Advisory Opinion, 2004 I.C.J. 232 (July 9) (separate opinion by Kooijmans, J.); JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE 42 (2013).

other states have an obligation not to recognize the new state or situation.[24] This conclusion is obligatory because under the principle of *ex injuria jus non oritur* the entity's claim cannot exist in law.[25] This conclusion is usually operationalized as a UN decision,[26] though such a decision is not required since it

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24. Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 38 (July 9) (separate opinion by Higgins, J.); *See also* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 55–56 (June 21) [hereinafter Namibia Advisory Opinion]; E. Timor Case (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. at 103–04 (June 30); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, arts. 40, 41, U.N. Doc. A/56/10 (2001); *See also* LAUTERPACHT, *supra* note 1, at 421; ROBERT R. LANGER, SEIZURE OF TERRITORY: STIMSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE 58 (1947); Enrico Milano, *The Non-recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question,* QUESTIONS OF INT'L L. 35 (2014).; Martin Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 683 (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett, eds., 2010); Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, *in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 104, 99–126 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006);]; Werner Meng, *Stimson Doctrine*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 690 (R. Bernhardt, ed. 1982).

25. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 132–37 (separate opinion by Cançado Trindade, J.); *See also* Gabčikovo-Nagymaros Proj. (Hung v. Slovak.), Judgment, 1997 I.C.J.ICJ Reps. 7, 54, 78 (Sept. 25); Namibia Advisory Opinion, *supra* note 24, at 54–56; LAUTERPACHT, *supra* note 1, at 421. For *ex turpi causa non oritur actio*, *see* Mil. and Paramil. Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 394, ¶ 270 (June 27) (dissenting opinion of Schwebel); US Dipl. & Cons. Staff in Tehran (US v. Iran), Judgment, 1980 I.C.J. Reps. 53–55, 62–63 (May 24) (dissenting opinion of Morozov & Tarazi); Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70 (June 28); *Id.* at Ser. C, No. 81, para. 240; Legal Status of E. Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 95 (Apr. 5) (dissenting opinion of Anzilotti); Factory at Chorzów (Germ. v. Pol.) 1927 P.C.I.J. (ser. A) No. 9, at 31 (July 26); *See also* Mavrommatis Jerusalem Concessions (Gr. v. UK), 1925 P.C.I.J. (ser. A) No. 5 at 50 (Mar. 26)*; see generally* William Thomas Worster, *The Effect of Leaked Information on International Legal Norms*, 28 (2) AM. UNIV. INT'L L. REV. 443 (2013).

26. *See, e.g.,* G.A. Res. 68/262, ¶ 6 (Mar. 27, 2014); *See also* G.A. Res. 3314 (XXIX), ¶ 6, Ann. Art. 6 (Dec.14, 1974) (giving content to the meaning of an

derives not from the UN Charter but from general international law.[27] The representative examples of *ex injuria* are the Turkish Republic of Northern Cyprus (TRNC), regarding the unlawful use of force,[28] and the apartheid "Bantustans," regarding the principle of self-determination.[29] In both cases, one is left with a de facto entity that may be operating effectively as a state with nationals and a coherent legal system, yet is excluded by law from the international legal system. Still, *ex injuria* is not itself a *jus cogens* rule and exceptions exist.[30] In some situations, unlawful acts do not, alone, preclude the enjoyment of legal rights or the imposition of other legal conclusions. For example, there is a long accepted distinction between *jus ad bellum*[31] and *jus in bello*,[32] that the lawfulness of the use of force should not have an effect on the application of international humanitarian law,[33] notwithstanding the obvious ten-

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act of aggression as established in the UN Charter); G.A. Res. 2734 (XXV), ¶ 6 (Dec.16, 1970); G.A. Res. 2625 (XXV) (Oct. 24, 1970).

27. *See generally* G.A. Res. 68/262, *supra* note 26; G.A. Res. 3314 (XXIX), *supra* note 26; G.A. Res. 2734 (XXV), *supra* note 26; G.A. Res. 2625 (XXV) *supra* note 26.

28. Anne Peters, *Statehood After 1989:* 'Effectivités' *Between Legality and Virtuality*, *in* SELECT PROCEEDINGS OF THE EUR. SOC'Y OF INT'L L. 171, 175 (James Crawford & Sarah Nouwen eds., 2010). The TRNC was created as a result of the unlawful, unilateral use of force by Turkey to intervene in Cyprus and assist in its secession, upon whom it remains dependent. *Id.*

29. *See, e.g.,* S.C. Res 217, ¶ 3 (Nov. 20, 1965) ("no legal validity" for Southern Rhodesian declaration of independence). The Bantustans were separate "homelands" that were set up by South Africa within its territory and excluded from the South African state as a part of the *apartheid* policy of stripping citizenship on a racial basis, though they remained dependent on South Africa. *See generally* Anthony A. D'Amato, *The Bantustan Proposals for South-West Africa*, 4(2) J. MOD. AFR. STUD. 177 (1966).

30. *See infra* Sec. III.B.3.

31. *See* U.N. Charter, arts. 42, 51, ¶ 1 (providing for prohibitions on the commencement of military operations against another state). *See generally* Saul Mendlovitz & Merav Datan, Judge Weeramantry's Grotian Quest, 7 TRANSNAT'L L. & CONTEMP. PROBS. 425 (1997).

32. *See* St Petersburg Declaration, November 29, (1868), *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff, eds., 2000) (providing for limitations on the type of military means and methods used in armed conflict); *See generally* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 77.

33. *See* MALCOLM SHAW, INTERNATIONAL LAW 807–08 (4th ed., 1997); Enzo Canizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT'L REV. RED CROSS 779, 791 (2006); Christopher

sion.[34] In addition, even if the use of use of force is unlawful, international law may still recognize the legal effects of the acts, *i.e.* the existence of a state of armed conflict.[35] Similarly, the destruction of Palmyra by the Islamic State of Iraq and the Levant (ISIL or ISIS) during that armed conflict was an unlawful act,[36] yet its effect in fact and law cannot be refused—it is still destroyed after all. However, when it comes to statehood, as a legal status, it is accepted that *ex injuria* can block recognition of legal personality.

There are drawbacks for failing to treat an entity as a state. Refusing to recognize personality frees the entity to some degree from responsibility for compliance with international law,[37] even though that entity acts in ways comparable to statehood.[38] *Ex injuria* in this situation ironically works partly in the favor of the entity by permitting it to enjoy de facto statehood (in the sense of local governance, control and the monopoly on the use of violence) without any of the obligations of international law. States need to engage with a variety of actors all over the world, ranging from non-governmental or-

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Greenwood, *The Relationship between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUDIES 221, 227 (1983).

34. *See Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly,* I Y.B. Int'l L. Comm'n 281, ¶ 18 (1949), U.N. Doc. A/CN.4/SR.1("It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that although the term 'laws of war' ought to be discarded, a study of the rules governing use of armed force – legitimate or illegitimate – might be useful . . . It was considered that if the Commission . . . were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace").

35. *See* Jasmine Moussa, *Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law*, 90 INT'L REV. RED CROSS 963, 963 (2008).

36. Kareem Shaheen, *Palmyra: destruction of ancient temple is a war crime, says Unesco chief*, GUARDIAN (Aug. 24, 2015) https://www.theguardian.com/world/2015/aug/24/palmyra-destruction-ancient-temple-baal-shamin-war-crime-un-isis ("The chief of the UN's cultural agency on Monday described Islamic State's destruction of a Roman temple in the ancient Syrian city of Palmyra as a 'war crime.'").

37. *See* Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, 10 Y.B. INT'L HUMANITARIAN L. 45, 63 (2007).

38. *See generally* YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW (2011).

ganizations (NGOs) to corporations, from billionaire philanthropists to secessionist groups, and cannot ignore many contested territorial entities even if they may not normally be considered states. Historically, there was a very low threshold for recognition as a state, potentially being implied from almost any engagement with a territorial-based entity,[39] so that states could more easily identify other entities as such and engage with them. Now, however, receiving recognition is an almost impossible task.[40] States therefore need to engage with de facto entities, yet at the same time play the delicate subtle act of denying statehood. Furthermore, there is a need to maintain the effectiveness of international law, globalization and cooperation, protect the individuals within the de facto states, or provide a means for independence though excluded from the international statehood regime.[41] All of these needs necessitate a

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39. *See* U.S. Dep't of State, Office of the Legal Adviser, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 260 (CarrieLyn Guymon, ed., 2013) (noting that recognition may be implied as "when a [recognizing] state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, [and] forms with it conventional relations."); *See also* David Gray Adler, *The President's Recognition Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 133 (David Gray Adler & Larry N. George, eds., 1996) ("At international law, the act of receiving an ambassador of a foreign government entails certain legal consequences. The reception of an ambassador constitutes a formal recognition of the sovereignty of the state or government represented."); 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW §§ 27, 73 (1906). However, in contemporary practice, conclusion of a treaty with the relevant entity can be done without de jure recognition. *See, generally.,* James Ker-Lindsey, *Engagement without Recognition: The Limits of Diplomatic Interaction with Contested States*, 91 INT'L AFF. 1 (2015); *see also* Linjun Wu, *Limitations and Prospects of Taiwan's Informal Diplomacy*, *in* THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS 35, 38–39 (Jean-Marie Henckaerts ed., 1996).

40. *See, e.g.,* Kolstø, *supra* note 22; DE FACTO STATES: THE QUEST FOR SOVEREIGNTY, *supra* note 22.

41. *See* CRAWFORD, *supra* note 3, at 44 ("Not being a State is to be denied independent access to those forums that States – themselves or through international organizations – still control."). *See also* LASSA OPPENHEIM, INTERNATIONAL LAW 100 (Hersch Lauterpacht, ed., 8th ed., 1955) (observing that an unrecognized state is considerably constrained in its ability to act internationally); Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131 (2005); Lung-chu Chen, *The U.S.-Taiwan-China Relationship and the Evolution of Taiwan Statehood*, OPINIO JURIS (May 16, 2016), http://opiniojuris.org/2016/05/16/the-u-s-taiwan-china-relationship-and-the-evolution-of-taiwan-statehood/ (last visited Nov. 25,

practical solution to quasi-statehood, even while refusing de jure statehood.

Thus, states find themselves in an awkward situation with an awkward solution: to extend some of the obligations of international law to the questionable entity and treat it as if it were a state for purposes of certain obligations, but not as if it were a state for other purposes. Treating an entity as if it were a state for certain purposes is simply a pragmatic solution.[42] Thus, even if *ex injuria* was an absolute principle in theory, the result is not borne out in law or practice. Quasi-states have partly grown out of the need to engage with certain entities, and yet at the same time refuse their personality.

In turn, quasi-states challenge the distinction between entities that *are* states and entities that are treated *as if they were*

2020) ("In the absence of formal diplomatic recognition from most states and without a seat in the United Nations, Taiwan and its 23 million people are isolated in the international community. The solution to this injustice cannot be based only in pure theory or pure politics. The two need to be conjoined in a workable reality."); Kofi A. Annan, *Two Concepts of Sovereignty*, ECONOMIST (Sep. 18, 1999), https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty.

42. *See, e.g.,* A Bill to Direct the Secretary of State to Develop a Strategy to Obtain Observer Status for Taiwan in the International Criminal Police Organization, and for Other Purposes, Publ. L. No. 114-139, 130 Stat. 313 (2016) (arguing in favor of RO China/Taiwan observer status for pragmatic, functional reasons, *i.e.* combatting global crime and effective police cooperation). *See also* An Act to direct the Secretary of State to develop a strategy to obtain observer status for Taiwan at the Triennial International Civil Aviation Organization Assembly, Publ. L. 113-17, 127 Stat. 480 (2013); Taiwan Allies International Protection and Enhancement Initiative (TAIPEI) Act of 2019, Pub. L. 116-135, 134 Stat. 278 (2020); Press Release, UNHCHR, Rupert Colville, Spokesperson, Press briefing notes on Palestine, item 4, U.N. Press Release (May 2, 2014), http://unispal.un.org/UNISPAL.NSF/0/262AC5B8C25B364585257CCF006C010D (last visited Nov. 25, 2020)

> This accession to seven core human rights treaties [ICCPR, ICESCR, etc.] and a key protocol is a significant step towards enhancing the promotion and protection of human rights in Palestine. It is notable in a region with a high number of reservations to human rights treaties, that Palestine is acceding to eight human rights treaties without making a single reservation.

states for functional purposes.[43] This article will discuss below many cases where the lack of statehood in law, for whatever reason, was set aside, albeit partially, for certain functional reasons. This practice does not mean that *ex injuria* is abolished of course, because it does indeed prevent some entities from becoming objective states. Instead, *ex injuria* relegates certain entities to relative, subjective statehood.

II. RELATIVE PERSONALITY OF NON-STATES

Following from the discussion on how personality is understood in international law, the common thread is one of capacity and functionality.[44] International organizations are the most obvious entity based on functional existence, but there are also quasi-international organizations, entities that may be treated as if they were international organizations depending on their function, yet not fully considered international organizations as properly understood.[45] In other works, this author has suggested that whether an entity has international legal personality is based on functional considerations and that the nature of the same entity can vary from situation to situation.[46] A good example are treaty regimes, such as the Arms Trade Treaty, that have a Conference of States Parties and a secretariat, and can engage in many functions that demand personality, yet are explicitly refused personality by the states parties.[47] There are

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43. *See* CRAWFORD, *supra* note 3, at 30 ("No further implications may be drawn from the existence of legal personality: the extent of the powers, rights and responsibilities of any entity is to be determined only by examination of its actual position."); *See generally* Van Essen, *De Facto Regimes*, 28 UTRECHT J. INT'L EUR. L. 31, 31–49 (2012).

44. *See generally* William Thomas Worster, *Territorial Status Triggering a Functional Approach to Statehood*, 8(1) PENN. ST. J.L. & INT'L AFF. 118 (2020); *See also* William Thomas Worster, *Relative International Legal Personality of Non-State Actors*, 42(1) BROOKLYN J. INT'L L. 207 (2017).

45. *See generally* Worster, *Relative International Legal Personality of Non-State Actors*, *supra* note 44, at 240–55, 267–71.

46. *See generally id.*

47. *See generally* William Thomas Worster, *The Arms Trade Treaty Regime in International Institutional Law*, 36 UNIV. PENN. J. INT'L L. 995 (2015); *See also* Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625, 631–43, 655, 658 (2000); *Committee on Accountability of International Organisations*, 68 INT'L L. ASS'N REP. CONF. 584, 587 (1998) (treaty regimes are "incomplete international organizations").

also other collective entities, such as corporations and NGOs, as well as individuals, that similarly enjoy aspects of international legal personality depending on how they are functioning within the international legal order.[48] The author has examined the relative personality of international organizations, peoples, National Liberation Movements (NLMs), indigenous peoples, belligerents, de facto entities, private entities, religious organizations, and the individual.[49] Some of these entities, such as NLMs, indigenous peoples, or insurgents, have some kind of territorial existence and their personality blurs into statehood.[50] The most obvious of these is the collective triumvirate of the Palestine Liberation Organization (PLO), Palestinian Authority (PA) and State of Palestine.[51] In each of these cases, the challenge is to determine whether the entity *is* an international legal person, or whether it is merely treated *as if it were* an international legal person.

III. RELATIVE STATEHOOD

Keeping in mind the numerous examples above where the personality of non-state actors was relative based on the function of the entity concerned, the analysis now turns to the particular personality of statehood. This author has also assessed the various types of entities that can claim at least partial and relative treatment as states.[52] That analysis was based on the territorial status of certain entities that triggered a functional appreciation. This article begins to unpack the functionalist treatment.

Insofar as this article compares functionalism for non-states to functionalism for states, it might be considered unfair to compare international organizations and other non-states to states in order to demonstrate relativity. The other entities are, after all, derived legal persons, not original, organic legal persons like states. Original legal persons might arise from the

48. Worster, *Relative International Legal Personality of Non-State Actors*, *supra* note 44, at 240–55, 267–71.

49. *Id.*

50. *Id.* at 221–40.

51. William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 (5) AM. UNIV. INT'L L. REV. 1153, 1160–62 (2011).

52. *See generally* Worster, *Territorial Status Triggering a Functional Approach to Statehood*, *supra* note 44.

historical process as facts yet are still expressions of the ways in which people engage with each other. States are created by people in a search of some sort of collective cohesion. Perhaps it is better to say that states are, in a manner, also derivative persons, receiving their personality from individuals acting collectively. States are treated as if they were persons by their constituent public, even while the public participates in the state.

This author is not alone in taking this approach comparing functional treatment. The examples cited above of NLMs do not comfortably follow the rigid distinction between a non-state and a state actor. NLMs are, in a way, deliberately "incorporated" as non-state entities and yet later bear the authority for exercising self-determination and then government. In addition, Schoiswohl has successfully compared international organizations and de facto regimes, even though, in the view of this author, the latter could be characterized as "organic." In his view, the key is whether the organization or the regime is "assuming and administrating functions which bear the capacity to eventually compromise fundamental rights of individuals."[53] It is remarkable that quasi-states, whose statehood might be relative and for whom a functionally based approach is so controversial, when it has long been accepted that international organizations and NLMs might be relative and functionally based, and both of those entities might also govern territory and people.[54] Even more importantly, practice shows

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53. *See* MICHAEL SCHOISWOHL, STATUS AND (HUMAN RIGHTS) OBLIGATIONS OF NON-RECOGNIZED DE FACTO REGIMES IN INTERNATIONAL LAW: THE CASE OF 'SOMALILAND' 82–88 (2004).

54. *See generally* James E. Hickey, Jr., *The Source of International Legal Personality in the 21st Century*, 2 HOFSTRA L. & POL'Y SYMP. 1, 18 (1997) (documenting the rise of international and regional organizations as legal personalities in the twentieth century, and examining potential bases for the international legal personality of new entities such as "nongovernmental organizations, multinational corporations and to some extent, subnational governments" in the twenty-first century); *Cf.* David Ettinger, Comment, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. 97, 104 (1992) (mentioning that the Olympic Charter has international personality by virtue of its near universal activities, and that the norms embodies in the Olympic Charter rise to the level of customary international law) *with* Romana Sadurska & C.M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845, 845, 856–87 (1990) (describing the creation of the International Tin Council ("ITC") by over twenty tin producing and consuming states, and arguing that the ITC

that many quasi-states are treated as if they were states for certain purposes. They are not treated as if they were international organizations or NLMs; they are treated as if they were territorially based states with the rights and duties accruing to states. Further, practice shows that entities may be treated as states in this way for certain limited, functional purposes without necessarily needing to determine those entities' international legal personality objectively for all purposes.[55] For these reasons, this author is comfortable conducting this analysis of relative statehood as a form of relative personality, with comparison to other non-state actors with relative personality.

The development of case-by-case functional solutions for the needs of the international community, as discussed above, has, however, led to an alternate statehood regime—a subjective regime—that exists alongside the objective regime.[56] The extensive number and lifespan of state-like situations, along with the general position in international law that legal personality is functional, raises the question of whether statehood itself, in

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and its Member States could be held liable by third party creditors in certain circumstances). *See also* William Thomas Worster, *The Contribution to Customary International Law of Territories under International Administration*, *in* INTERNATIONAL ORGANISATIONS, NON-STATE ACTORS AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW (Sufyan Droubi & Jean d'Aspremont, eds., 2020) (discussing how international organizations contribute to customary international law when they are governing an international territorial administration such as UNTAET or UNMIK).

55. *See, e.g.,* Larsen v Hawaiian Kingdom, Hague Ct. Rep. paras. 9.2-9.4 (Perm. Ct. Arb. 2001) (observing that the parties "stipulated the continuing existence of the Hawaiian Kingdom", so that the tribunal found it unnecessary to consider "whether for the purposes of international law the Hawaiian Kingdom may be regarded as continuing to exist", yet the tribunal did not dismiss the case on those grounds); *See also* Gorji-Dinka v Cameroon, Commc'n. No. 1134/2002, U.N. Doc. No. CCPR/C/83/D/1134/2002 (U.N. Hum. Rts. Comm. 2005) (observing that the author claimed to be the Fon, or traditional ruler, of Widikum in Cameroon and the head of the exile government of "Ambazonia" which was unlawfully annexed by Cameroon in violation of the right to self-determination and only finding the claim inadmissible as exceeding the competence granted on the Committee by the optional protocol, not because such a claimed state had no right to self-determination).

56. *See, e.g.,* DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 98 (7th ed., 2010) (describing the status of Belarus and Ukraine as original members of the UN as "international persons sui generis"). *See also* MALCOLM SHAW, INTERNATIONAL LAW 196 (6th ed. 2008) ("[p]ersonality is a relative phenomenon varying with the circumstances"); Kelsen, *supra* note 8, at 609.

all cases, can also be subjective and functional. Perhaps there are no objective entities after all. What this article finds is that personality—indeed, statehood—may no longer be absolute and objective, but varying and fluctuating.[57] This article will not take up this tempting discussion in its entirety but will only focus on the subjective statehood of certain entities and their co-existence with objective statehood. If the thesis of this article can be sustained, though, a non-objective theory of statehood is potentially the next step.

There are two principal ways in which quasi-states may have relative statehood: (1) through subjective relationships or (2) through relative functions. Further, these two considerations can overlap.

A. Subjective Relationships

The first possibility is that a quasi-state only enjoys personality vis-à-vis another international actor, such as when another state recognizes and engages with the quasi-state on the international plane. This discussion appears to apply the constitutive theory, the theory that states only exist when they are recognized as states,[58] but that is only partly the case. This article will largely avoid a lengthy analysis of the classic constitu-

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57. *See* CRAWFORD, *supra* note 3, at 324; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8 (1995); Pierre-Marie Dupuy, *L'unité de l'Ordre Juridique International* [The Unity of the International Legal Order], 297-I RCADI 108–12 (2002); Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94 AM. J. OF INT'L L. 453, 475 (2000) ("[w]hat should be clear is that simplistic conceptions of the international legal system of the past . . . are not valid today. A non-state entity may have international legal personality with rights and duties under international law."). For an unusual approach, *see* Eiki Berg & Ene Kuusk, *What Makes Sovereignty a Relative Concept? Empirical Approaches to International Society*, 29 POL. GEOGRAPHY 40–49 (2010)

> Sovereignty takes on many forms today . . . the quantification of empirical sovereignty would give us a few ways to compare and contrast the different degrees of internal and external sovereignty and demonstrate the 'differences of being sovereign' among internationally recognised states, *de facto* states, autonomous regions, dependent territories and governments-in-exile.

58. William Thomas Worster, *Law, Politics and the Concept of the State in State Recognition Theory*, 27(1) BOSTON UNIV. INT'L L.J. 115, 118 (2009).

tive/declaratory question, whether statehood is purely based on recognition or not,[59] as this author has already written on this topic, and there is an extensive discussion on this debate in the literature.[60] Suffice it to say that the debate can be largely avoided because of the ways that the two theories often dissolve into each other in practice. Where a state may apply the declaratory theory, there is a need to analyze the Montevideo criteria,[61] and yet, in a decentralized legal system, states might disagree on whether the factual criteria are met, resulting in, effectively, the constitutive theory in application. Many scholars, such as Oppenheim and Crawford, have admitted that there was no consensus on the theoretical basis for state existence[62] and no obligation to recognize the statehood of an entity.[63] If it is accepted that there is no duty to accord international rights and duties in bilateral relationships, it must be contemplated that there will be some bilateral relationships where one actor is not treated as a state in law by the other actor,[64] regardless of the underlying facts. Thus, whether under

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59. *See id. See also* Conf. on Yugoslavia Arb. Comm'n ["Badinter Comm'n"], 31 I.L.M. 1488, 1494, 1521–23, 1525–26 (1992) ("[T]he effects of recognition by other States are purely declaratory.").

60. *See id.*

61. The Montevideo criteria is as follows: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." [Montevideo] Convention on Rights and Duties of States, art.1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

62. *See* CRAWFORD, *supra* note 3, at 37; OPPENHEIM, *supra* note 41, at 109; Aziz Tuffi Saliba, Recognition/Non-Recognition in International Law, 75 Int'l L. Ass'n Rep. Conf. 164, 170–74 (2012); Penelope Simmons, *The Emergence of the Idea of the Individualized State in the International Legal System*, 5 J. HIST. INT'L L. 293, 334–35 (2003); Eric Suy, *New Players in International Relations*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 373–83 (2002).

63. Victor Rodríguez Cedaño (Special Rapporteur on the Unilateral Acts of States), *Sixth Rep. on Unilateral Acts of States*, ¶¶ 39–40, U.N. Doc. A/CN.4/534 (May 30, 2003) (emphasizing that "Acts of recognition are … discretionary … [which] means … that there is no obligation to perform such an act …"); *see also* Conf. on Yugoslavia Arb. Comm'n, *supra* note 60, at 1525–26.

64. *See, e.g.,* Saikō Saibansho [Sup. Ct.] Dec. 8, 2011, Hei 21 (Ju) No. 602, 603, 65 Saikō Saibansho Minji Hanreishū [Minshū] 3275, paras, (I)(2)(6)-(7), (II)(2)(Japan) (finding that, for purposes of the Berne Convention, the non-recognition of North Korea as a state meant that Japan did not have to treat North Korea as a state party to the treaty, but arguing that this conclusion

the declaratory or the constitutive theory, there will inevitably be a situation where some entities are not universally regarded as states. The "grotesque spectacle"[65] of inconsistent, subjective statehood is unavoidable and in fact the normal functioning of the decentralized international legal system. Perhaps it is not so grotesque after all. It is the existence of this spectacle, and its legal implications, that this article wishes to address.

Because of this naturally occurring inconsistency in some entities' statehood, where a state has recognized an entity as a state (or quasi-state), regardless of which theory is being applied, the recognizing state should continue to treat the recognized state as a state, notwithstanding the interpretation of the situation by other states. Russian relations with Abkhazia serve as a contemporary example.[66] Although the recognition of

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would not be possible where the obligation assumed was one of "general international law"); *see also* Nat'l City Bank v. Rep. of China, 348 U.S. 356, 359 (1955); Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938); Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918); US Sec'y St. John Kerry, Remarks (Apr. 19, 2013), *reprinted at* US DEP'T OF STATE, OFC. LEGAL ADV.; DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 256 (CarrieLyn D. Guymon ed., 2013) (regarding the Serbia-Kosovo agreement); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §94(1) (AM. L. INST. 1965) (recognition is where "a state commits itself to *treat an entity as a state* or to treat a regime as the government of a state") (this author's emphasis); 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 27, at 72 (1906).

65. *See* LAUTERPACHT, *supra* note 1, at 67, 78.

66. *See, e.g.,* Treaty of Friendship, Cooperation and Mutual Assistance, Abkhazia-Russ., art. 1, Sept. 17, 2008, http://abkhasia.kavkaz-uzel.ru/articles/152365&usg=ALkJrhgzMrZNLX4ZUuqT7xhYODMii4bjNQ ("The Contracting Parties shall build their relations as friendly states, consistent with the principles of mutual respect for sovereignty and territorial integrity, the peaceful settlement of disputes and non-use of force or threat of force … and other universally recognized principles and norms of international law.") (translation by author); *see also* Agreement on the Establishment of Informatory-Cultural Centres and the Conditions Governing their Activities, Abkhazia-Russ., Apr. 26, 2011, *reprinted in* Парламент ратифицировал соглашение между правительствами Абхазии и России об оказании помощи РА в социально-экономическом развитии, APSNYPRESS (June 15, 2012) http://apsnypress.info/news/6541.html (translation by author); Agreement on the Trade of Goods, Abkhazia-Russ., May 28, 2012, *reprinted in* Подписано соглашение между правительствами Республики Абхазия и Российской Федерации о режиме торговли товарами, APSNYPRESS (May 29, 2012) http://apsnypress.info/news/6386.html_(translation by author); Agreement on the Procedure of the Pension Schemes for Internal Affairs Officials, Abkhazia-Russ., May 8, 2012, *reprinted in* Два соглашения ратифицировано и одно принято в первом чтении,

this entity might violate the rule of *ex injuria*, and thus could not establish the entity as an objective state for all purposes, that violation does not appear to preclude the Russian-Abkhaz relationship from existing on the international plane.[67] One can compare Switzerland's practice of treating the Global Fund as an international legal person for certain purposes, such as its Headquarters Agreement,[68] though not for others. Switzerland's practice resembles that of Russia-Abkhazia in taking a subjective approach, though the latter is a discussion of states, and, of course, the Global Fund does not implicate *ex injuria.*

The question, then, is how to determine which rights and obligations evidence statehood. Surely where two or more states have entered into a treaty that instrument requires them to accord international rights to an entity, the instrument is gov-

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APSNYPRESS (May 8, 2012) http://apsnypress.info/news/6203.html (translation by author); Cooperation Agreement on Disaster Prevention and Management, Abkhazia-Russ., May 8, 2012, *reprinted in* Два соглашения ратифицировано и одно принято в первом чтении, APSNYPRESS (May 8, 2012) http://apsnypress.info/news/6203.html (translation by author); Cooperation Agreement on the Protection of State Borders, Abkhazia-Russ., Apr. 20, 2009, *reprinted in* Сегодня Россия подпишет соглашения с Абхазией и Южной Осетией об охране границы, CAUCASIAN KNOT (Apr. 30, 2009) http://abkhasia.kavkaz-uzel.ru/articles/153576 (translation by author); Agreement on a Joint Russian Military Base in Abkhazia, Abkhazia-Russ., Feb. 17, 2010, *reprinted in* Абхазия и Россия подпишут соглашение об объединенной военной базе, CAUCASIAN KNOT (Feb. 17, 2000) http://georgia.kavkaz-uzel.ru/articles/165534/ (translation by author). For the similar relationship between Russia and South Ossetia, *see* Treaty of Friendship, Cooperation and Mutual Assistance, Russ-S. Ossetia, art. 1, Sept. 17, 2008, http://abkhasia.kavkaz-uzel.ru/articles/152334&usg=ALkJrhjxmc_q2WRUvfxPW2xvY1au3hH95g ("The Contracting Parties shall build their relations as friendly states, consistent with the principles of mutual respect for sovereignty and territorial integrity, the peaceful settlement of disputes and non-use of force or threat of force … and other universally recognized principles of norms of international law") (translation by author).

67. David M. Herszenhorn, *Pact Tightens Russian Ties with Abkhazia*, N.Y. TIMES, Nov. 24, 2014 http://www.nytimes.com/2014/11/25/world/europe/pact-tightens-russian-ties-with-abkhazia.html.

68. *See generally Agreement Between the Swiss Federal Council and the Global Fund to Fight AIDS, Tuberculosis and Malaria in View of Determining the Legal Status of the Global Fund in Switzerland* (Dec. 13, 2004) Global Fund Doc. GF/B8/7, https://www.theglobalfund.org/media/8551/core_headquarters_agreement_en.pdf?u=637319004239270000 (last visited Nov. 25, 2020).

erned by international law, and the states are bound to perform the treaty. While the Vienna Convention on the Law of Treaties (VCLT) restricts states from entering into treaties that accord international obligations to third states,[69] this rule does not seem to apply when the agreement is constitutive of an international organization.[70] This same rule does not appear to be applied by analogy to agreements constituting states, partly because it is still controversial whether states can be brought into existence in this fashion.[71] Thus in order for obligations to vest in a state-like actor, the entity must consent.[72] By analogy, the same reasoning should apply to binding unilateral statements to treat an entity as it were a state, potentially obliging states to treat an entity as a state when it has been subjectively recognized as such. Further, where a quasi-state acts with some degree of personality, it will be held to the general rules under customary international law, as any international legal person would.

B. Functional Statehood for Certain Issues

1. Relative to Treaty Regimes

Certain treaties are open only to states, and possibly also international organizations,[73] but may permit a functional interpretation of statehood. To provide some context for this conclusion, consider that it is well accepted that sub-entities of a state, such as provinces, may conclude treaties under international law depending on the content of the treaty.[74] Certainly,

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69. Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

70. Reparations Advisory Opinion, *supra* note 15, at 180.

71. *See, e.g.,* Badinter Comm'n, *supra* note 59 (seemingly embracing the declaratory theory).

72. *See* 2 Council of the Eur. Union, Indep. Int'l Fact-Finding Mission on the Conflict in Georgia, *The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, at 239–43 (Sept. 2009) [hereinafter IIFFMCG Report].

73. *See, e.g.,* U.N. Conference on the Law of Treaties between States and International Organizations or between International Organizations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, art. 82, U.N. Doc. A/CONF.129/15 (1986) (not yet entered into force).

74. Saliba, *supra* note 62, at 172; Brad R. Roth, *Secession, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doc-*

the central or federal state authority may conclude a treaty on behalf of one of its subdivisions or members of its federation,[75] but this practice is not mandated by international law and is primarily a domestic constitutional consideration.

There is well-established practice supporting this conclusion that statehood can be relative for a particular treaty regime, dating back many centuries. Historically, the German states have exercised a wide latitude in concluding agreements, both before[76] and after their federation.[77] Another example is the

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trine, 11 MELBOURNE J. INT'L L. 1, 7 (2010); Thomas Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COL. J. TRANSNAT'L L. 403, 434–35 (1998); *See also, e.g.,* Grundgesetz für die Bundesrepublik Deutschland, art. 32(3), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Christian Tomuschat & David P. Currie trans., 2008). Convention for the Protection of Lake Constance against Pollution, Oct. 27, 1960, Austria – Baden-Württemberg – Bavaria – Switz. *reprinted at* Internationale Gewässerschutzkommission für den Bodensee, *Übereinkommen Über Den Schutz Des Bodenseesgegen Verunreinigung*, http://www.igkb.de/html/publikationen/uebereinkommen.html (last visited Nov. 25, 2020) *reprinted in* G. SCHLOTTAU, ED., FRESH WATER POLLUTION CONTROL, app. 7 (1966).

75. *See, e.g.,* Exchange of notes constituting an agreement terminating a Declaration of 27 August 1872 relating to succession or legacy duties so far as it applies to the relations between the Canton de Vaud and the Commonwealth of Australia, Austl.-Switz. (acting on behalf of the Canton of Vaud), May 4–21, 1959, 341 U.N.T.S. 283, U.N. Reg. No. 4891; Exchange of notes constituting an arrangement abrogating the Agreement of 27 August 1872 between Great Britain and Switzerland concerning succession duties, Can.-Switz. (acting on behalf of Canton of Vaud), Mar. 28– June 23, 1958, 391-15 U.N.T.S. 215, U.N. Reg. No. 5625.

76. For Anhalt, *see, e.g.,* Additional Act for the Navigation of the Elbe, Apr. 13, 1844, 96 CTS 307-1 [hereinafter Elbe Navigation Act]; Convention on the Publication of Uniform Police Ordinances for the Elbe, Apr. 13, 1844, 96 CTS 307-3 [hereinafter Elbe Police Ordinances Convention]. For Hanover, *see, e.g.,* Elbe Navigation Act, *supra* note 76; Elbe Police Ordinances Convention, *supra* note 76. For Hesse-Darmstadt, *see, e.g.,* Declaration respecting the Measures taken for the Repression of Offences in the Border Forests, Jan. 8–21, 1822, Hesse-Darm.-Nassau, 72 CTS 249 [hereinafter Border Forests Declaration]. For Mecklenburg-Schwerin, *see, e.g.,* Elbe Navigation Act, *supra* note 76; Elbe Police Ordinances Convention, *supra* note 76. For Nassau, *see, e.g.,* Convention for the Repression of Offences in the Boundary Forests, Oct. 10–Nov. 20, 1821, 72 CTS 181 [hereinafter Border Forests Convention]; Convention relative to the Abolition of the Droit de Détraction etc., May 17, 1822, Den.-Nassau, 72 CTS 339; Border Forests Declaration, *supra* note 76. For Prussia, *see, e.g.,* Border Forests Convention, *supra* note 76; Elbe Navigation Act, *supra* note 76; Elbe Police Ordinances Convention, *supra* note 76. For

case of the Austro-Hungarian Empire, where the treaty party was sometimes the Empire of Austria-Hungary,[78] sometimes it was Hungary on its own behalf,[79] sometimes Austria-Hungary in its own capacity and separately on behalf of Bosnia-Herzegovina,[80] and sometimes Bosnia-Herzegovina in its own competence.[81] These cases, however, are not limited to historical Germany and Austria or to the obvious cases of colonial territories with rights to self-determination. These cases also include entities such as Iceland[82] and Norway[83] that historically

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Saxony, *see, e.g.,* Elbe Navigation Act, *supra* note 76; Elbe Police Ordinances Convention, *supra* note 76.

77. *See, e.g.,* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Nov. 29 – Dec. 11, 1868 *reprinted in* D. SCHINDLER AND J. TOMAN, THE LAWS OF ARMED CONFLICTS 102 (1988) (including as participants Austria-Hungary (Dec. 11, 1868), Baden (Jan. 11, 1869), Bavaria (Dec. 11, 1868), Wurtemberg (Dec. 11, 1868) and the joint member of Prussia and the North German Confederation (Dec. 11, 1868)); Declaration Respecting Maritime Law, Apr. 16, 1856, LXI Brit. St. Papers 155-8 (1856) (including as participants Sardinia (Apr. 16, 1856), The Two Sicilies (May 31, 1856), Parma (Aug. 20, 1856), and the German Confederation (July 10, 1856), but also Anhalt-Dessau-Coethen (June 17, 1856), Bavaria (July 4, 1856), Baden (July 30, 1856), Bremen (June 11, 1856), Brunswick (Dec. 7, 1857), Frankfort (June 17, 1856), Hamburg (June 27, 1856), Hesse-Cassel (June 4, 1856), Hesse-Darmstadt (June 15, 1856), Lubeck (June 20, 1856), Mecklembourg-Schwerin (July 22, 1856), Mecklembourg-Strelitz (Aug. 25, 1856), Nassau (June 18, 1856), Oldenburg (June 9. 1856), Saxe-Altenbourg (June 9, 1856), Saxe-Coburg-Gotha (June 22, 1856), Saxe-Meiningen (June 30, 1856), Saxe-Weimar (June 22, 1856), Saxony (June 16, 1856), and Wurtemberg (June 25, 1856)).

78. *See, e.g.,* Service Règlement annexed to the International Telegraph Convention, June 11, 1908, 207 CTS 89 [hereinafter Int'l Telegraph Convention Service Règlement].

79. *See, e.g.,* Regulations annexed to the Revised International Telegraph Convention, July 10, 1903, 193 CTS 327 [hereinafter Int'l Telegraph Convention Regulations]; Revision of the International Service Regulations annexed to the International Telegraph Convention of St. Petersburg of 22 July 1875, July 22, 1875, 183 CTS 159 [hereinafter Int'l Telegraph Convention Revised Regulations].

80. *See, e.g.,* International Radiotelegraph Convention, July 5, 1912, 216 C.T.S 244 [hereinafter International Radiotelegraph Convention].

81. *See, e.g.,* Int'l Telegraph Convention Service Règlement, *supra* note 78.

82. *See, e.g., id.*

83. *See, e.g.,* Int'l Telegraph Convention Revised Regulations, *supra* note 79; Int'l Telegraph Convention Regulations, *supra* note 79; Int'l Telegraph Convention Service Règlement, *supra* note 78; International Radiotelegraph Convention, *supra* note 80.

concluded treaties on their own behalf despite being in federation with Denmark and Sweden, respectively.

This practice continues in contemporary times. North Ossetia has limited treaty making powers under the Russian constitution.[84] South Ossetia also has limited authority within the Georgian constitutional order to conclude certain treaties, such as an armistice where it is party to an armed conflict.[85] Similarly, Puerto Rico is a territory of the United States—that is, not a state or otherwise sovereign within the federation—yet retains an important degree of international autonomy.[86] Admittedly, in some cases of sub-entities of a state acting as parties to international instruments, these agreements probably do not amount to treaties as properly understood, simply because they do not have more than one state as party,[87] but they do constitute agreements.[88] What this practice shows is that

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84. *See* Konstitutsiia Rossiiskoi Federatsii [Konst. RF][Constitution], art. 72 (Russ.); IIFFMCG Report, *supra* note 72, at 240.

85. *Id.*; *see also* Anne Peters, *Treaty-Making Power*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 61–62 (Rudiger Wolfrum ed. 2009).

86. *See* Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1880 (2016) ("Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U. S. Capitol—the Commonwealth and the United States are not separate sovereigns."); *see generally* Downes v. Bidwell, 182 U.S. 244 (1901); *see also* REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 3, 17, 21 (2011); CRAWFORD, *supra* note 3, at 22; Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L. J. 159, 161–62 (1998). As to whether or not the people of Puerto Rico retain a right to self-determination, *see Sánchez Valle*, 136 S. Ct. 1863, at 6 (Breyer, J., dissenting) ("In 1945 the United States, when signing the United Nations Charter, promised change. It told the world that it would "develop self-government" in its Territories. Art. 73(b), 59 Stat. 1048, June 26, 1945, T. S. No. 993 (U. N. Charter).").

87. *See, e.g.,* Mysore Agreement—Population Project, Int'l Dev. Assoc.-Swe.-Mysore, June 14, 1972, 879 U.N.T.S. 3; Tunis Project Agreement—Urban Planning and Public Transport Project for the Tunis District, Oct. 5, 1973, Int'l Bank Reconstr. & Dev. – Int'l Dev. Assoc.- Tunis, Oct. 5, 1973, 1063 U.N.T.S. 325; s*ee also* Uttar Pradesh Agreement—Population Project, Int'l Dev. Assoc.-Swe.-Uttar Pradesh, June 14, 1972, 879 U.N.T.S. 27. *See also* Vienna Convention, *supra* note 69, art. 2(1) (providing that only agreement between states are treaties).

88. Note that the United Nations Charter and Vienna Convention distinguish between treaties and agreements, suggesting that they have different meaning. *See* United Nations Charter, art. 102 ¶ 1 ("[e]very treaty and every international agreement entered into by any Member of the United Nations

within a state, there may be sub-entities that operate as quasi-states, acting on the international plane from time to time, depending on their functional role. Thus, there is nothing necessarily objectionable about a territory that is normally considered part of a larger state operating on the international plane based in its own right.

When states adopt treaties they can elect one of several methods for designating the parties that are qualified to adhere to the agreement. If they wish, the negotiating parties to a treaty may adopt the "Vienna formula" to qualify the potential parties.[89] This formula is based on the approach taken in the VCLT and limits participation to members of the UN, specialized agencies, International Atomic Energy Agency, or International Court of Justice, plus any other state specifically invited by the UN General Assembly to participate.[90] Although it appears quite strict, this language can be interpreted to include entities other than states. For example, the Holy See—importantly, not the Vatican City State—was able to adhere to the Vienna Convention,[91] despite the use of the strict Vienna formula and despite the fact that the Holy See is not a state. Similarly, Ukraine and Belarus could adhere to treaties under the Vienna formula prior to their independence as states because they were already admitted to membership in the UN.[92]

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after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it"); *see also* Vienna Convention, *supra* note 69, art. 31 ¶ 3. Indeed, the meaning is most likely that treaties are legally binding whereas agreements may be either binding or not. *See* Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations Between States in International Law*, 2002 BRIT. Y.B. INT'L L. 141, 143–44.

89. U.N. TREATY SECTION OF THE OFFICE LEGAL AFFAIRS, SUMMARY OF PRACTICE OF THE SECRETARY-GENERAL AS DEPOSITARY OF MULTILATERAL TREATIES, ¶ 78(B)(1), U.N. Doc. ST/LEG/7/Rev.1, U.N. Sales No. E.94.V.15 (1999) [hereinafter U.N. Secretariat].

90. Vienna Convention, *supra* note 69, art 81.

91. U.N. Treaty Collection, Ch. XXIII, No. 1, *Vienna Convention on the Law of Treaties*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

92. *See, e.g.,* Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (the Byelorussian SSR signed on July 17, 1980, ratified on Feb. 4, 1981, and withdrew its reservation on Apr. 19, 1989, and Ukrainian SSR signed on July 17, 1980, ratified on Mar. 12, 1981, and withdrew its reservation on Apr. 20,

The Vienna formula is not mandatory and each treaty regime may vest the word "state" with a different meaning.[93] As an alternative to the Vienna formula, states may use the "all states" formula.[94] Under this option, the parties do not use the elaborate language of the Vienna formula, nor do they necessarily indicate any clear parameters for determining which entities are states, such as by UN General Assembly invitation. When faced with an "all states" text, the UN Secretary General simply seeks guidance from the UN General Assembly, though not necessarily requiring a clear, formal invitation.[95] For example, Guinea-Bissau and Vietnam were accepted as parties to the UN Convention on the Law of the Sea under this method when they were not yet clearly consolidated as states.[96]

1989, when neither was considered a state under international law, but were permitted to do so under the terms of the CEDAW).

93. *See, e.g.,* Montreal Protocol on Substances That Deplete the Ozone Layer, art. 11 ¶ 5, Sept. 16, 1987, 1522 U.N.T.S. 3, *as adjusted and amended by* Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 1598 U.N.T.S. 469, Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Nov. 25, 1992, 1785 U.N.T.S. 517, UNEP, Seventh Mtg. of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/Oz.L.Pro.7/12 (Dec. 27, 1995), Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 17, 1997, 2054 U.N.T.S. 522., Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Dec. 3, 1999, 2173 U.N.T.S. 183., UNEP, Nineteenth Mtg. of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Doc. UNEP/OzL.Pro.19/7 (Sept. 21, 2007).; UNEP, Fifteenth Mtg. of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Dec. XV/3, U.N. Doc. UNEP/OzL.Pro.15/9 (Nov. 11, 2003)

> *Recalling* that . . . the Parties to the Beijing Amendment have accepted obligations . . . to ban the import and export of the controlled substances . . . from any 'State not party to this Protocol' . . . . The term 'State not party to this Protocol' includes all other States and regional economic integration organizations that have not agreed to be bound by the Copenhagen and Beijing Amendments.

94. U.N. Secretariat, *supra* note 89, ¶ 78–81.

95. *See id.* at ¶ 78, 81.

96. *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3; U.N. Treaty Collection, Ch. XXI, No. 6. *U.N. Convention on the Law of the Sea*, https://treaties.un.org/Pages/Treaties.aspx?id=21&subid=A&clang=_en.

This relative application of the definition of "state" in treaty practice finds wide acceptance. Treaties adopting a flexible approach include such significant agreements as the Disabilities Convention and Space Objects Convention, providing that state-like entities might also participate as if they were states.[97] Even the European Convention on Human Rights (ECHR) is, theoretically, open to a liberal interpretation of the term "state".[98] The ECHR permits any member of the Council of Europe to become a party and the Saar was a member of the Council of Europe.[99] The Saar Protectorate was in existence from 1947 to 1956 and, as part of Germany occupied by France in the post-war framework, was not commonly considered a state.[100] In fact, in a plebiscite, the people of the Saar explicitly rejected independent statehood in favor, implicitly, of reunifica-

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97. *See* U.N. Convention on the Rights of Persons with Disabilities, art. 44 ¶¶ 1–2, Dec. 13, 2006, 2515 U.N.T.S. 3.; U.N. Convention on International Liability for Damage Caused by Space Objects, art. XXII, Mar. 29, 1972, 961 U.N.T.S. 187.

98. *See* Drozd & Janousek v. France & Spain, 20 Eur. Ct. H.R. (ser. A), ¶¶ 67, 86–88 (1992) (noting that, even though Andorra was admitted to be an unusual entity, the ECHR observed that the Principality was a European "country" and could adhere to the Statute of the Council of Europe as an associate member); Anthony Cullen & Steven Wheatley, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 691, 692 (2013).

99. *See* Statute of the Council of Europe, arts. 4–5, May 5, 1949, 87 U.N.T.S. 103 (although opening membership in the Council of Europe to "[a]ny European State"); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, as amended (ECHR), art. 59(1) ("This Convention shall be open to the signature of the members of the Council of Europe.") (opening membership of the ECHR to any member of the Council of Europe, and the Saar was eligible to be a member of the Council of Europe); Instrument of Accession of the Saar, May 13, 1950, 100 U.N.T.S. 302. In 1950, the Federal Republic of Germany (FRG), and then French-occupied Saarland became associate members. Council of Eur., *Federal Republic of Germany Joins the Council of Europe* (July 13, 1950), https://70.coe.int/-/1950-federal-republic-of-germany-joins-the-council-of-europe (last visited Nov. 25, 2020). The FRG became a full member in 1951, while the Saarland withdrew from its associate membership in 1956 after joining the FRG in 1955. *Id.* At the time of writing, there are no associate members in the Council of Europe.

100. *See, e.g., Report of* Mrs. W. v. F.S. (Ct. 1st Inst., Amsterdam, Neths., 1954), *reported at* 2 Nederlands Tijdschrift voor International Recht 296, 50 AM. J. INT'L L. 440 (1956), *reprinted in* [1963] II Y.B. Int'l L. Comm'n, ¶ 103, U.N. Doc. A/CN.4/SER.A/1963/ADD.1 (holding that the Saar was not a part of Germany for purposes of the Hague Convention on Civil Procedure).

tion with Germany (the *Kleine Wiedervereinigung*).[101] Although the Saar Protectorate never adhered to the ECHR, it was potentially eligible to do so under a liberal interpretation of the statehood requirement. Some authorities have even argued that the European Union single market would be open to portions of a state.[102] The EU has acknowledged that a quasi-state may be a party to a treaty with the Union as a "country" rather than a "state," under a flexible application of the law. [103]

As a contemporary example from practice, consider Palestine's relative statehood under differing treaty regimes. Given the number of treaties to which Palestine has adhered, it seems that many treaty regimes have accepted Palestine as if it were a state. Some of these instruments use the all states or a similar formula such as the Geneva Conventions,[104] Convention on

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101. *See* Saarländische Volkszeitung, Für Christentum und Demokratie, No. 247 (Oct. 24, 1955) at 10; Treaty for the Settlement of the Question of the Saar, Fr-Germ, Oct. 27, 1956, 1053 U.N.T.S. 337 (entered into force Jan. 1, 1957) (contemplating such items as, *inter alia*, "Saar nationals" "Saar Government" and "Saar law").

102. *See, e.g.,* Nikos Soutaris, *Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or Single Market?*, 19 CAMBRIDGE YB EUR. L. STUDIES 287, 310 (2017) (discussing whether portions of an EU Member State can remain in the single market upon the withdrawal of the Member State, however, participation in the single market is clearly not the same as membership in the EU); *see also* Treaty amending, with regard to Greenland, the Treaties establishing the European Communities, Feb. 1, 1985, O.J. (L 29).

103. *See* Case T-370/19, Spain v Eur. Comm'n, ECLI:EU:T:2020:440, ¶ 30 (Sept. 23, 2020)

> It follows that the provisions of the TFEU [Treaty on the Functioning of the European Union] relating to 'third countries' are clearly intended to pave the way for the conclusion of international agreements with entities 'other than States'. Thus, the European Union may conclude international agreements with territorial entities, covered by the flexible concept of 'country', which have the capacity to conclude treaties under international law but which are not necessarily 'States' for the purposes of international law. To claim the contrary would be to create a legal vacuum in the European Union's external relations. (applying the law to Kosovo).

104. *See generally* Int'l Comm. Red Cross, *Treaties, States Parties and Commentaries*: *Palestine*, https://ihl-databa

the Rights of the Child,[105] Convention on the Elimination of Discrimination Against Women,[106] Hague Convention,[107] Disabilities Convention,[108] Torture Convention,[109] Corruption Convention[110] or Apartheid Convention.[111] However, Palestine is also party to treaties that use the Vienna formula such as the Vienna Convention on Diplomatic Relations,[112] Vienna Conven-

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ses.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS&nv=4 (last visited Nov. 25, 2020).

105. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 11, *Convention on the Rights of the Child*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en. *See generally* U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

106. *See generally* U.N. Treaty Collection, Ch. IV, Human Rights, No. 8, *Convention on the Elimination of All Forms of Discrimination against Women*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en (last visited Nov. 25, 2020). *See generally* CEDAW, *supra* note 92.

107. *See* Int'l Comm. Red Cross, *Treaties, States Parties and Commentaries*: *Palestine*, https:/ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PS&nv=4.

108. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 15, *Convention on the Rights of Persons with Disabilities* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en *See generally* U.N. Convention on the Rights of Persons with Disabilities, *supra* note 97.

109. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 9, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en *See generally* U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

110. *See* U.N. Treaty Collection, Ch. XVIII, Penal Matters, No. 14, *United Nations Convention against Corruption* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&clang=_en. *See generally* U.N. Convention against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

111. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 7, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=_en. *See generally* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243.

112. *See* U.N. Treaty Collection, Ch. III, Privileges and Immunities, Diplomatic and Consular Relations, etc., No. 3, *Vienna Convention on Diplomatic*

tion on Consular Relations,[113] Convention on the Elimination of Racial Discrimination,[114] Genocide Convention,[115] International Covenant on Civil and Political Rights,[116] International Covenant on Economic, Social and Cultural Rights,[117] and, of course, the VCLT.[118] Palestine is also a member of UNESCO, a UN specialized agency.[119] Therefore, practice to date permits it to qualify under either the all states formula or Vienna formula.

In many of these treaties, participation and compliance are judged in a decentralized fashion, so non-recognition can pre-

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Relations,
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en. *See generally* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N. T. S. 95.

113. *See* U.N. Treaty Collection, Ch. III, Privileges and Immunities, Diplomatic and Consular Relations, etc., No. 6, *Vienna Convention on Consular Relations*,
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en. *See generally* Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N. T. S. 261.

114. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 2, *International Convention on the Elimination of all Forms of Racial Discrimination*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en. *See generally* International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, 660 U. N. T. S., 195.

115. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 1, *Convention on the Prevention and Punishment of the Crime of Genocide*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

116. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 4, *International Covenant on Civil and Political Rights*
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en. *See generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

117. *See* U.N. Treaty Collection, Ch. IV, Human Rights, No. 3, *International Covenant on Economic, Social and Cultural Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en. *See generally* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T. S. 3.

118. *See* U.N. Treaty Collection, Ch. XXIII, Law of Treaties, No. 1, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en. *See generally* Vienna Convention, *supra* note 69.

119. *Palestine*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC CULTURAL ORGANIZATION, https://en.unesco.org/countries/palestine (last visited Nov. 25, 2020).

clude a quasi-state from enjoying its rights and undertaking its duties in relation to certain other parties. However, in situations where there is a treaty-monitoring body, tribunal or court, the judgment is no longer decentralized. In a recent decision by the Committee on the Elimination of Racial Discrimination concerning Palestine's inter-state complaint against Israel, the Committee found that both Palestine and Israel were parties, which gave rise to the obligations *erga omnes partes*, regardless of whether one of the states recognized the other one.[120] The Committee reasoned that human rights are of a non-reciprocal nature[121] and the Convention does not require bilateral relations between any two parties in order for obligations to arise;[122] thus, the inter-state dispute settlement procedure applied.[123] This view should not be surprising as it is already the practice within the United Nations when two UN members do not recognize each other, as will be discussed in more detail in the next section.

Lastly, this relativist approach to statehood also goes beyond questions pertaining to which entities can adhere to a treaty and can touch on other topics in a treaty where statehood is an issue. For example, in the case of the Statelessness Convention, even "an entity that is not a state" might be considered as if it were a state for statelessness analysis.[124] There appears to be no restriction on a particular treaty regime developing its own *lex specialis*, even on an issue as fundamental as statehood.

2. Relative to International Organizations

Palestine's membership in UNESCO raises the next possibility that a state-like entity might be treated as if it was a state for purposes of an international organization. An international organization might need to recognize the entity as a state or

120. *See generally* Comm. on the Elimination of Racial Discrimination, Inter-State Communication Submitted by the State of Palestine Against Israel, U.N. Doc. CERD/C/100/5 (Dec. 12, 2019).

121. *See id.* ¶ *3.25.*

122. *Id.* ¶ 3.40

123. *See id.* ¶ 3.43

124. U.N. High Comm'r for Refugees, *Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons*, ¶¶ 11–14, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012) (interpreting the word "state" for purposes of the Convention definition of statelessness to potentially include "an entity which is not a State" but admitting that the analysis can be "complex").

international legal person separate from the consideration of membership or observer status. The UN Charter provides that only states may bring matters of peace and security to the attention of the UN Security Council[125] and participate without a vote.[126] Several states have taken advantage of this opportunity even though their statehood was in question, including Indonesia,[127] Tunisia,[128] and Kuwait.[129] Although all of those entities are now clearly states, at least one case did not later mature into statehood and yet was treated as if it was a state at the time: the Princely State of Hyderabad.[130] Hyderabad had existed as an independent Princely State in the Indian subcontinent since the early 18th century and, though it came under British suzerainty in 1805, it retained its nominal independence throughout British rule in India.[131] Upon Indian independence in 1947, the ruler of Hyderabad refused to join either India or Pakistan, and reasserted the sovereignty of the state. India invaded the territory in 1948 and forced its formal an-

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125. *See* U.N. Charter, art. 11, ¶ 2; U.N. Charter, art. 32; U.N. Charter art. 35, ¶ 2; U.N. SCOR, Provisional Rules of Procedure of the Security Council, at 6, U.N. Doc. S/96/Rev.4, U.N. Sales No. 52.I.18 (1946); U.N. Charter, arts. 11(2), 32, 35(2) (only permitting states to participate in UNSC sessions).

126. U.N. Charter, art. 32; U.N. SCOR, Provisional Rules of Procedure of the Security Council, at 3, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983) (requiring members and non-member states participating in Security Council meetings to submit credentials prior to the meeting).

127. *See* U.N. SCOR, 2nd Sess., 181st mtg. at 1940, U.N. Doc. S/PV.181 (Aug. 12, 1947).; U.N. SCOR, 3rd Sess., 357th mtg. U.N. Doc. S/PV.357 (Sept. 16, 1948); *But see* U.N. SCOR, 2nd Sess., 184th mtg. at 1984–1985, U.N. Doc. S/PV.357 (Aug. 14, 1947) (UK arguing that the invitation of Indonesia was incorrect).

128. *See* Theodor Schweisfurth, *Pacific Settlement of Disputes, in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY ch. VI, art. 35, at 1114 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf, eds., 3rd ed. 2012).

129. *See id.*

130. *See generally* U.N. SCOR, 3rd Sess., 357th mtg. *supra* note 127; *Also cf.* U.N. SCOR, 2nd Sess., 184th mtg. *supra* note 128, at 1984–85 (UK arguing that the invitation of Indonesia was incorrect) *to* UNSCOR 357th mtg. *supra* note 127, at 10–11 (UK arguing in favor of hearing Hyderabad). *See generally* Taylor C. Sherman, *The Integration of the Princely State of Hyderabad and the Making of the Postcolonial State in India, 1948-56*, 44(4) IND. ECON. & SOC. HIST. REV. 489 (2007).

131. *See generally* Clyde Eagleton, *The Case of Hyderabad Before the Security Council*, 44 AM. J. INT'L L. 277, 281–82 (1950).

nexation.[132] Subsequently, the deposed ruler of Hyderabad brought the matter of Indian annexation to the UN Security Council's attention, claiming an unlawful use of force contrary to the UN Charter. [133] As a threshold matter, the UN Security Council agreed, at least prima facie, that Hyderabad was a "state" under the UN Charter for these purposes.[134]

This decision is substantive and meaningful because other delegations have been refused the opportunity to bring matters to the UN Security Council for failure to be the functional equivalent to a state.[135] The UN Security Council has already permitted Palestine to participate on prior occasions.[136]

Similarly, the Statute of the International Court of Justice permits states that are not UN members to submit their disputes. This was the basis for the *Nottebohm* judgment.[137] Both Palestine and Kosovo have been permitted to address the ICJ

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132. *See id.* at 278.

133. *See id.*at 279–80.

134. *See* U.N. SCOR, 3rd Sess., 357th mtg. *supra* note 127 at 10–11 (implicitly reaching this conclusion by inviting Hyderabad under the terms in the UN Charter concerning a "state," though reserving the question for revision); CRAWFORD, *supra* note 3, at 191; ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 42–43 (1963) ("entities which would not be considered states for the purposes of a claim for comprehensive participation in the United Nations might nevertheless satisfy the requirements of statehood where the claim is for limited participation").

135. *See, e.g.*, U.N. SCOR, 2nd Sess., 193d mtg. at 2172, U.N. Doc. S/PV.357 (Aug. 22, 1947) (voting not to admit representatives of East Indonesia and Borneo to the Security Council).

136. *See, e.g.,* U.N. SCOR, 75th Sess., 8717th mtg. at 1–2, U.N. Doc. S/PV.8717 (Feb. 11, 2020) ("Agenda: The situation in the Middle East, including the Palestinian question" and noting that Mahmoud Abbas, as "President of the Observer State of Palestine," was seated at the Council table); *see also* G.A. Res. 52/250, ¶ 1 (July 13, 1998) (granting Palestine the right to participate in general debate of the General Assembly).

137. In addition, the Statute of the International Court of Justice permits non-UN members to submit their disputes to the ICJ even if they decide against membership in the UN by lodging a declaration to that effect with the Court. This method was used by several micro-states to join the Court without joining the UN, and in the case of Liechtenstein to actually lodge disputes with the Court. *See, e.g.,* Nottebohm Case (Liech. v. Guat.), Judgment, 1955 I.C.J. 4 (Apr. 6). However, in these cases, the applicants were undoubtedly states when they sought to lodge their declarations with the Court. *See id.* at 20 ("It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality…").

as if they were states.[138] This practice is in line with the prior practice of the Permanent Court of International Justice which treated the City of Danzig as if it was a state for the same purposes.[139] Importantly, both the Kosovo and Palestine entities were grouped with states— i.e., they addressed the court alongside other states during the sessions set aside for states— but were only given this limited, functional privilege for the purposes of the advisory proceedings pertaining to them.[140] The ICJ has therefore interpreted its own statute liberally, following a practice similar to that of the Security Council.[141]

Turning to questions of membership, each international organization has in its constitutive instrument requirements for membership. Some permit non-states as members, others do not, but even where the constitutive instrument requires the member to be a state, there is a wide variety of interpretations

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138. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Verbatim Record, I.C.J. Doc. CR 2004/1 at 18 (Feb. 23, 2004, morning sess.) https://www.icj-cij.org/public/files/case-related/131/131-20040223-ORA-01-00-BI.pdf (invited to speak as "Palestine" alongside other states) [hereinafter Legal Consequences Palestinian Territory]; Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Verbatim Record, I.C.J. Doc. CR 2009/25 at 6 (Dec. 1, 2009, afternoon sess.) https://www.icj-cij.org/public/files/case-related/141/141-20091201-ORA-02-00-BI.pdf (invited to speak as the "authors of the unilateral declaration of independence" though alongside other states) [hereinafter Unilateral Declaration of Kosovo].

139. *See* CRAWFORD, *supra* note 3, at 31 (Danzig treated as a state for purposes of the Permanent Court of International Justice). *See also* Danzig Pension Case (Obergericht (Superior Court) Danzig, 1929), *reported at* 2 Y.B. Int'l L. Comm'n para. 284 (1963) U.N. Doc. A/CN.4/SER.A/1963/ADD.1 (holding that the Free City of Danzig was not part of Poland for purposes of the law on civil servant pensions).

140. *See* Legal Consequences Palestinian Territory, *supra* note 138; Unilateral Declaration of Kosovo, *supra* note 138.

141. In addition, the European Union has also indicated that it will follow a functional approach when faced with questions of statehood. *See* Case C-482/99, France v. Comm'n, 2001 E.C.R. I-4417 (Stardust Case) ("The concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features."); Case C-356/05, Whitty v. Motor Insurers' Bureau of Ireland, 2007 E.C.R. I-3112; Case C-157/02, Rieser Internationale Transporte GmbH v. Autobahnen-und Schnellstrßen-Finanzierungs-AG (Asfinag) [2004] E.C.R. I-1526; Case C-343/98, Collino and Chiappero v. Telecom Italia Spa, 2000 E.C.R. I-6700; Case C-188/89, Foster v. British Gas, 1990 E.C.R. I-1526.

of the term "state" based on a functional perspective. For example, the World Meteorological Organization bases membership on whether the entity has a meteorological office,[142] the Universal Postal Union bases membership on postal delivery services,[143] and Interpol bases its membership on whether the entity has police.[144] Many other entities have followed this functional model,[145] such as the Food and Agriculture Organi-

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142. *See* Convention of the World Meteorological Organization, Oct. 11, 1947, *as amended by* Res. 1 & 2 *adopted by* the 3d Congress, 1959; Res. 1 & 2 *adopted by* the 4th Congr., 1963; Res. 1, 2 & 3 *adopted by* the 5th Congr., 1967; Res. 48 *adopted by* the 7th Congr., 1975; Res. 50 *adopted by* the 8th Congr., 1979; Res. 41, 42 & 43 *adopted by* the 9th Congr., 1983; Res. 39 & 41 *adopted by* the 14th Congr., 2003; Res. 44 *adopted by* the 15th Congr., 2007, art 3, ftp://ftp.wmo.int/Documents/MediaPublic/Publications/Policy_docs/wmo_convention.pdf (any territory that has a meteorological service may join, though voting is not extended to British Caribbean Territories, French Polynesia, Hong Kong, Macau, Neths. Antilles, and New Caledonia); CRAWFORD, *supra* note 3, at 633 n. 146 (reporting admission of Cook Isls. as a member).

143. Constitution of the Universal Postal Union, 1964, *as amended by* the Additional Protocols of 1969 *adopted by* the Tokyo Congr., III 5–8, 1974 *adopted by* the Lausanne Congr., III 23–25, 1984 *adopted by* the Hamburg Congr., III 25–28, 1989 *adopted by* the Washington Congr., III/1 27–32, 1994 *adopted by* the Seoul Congr., III 25–29, 1999 *adopted by* the Beijing Congr., A 3–A 6, 2004 *adopted by* the Bucharest Congr., A 3–A 7, art 2 *reprinted in* International Bureau of the Universal Postal Union, *Constitution and General Regulations Manual Rules of Procedure: Legal Status of the UPU with Commentary, art. 2,* Doc. A.8 (2018), https://www.upu.int/UPU/media/upu/files/UPU/aboutUpu/acts/manualsInThreeVolumes/actInThreeVolumesConstitutionAndGeneralRegulationsEn.pdf (also note the official Commentary to art 2. by the Int'l Bureau, including the Neths. Antilles, Aruba, and UK Overseas territories). Also note that the UPU permitted the admission of a member that represented a group of states or non-autonomous territories: the Netherlands Antilles and Suriname joined as a single member under this provision. *Id.*

144. *See The State of Palestine and the Solomon Islands become INTERPOL member countries,* INTERPOL (Sept. 27, 2017), https://www.interpol.int/en/News-and-Events/News/2017/The-State-of-Palestine-and-the-Solomon-Islands-become-INTERPOL-member-countries#:~:text=The%20State%20of%20Palestine%20and%20the%20Solomon%20Islands%20become%20INTERPOL%20member%20countries,-27%20September%202017&text=BEIJING%2C%20China%20%E2%80%93%20The%20INTERPOL%20General,policing%20body%20now%20totals%20192; CRAWFORD, *supra* note 3, at 333 n.147 (reporting admission of the N. Mariana Isls. as a member and of Puerto Rico).

145. For the Asian Development Bank, *see* Agreement Establishing the Asian Development Bank, art. 3(3), Dec. 1965,

https://www.adb.org/sites/default/files/institutional-document/32120/charter.pdf. For the Caribbean Development Bank, *see* Agreement Establishing the Caribbean Development Bank, art. 3, Oct. 18, 1969, (entered into force Jan. 26, 1970), https://www.caribank.org/sites/default/files/publication-resources/Agreement-establishing-CDB.pdf ("states and territories of the region"). Also note art. 3(4) of the Constitution, that the CDB permits the admission of a single member to represent a group of states or non-autonomous territories. *Id.* at art. 3(4). Anguilla, Montserrat, British Virgin Isls., Cayman Isls., and Turks & Caicos Isls. joined as one member under this provision. *Id.* For the European and Mediterranean Plant Protection Organization, *see* Convention for the Establishment of the European and Mediterranean Plant Protection Org., Apr. 18, 1951, *as amended* Apr. 27, 1955, May 9, 1962, Sept. 18, 1968, Sept. 19, 1973, Sept. 23, 1982, Sept. 21, 1988, Sept. 15, 1999, art. III, http://www.eppo.org/ABOUT_EPPO/convention/convention.htm (permitting territories to become members even if their foreign relations are controlled by another member, as long as that other member proposes their membership. For the International Baltic Sea Fishery Commission, *see* Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts ("Gdansk Convention"), art. V, Sept. 13, 1973 (establishing the International Baltic Sea Fishery Commission); *see also* Amendments to the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, Nov. 11, 1982 (amending the organization's constitution to permit the EC to become a member); *see also* Council Decision 83/414/EEC of 25 July 1983, 1983 O.J. (L 237) 4. For International Civil Aviation Organization, *see* CRAWFORD, *supra* note 3, at 633 n.146 (reporting admission of Cook Isls. as a member of ICAO. For the International Coffee Organization, *see* International Coffee Agreement, art 5, Sept. 28, 2007, http://www.ico.org/documents/ica2007e.pdf (permitting separate membership of territory under the same authority for foreign affairs, provided the member proposes separate membership and the territory is otherwise qualified to join the organization, no members admitted under this provision as of yet). Also note that the organization permits the admission of a member that represents a group of states. *See id.* at art. 4 (Membership of the Organization), art. 2(5) (providing that a member is a contracting party which his in turn a "Government"). For the International Fund for Agricultural Development, see CRAWFORD, *supra* note 3, at 633 n.146 (reporting admission of Cook Isls. as a member). For the International Institute of Refrigeration, *see* Convention Concerning the International Institute of Refrigeration, June 21, 1920, *as amended* May 31, 1973, *replaced by* International Agreement Concerning the International Institute of Refrigeration, Dec. 1, 1954, *as amended* Sept. 2, 1967, Aug. 28, 1971, Aug. 17, 2003, Aug. 21, 2007, and August 17, 2015, art. III,
https://iifiir.org/uploads/store/ckeditor/attachmentfile/29/data/8ca41a1bd0b5426ce058b0e120365ecc.pdf. For the International Telecommunications Union, *see* Agreement Establishing the International Telegraphic Union, 1865, *reprinted at* UNION TÉLÉGRAPHIQUE INTERNATIONALE, DOCUMENTS DE LA CONFÉRENCE TÉLÉGRAPHIQUE INTERNATIONALE DE PARIS (1865) (permitting as

zation,[146] International Centre for the Settlement of Investment Disputes,[147] Organization for the Prohibition of Chemical Weapons,[148] UNESCO,[149] World Health Organization (WHO),[150]

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members colonial Southern Rhodesia and overseas territories of France, Portugal, Spain, the UK and US); 1973 U.N.Y.B. 954, U.N. Sales No. E.75.I.1; 1975 U.N.Y.B. 1068, U.N. Sales No. E.77.I.1 (documenting that as of 1975, the convention restricted membership only to states). S*ee also* Union Télégr. Int'l, *Verbaux de la 1ère séance de la Conference Télégraphique Internationale de Rome 2 decembre 1871*, *in* DOCUMENTS DE LA CONFERENCE TÉLÉGRAPHIQUE INTERNATIONALE DE ROME, UNION TÉLÉGRAPHIQUE INTERNAZIONALE (1872) (documenting the participation of British India with a separate delegation than the UK even as long ago as 1865); *See generally* GEORGE A. CODDING JR., THE INTERNATIONAL TELECOMMUNICATION UNION: AN EXPERIMENT IN INTERNATIONAL COOPERATION (1952); *See generally* GEORGE A. CODDING JR. & ANTHONY M. RUTKOWSKI, THE INTERNATIONAL TELECOMMUNICATION UNION IN A CHANGING WORLD (1982). For the Northwest Atlantic Fisheries, *see* Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries http://www.nafo.int/about/overview/governance/convention/convention.pdfhttp://www.nafo.int/about/overview/governance/convention/convention.pdf (establishing the NW Atlantic Fisheries).

146. *See generally* Food and Agriculture Organization [FAO], *Constitution*, art. II, http://www.fao.org/docrep/010/k1713e/k1713e01.htm#2 (permitting regional economic integration organizations to be admitted as members, such as the EU).

147. *See* Maffezini v. Spain, Case No. ARB/97/7, Dec. of the Trib. on Objs. to Juris. (Jan. 25, 2000) *reprinted at* 1 ICSID Rev.-For. Invest. L. J 27-28, ¶74–75

> Under the ICSID Convention, the Centre's jurisdiction extends only to legal disputes arising directly out of an investment between a Contracting state and a national of another Contracting State . . . . However neither the term 'national of another Contracting State' nor the term 'Contracting State' are defined in the Convention . . . . Accordingly the Tribunal has to answer the following two questions: first, whether or not SODIGA is a State entity for the purpose of determining the jurisdiction of the Centre and the competence of the Tribunal, and second, whether the actions and missions complained of by the Claimant are imputable to the State. While the first issue is one that can be decided at the jurisdictional state of these proceedings, the second issue bears on the merits of the dispute and can be finally resolved only at that state.

148. *See* CRAWFORD, *supra* note 3, at 633 n.146 (reporting admission of Cook Isls. as a member).

World Trade Organization,[151] as well as possibly the World Bank[152] and International Monetary Fund.[153] We can recall that the People's Republic of China, for a brief time, dropped its opposition to observer status for the Republic of China (RO China, or more commonly, Taiwan) at the WHO due to real concerns over health issues in the region,[154] though it has since returned to its former policy of blocking the island from participation.[155] Recently the applications of Kosovo and Palestine to join the Permanent Court of Arbitration (PCA), while initially uncontroversial, have since forced an unusual membership reconsideration by the PCA Administrative Council to deal with the situations.[156]

This relativist approach to statehood for purposes of membership even includes UN practice. It is well known and ac-

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149. *See* CRAWFORD, *supra* note 3, at 633 n.145 (reporting the admission of Niue as a member); *Id*. at 633 n.146 (reporting admission of Cook Isls. as a member).

150. *See id.* at 633 n.145 (reporting the admission of Niue as a member); *Id.* at 633 n.146 (reporting admission of Cook Isls.); *Id*. at 633 n.147 (reporting admission of Puerto Rico).

151. *See* Marrakesh Agreement Establishing the World Trade Organization, art. XII(1), Apr. 15, 1994, 1867 U.N.T.S. 154 (permitting admission of separate customs territory, such as Hong Kong and "Chinese Taipei" (RO China/Taiwan); *Id.* arts. XI(1), XIV(1) (permitting the admission of the European Communities).

152. *Kosovo Joins World Bank Group Institutions*, OCHA (June 29, 2009), https://reliefweb.int/report/serbia/kosovo-joins-world-bank-group-institutions.

153. *See* Articles of Agreement of the IMF, art. II(2) June 28, 1990 (entered into force Dec. 27, 1945), https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf ("Membership shall be open to other countries at such times and in accordance with such terms as may be prescribed by the Board of Governors. These terms, including the terms for subscriptions, shall be based on principles consistent with those applied to other countries that are already members."); *Kosovo Joins World Bank Group Institutions*, *supra* note 152.

154. *See* Keith Bradsher, *Taiwan Takes Step Forward at U.N. Health Agency*, N.Y. TIMES (Apr. 29, 2009), https://www.nytimes.com/2009/04/30/world/asia/30taiwan.html (reporting that PR China "officials had dropped their objections to Taiwan's participation as an observer at" the WHO).

155. *See, e.g.,* Yu-Jie Chen & Jerome A. Cohen, *Why Does the WHO Exclude Taiwan?*, COUNCIL FOREIGN REL. (Apr. 9, 2020), https://www.cfr.org/in-brief/why-does-who-exclude-taiwan (noting that the PR China has since reversed policy and is blocking observer status for RO China/Taiwan).

156. Gentian Zyberi, *Membership in International Treaties of Contested States: The Case of the Permanent Court of Arbitration*, 5(3) ESIL REFLECTION (Mar. 10, 2016), http://www.esil-sedi.eu/node/1261.

cepted that both Ukraine and Belarus were not independent states when they joined the UN,[157] notwithstanding that UN membership is expressly limited to "states".[158] In fact, Belarus' and Ukraine's memberships have, in turn, served as the basis for treating those entities as if they were states prior to their independence from the USSR for purposes of applying the Vienna formula for treaty adherence.[159] Part of what makes the Belarus and Ukraine examples so compelling is that there was no effort made to alter the language of the UN Charter restricting membership to states in light of the political compromise to admit them.[160] It appears that the states negotiating in San Francisco did not see a need to clarify that "state" could obviously be interpreted to include both of those non-independent entities. But Ukraine and Belarus were not unique. Both India and the Philippines joined the UN before either could be truly said to be independent.[161] There is also no evidence that

157. *See* UN Office of Legal Counsel, Legal Op. No. 15, *Questions regarding the scale of assessment for Belarus and Ukraine in the light of the change in the relationship between them and the former Union of Soviet Socialist Republics – Report of the Committee on contributions on "Assessment of New member States" – General Assembly Resolution 46/221 A and Rule 160 of the Rules of Procedure of the General Assembly*, Fifth Committee, 38th meeting (Dec. 8, 1992) *reprinted at* 1992 U.N. Jurid. Y.B. 435, U.N. Doc. ST/LEG/SER.C/30 (confirming that Ukraine and Belarus are "original Members" of the United Nations following their dissolution from the Soviet Union); ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 18 (2005).

158. *See* U.N. Charter, arts. 3, 4; Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 62 (May 28, 1948).

159. *See, e.g.,* CEDAW, *supra* note 92; *see also* U.N. Convention on the Rights of Persons with Disabilities, *supra* note 97, art. 44(1)–(2); Convention on International Liability for Damage Caused by Space Objects, *supra* note 97, art. XXII.

160. *See* UN Office of Legal Counsel, *supra* note 157; AUST, *supra* note 157, at 18; Declaration of State Sovereignty of Ukraine (Ukr. 1990); U.N. Charter, arts. 3, 4; Admiss. of a St. to the U.N. (Charter, Art. 4), Adv. Op. 1948 I.C.J. Reps. 57, 62 (May 28, 1948).

161. *See* JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 52–55 (1987) (discussing Byelorussia, India, Lebanon, Namibia, the Philippines, Syria, and Ukraine); Roger O'Keefe, *The Admission to the United Nations of the Ex-Soviet and Ex-Yugoslav States*, 1 BALTIC YB INT'L L. 167, 171–76 (2001) (observing that the admission of Moldova, Georgia, and Bosnia-Herzegovina to the United Nations when each had only tenuous governmental authority demonstrates the United Nations "flexible approach to the formal criteria for membership"); *cf.* FELICE MORGENSTERN, LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS 50 (1986) (noting the ILO's admission of Vietnam in 1950, at

Ukraine and Belarus were ever treated differently from other UN members for any other purpose. Once membership was established, there was no need to justify statehood for each discrete act of the UN pertaining to those entities. That being said, the RO China's renewed application for membership to the UN was rejected on the grounds that it was a part of the territory of China, although the application itself was unclear about that fact.[162]

Recently, Palestine attempted to accept the jurisdiction of the International Criminal Court (ICC), join the Court, and then trigger its jurisdiction over certain individuals, causing considerable discussion to erupt over whether it was a state. Many scholars, including this author, settled on the functional ability of the Palestinian Authority to discharge its obligations.[163] Following from this practice above, it is clearly possible that the term "state" in the Rome Statute could be understood to permit quasi-states to adhere.[164] The treaty elects not to use the Vienna formula and instead uses the "all states" terminology,[165]

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a time when France still exerted influence over Vietnam's foreign affairs); *but see* U.N. SCOR, 16th Sess., 985th mtg. at 8–10, U.N. Doc S/PV.985 (Nov. 30, 1961) (presenting arguments made regarding whether Kuwait was sufficiently independent from the United Kingdom to be admitted to the United Nations); *see also* HIGGINS, *supra* note 134, at 16–17 (suggesting that although certain countries that fell short of meeting the criteria for statehood, like India, were admitted as original members to the United Nations, these cases are not truly indicative of United Nations practice).

162. *Cf. UN Rejects Taiwan Application for Entry*, N.Y. TIMES (July 24, 2007) https://www.nytimes.com/2007/07/24/world/asia/24iht-taiwan.1.6799766.html?_r=0 *with* J. Michael Cole, *UN Told to Drop 'Taiwan is a Part of China': Cable*, TAIPEI TIMES (Sept. 6, 2011) http://www.taipeitimes.com/News/front/archives/2011/09/06/2003512568 (on the one hand, the rejection the application for membership, yet on the other hand, the demand from many states to stop officially considering the RO China/Taiwan as part of China); *see also* G.A. Res. 2758 (XXVI), at 2 (Oct. 25, 1971) (expelling "Republic of China" (Taiwan) delegation in favor of those from the PR China as representing "China").

163. *See generally* Worster, *supra* note 51.

164. *See id.* The Rome Statute refers to "States" or "States Parties" in several articles. *See, e.g.*, Rome Statute of the International Criminal Court, arts. 4(2), 9(1), (2), 11(2), 12(1), (3), 13(a), 14, 17(1)(a)-(b), 18, 125(1), (3), July 17, 1998, 2187 U.N.T.S. 90.

165. Rome Statute, art. 125(1) ("This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17

although either usage would permit a liberal interpretation. A liberal approach must be possible because the ICC has already adopted this interpretation of the Rome Statute in practice well before Palestine was an issue. The Cook Islands have long been a member of the ICC,[166] though that entity is not clearly a state. This author can find no evidence that the admission of the Cook Islands was met with any serious protests at the time. Thus, for membership issues, it is well established that an international organization can interpret the meaning of "state" in its constitutive instrument in a relative manner. Therefore, the Pre-Trial Chamber in the pending question of Palestinian statehood should conclude that it is correct to interpret the "all states" language in the Rome Statute to include entities that have only questionable statehood, and generally treat them as if they were states. A contrary ruling would necessarily bring the membership of the Cook Islands into doubt and perhaps even challenge whether Ukraine and Belarus were properly admitted to the UN as original members.

3. Private Rights

One way that an entity which is not considered a state might be treated as a state is for other states to accord its acts as having legal effect, i.e., the "*Namibia* exception."[167] In the *Namibia Advisory Opinion,* the ICJ held that South Africa's control of Namibia was not lawful and thus could not have legal effect.[168] However, by not recognizing South Africa's governance, the local population would be prejudiced by losing recognition state acts such as the registration of births, deaths and marriages.[169] Thus, although it was not a state and the South African regime was unlawful, the state acts were valid.[170] How a non-state could produce state acts is answered by the need to provide for

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October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000."); "This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations." *Id.* art. 125(3).

166. *Asia-Pacific States*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx.

167. *See* Namibia Advisory Opinion, *supra* note 24, at 55–56.

168. *See id.*; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. at 25 (2001).

169. *See* Namibia Advisory Opinion, *supra* note 24, at 55–56.

170. *See id.*

individual rights. Thus, courts may give legal effect to the routine acts of administration of unrecognized states, unless there is a strong public policy against the recognition.[171]

This approach has been applied beyond the situation in Namibia. For example, Western Sahara was addressed as if it was a state for purposes of human rights analysis.[172] This approach may again be a pragmatic solution to a situation where it is politically unacceptable to either consider the entity an independent state or lend legitimacy to the territory's occupation.[173] This reality supports the fundamental argument of this article. Quasi-states and territories of unclear statehood are being accommodated by attributing aspects or elements of statehood to them, all the while refusing full-fledged statehood.

4. Human Rights

If legal value is accorded to the purported public acts of non-states in the interest of human rights, one might then take the next step and demand that the non-states comply with human rights generally.[174] This approach could be limited—e.g., requiring public acts to comply with a right to court access in order to receive recognition—or expansive—e.g., holding quasi-

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171. *See id.*; Hopkins (U.S.) v. United Mexican States, 4 R.I.A.A. 41, 41 (Gen. Claims Comm'n. 1926); R. (on the application of Kibris Turk Hava Yollari) v. Secretary of State for Transport [2009] EWHC (Admin) 1918, [2010] 1 All ER (Comm.) 253; *Emin v Yeldag* [2002] 1 FLR 956 (Austl.); B. v. B. [2000] 2 Fam. 707 (Eng.); Reel v. Holder, [1981] 1 WLR 1226 (Eng.) (interpreting the meaning of "country" under International Amateur Athletic Federation rules as territory over which there is authority, not necessarily the same as the meaning of state or nation); Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd. [1978] 1 QB 205 (Eng.); In re Al-Fin Corporation's Patent, [1970] 1 Ch. 160 at 177-81 (Eng.); Luigi Monta of Genoa v. Cechofracht Co. [1956] 2 QB 552 (Eng.); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 205(3) (AM. LAW INST. 1987).

172. *See* U.S. Dep't State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2015: Western Sahara (2015), https://2009-2017.state.gov/documents/organization/253165.pdf.

173. *But see* U.S. Dep't State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices for 2015: Israel and the Occupied Territories (2015), https://2009-2017.state.gov/documents/organization/253139.pdf.

174. *See* Philip Alston, *The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3–6 (Philip Alston ed., 2005).

states responsible for human rights violations.[175] Some non-state actors already comply with international human rights voluntarily, even though not formally bound to comply, because of a desire to appear more state-like and thus accrue international legitimacy.[176] For example, the RO China has acted in compliance with the International Covenant on Civil and Political Rights (ICCPR), even though it is no longer a party.[177] In addition, there is evidence of evolution in the possibility of holding state-like entities responsible for human rights violations.[178] Historically, quasi-states were usually analogized with private actors, and thus not held to human rights law, as the DC District Court in *Tel-Oren v Libya* concluded concerning the Palestine Liberation Organization.[179] However, contemporary

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175. *See generally* Toni Erskine, *Assigning responsibilities to institutional moral agents: The case of states and quasi-states*, 15(2) ETHICS & INT'L AFF. 67 (2001); Sascha Dov Bachmann & Martinas Prazauskas, *The Status of Unrecognized Quasi-States and Their Responsibilities Under the Montevideo Convention*, 52(3) INT'L LAWYER 393 (2019).

176. *See* CLAPHAM, *supra* note 20, at 291–94.

177. *See President Ma Attends Press Conference Unveiling English Version of Taiwan's First National Human Rights Report under the ICCPR and ICESCR*, OFF. OF THE PRESIDENT REPUBLIC OF CHINA (TAIWAN) (Dec. 18, 2012) http://english.president.gov.tw/Default.aspx?tabid=491&itemid=28855&rmid=2355 ("The president [of the ROC] explained that the ROC, as a founding member of the UN, signed the two human rights covenants back in 1967, but after losing its representation in the UN was unable to further participate in UN conferences or activities, so action to ratify these two covenants was delayed. However, in response to widespread calls here for Taiwan's human rights protections to be brought in line with international practices … [o]n May 14 of the following year, the president formally signed the instruments of ratification for the two covenants"); *President Ma Holds Press Conference on the Release of Taiwan's First Human Rights Report* OFF. OF THE PRESIDENT REPUBLIC OF CHINA (TAIWAN) (Apr. 20, 2012), https://english.president.gov.tw/NEWS/3880.

178. *See generally* ALSTON, *supra* note 174.

179. *See, e.g.,* Tel-Oren v. Libya, 726 F.2d 774, 791–92, 795 (D.C. Cir. 1984)

> The Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law . . . . It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals . . . . While I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read section 1350 to cover torture

developments suggest that opinion may be beginning to change, and that these entities could be analogized with public actors, as the Southern District of New York appeared to do in *Sokolow* also concerning the PLO.[180] In any event, state-like entities are increasingly being treated as if they were states for purposes of human rights obligations.

5. Nationality

Similarly, some states will recognize the nationality of a person notwithstanding whether their "state" of nationality is not itself recognized as a state.[181] Setting aside the unique regime of "national" for purposes of international sport or similar concerns, where individuals might easily hold the nationality of a non-state entity,[182] there are cases where nationality has been recognized for a wider variety of purposes.[183] In 1924, the Irish

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by non-state actors, absent guidance from the Supreme Court on the statute's usage of the term "law of nations."

180. *See* Sokolow v. Palestine Liberation Org., No. 04 CIVIL 00397 (GBD), 2015 WL 10852003 (S.D.N.Y. Oct. 1, 2015), (finding PLO and PA liable for funding terrorism) *vacated and remanded sub nom.*, 835 F.3d 317 (2d Cir. 2016); Nicole Hong, *Jury Finds Palestinian Authority, PLO Liable for Terrorist Attacks in Israel a Decade Ago; Federal Jury Orders Groups to Pay $218.5 Million to Victims' Families*, WALL ST. J. (Feb. 24, 2015), http://www.wsj.com/articles/jury-finds-palestinian-authority-plo-liable-for-terrorist-attacks-in-israel-a-decade-ago-1424715529. That being said, *Sokolow* was vacated and remanded by the Second Circuit, holding that "neither the PLO nor the PA is recognized by the United States as a sovereign state." Waldman v. Palestine Liberation Org., 835 F.3d 317, at 22 (2d Cir. 2016).

181. *See* U.S. DEP'T STATE, 9 FOREIGN AFFAIRS MANUAL 403.9-3(B)(2) (2020) (regarding passports from ROC Taiwan and Turkish Republic of Northern Cyprus); Caglar v. Billingham [1996] STC 150 (Eng.); 584 Parl. Deb HL (5th ser.) (1998) col. 205 (UK), 304 Parl. Deb HC (6th ser.) (1998) col. 277 (UK); CRAWFORD, *supra* note 3, at 31 (regarding "A" Mandated Territories).

182. *See Palestine*, OLYMPIC, http://www.olympic.org/Palestine.

183. *See, e.g.*, Marrakesh Agreement Establishing the World Trade Organization, *supra* note 151, art. XII(1) (permitting members of any separate customs territory, currently Hong Kong, Macau, and Chinese Taipei, to be admitted); *Id.* art. XI(1); *Id.* art. XIV(1) (permitting the admission of the European Communities) ("The terms 'country' or 'countries' as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO. In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term 'national', such expression shall be read as pertaining to that customs territo-

Free State seceded from the UK and began administering some sovereign powers, although it remained unclear whether it considered itself an independent state or was merely exercising sovereign powers delegated from the UK. In 1937, Ireland adopted a new constitution which declared the entity a sovereign state and claimed the entire island as the territory of the state.[184] However, Irish persons continued to be considered British nationals under the law of the UK.[185] It was only in 1949 that Ireland declared itself a republic and thus outside of the Commonwealth.[186] Nonetheless, the UK has continued to legislate that Irish people are not considered "foreigners",[187] meaning that they have the right to abode within the UK, can vote in UK elections, and stand for British Parliament. Oddly, Irish citizens resident in the UK could even vote in the Brexit referendum.[188] The people of Northern Ireland under the Good Friday Agreement have even more ambiguous status in that

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ry, unless otherwise specified."); *see also, e.g.* Paul Koring, *Palestine Exists for a Select Few Canadians*, GLOBE & MAIL (Sep. 20, 2011), http://www.theglobeandmail.com/news/world/palestine-exists-for-a-select-few-canadians/article594913/ (providing that "Palestine" exists as a valid "Country of Birth" for Canadians, although the government does not recognize Palestine as a state). *But see* U.S. DEP'T STATE, 8 FOREIGN AFFAIRS MANUAL 403.4-4(A) (2019) (prohibiting "Palestine" as a valid country of birth after 1948, and requiring instead "West Bank" or "Gaza Strip").

184. *See* Constitution of Ireland 1937 art. 2 ("national territory [of the Irish state] consists of the whole island of Ireland"); *Id.* art. 3 ("Pending the reintegration of the national territory . . . the laws enacted by [the Irish] Parliament shall have the like area and extent of application as the laws of Saorstat Éireann [the Irish Free State]"). This claim was withdrawn in 1999 in the course of the Northern Ireland peace process.

185. *See* 465 Parl. Deb HC (5th ser.) (1949) col. 2235-36 (UK) (Sec'y St. Home Aff'rs).

186. *See* The Republic of Ireland Act, 1948 (Act No. 22/1948), http://www.irishstatutebook.ie/eli/1948/act/22/enacted/en/html#.

187. *See* British Nationality Act 1981 c. 61, § 50(1) ("alien" means a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland" … "foreign country" means a country other than the United Kingdom, a dependent territory, a country mentioned in Schedule 3 and the Republic of Ireland"); *see also* MARY FULBROOK, A HISTORY OF GERMANY 1918-2008: THE DIVIDED NATION 32 (4th ed. 2015) (documenting West German legislation that provided that East Germans were not foreigners, though they were citizens of an independent state).

188. *See* European Union Referendum Act 2015, c. 36 §2(2)(a)-(b) (Dec. 17, 2015) ("A person falls within this subsection [entitled to vote in the Brexit referendum] if the person is either — a Commonwealth citizen, or . . . a citizen of the Republic of Ireland.").

they are considered Irish and British citizens simultaneously and may select either citizenship.[189] Apparently a state of nationality can be relative depending on function.

Recent practice before the UN Compensation Commission (UNCC) is even more on point. The default rules on diplomatic protection of nationals before the UNCC were amended with a *lex specialis* rule permitting states to submit claims on behalf of persons resident on their territory.[190] This approach was undertaken to solve the recurring problem of protection for stateless persons or other unwillingness of states to exercise protection over their nationals.[191] The practice was well in line with the progressive development of the law proposed in the International Law Commission Draft Articles on Diplomatic Protection.[192] Even more significantly, non-state entities were also given permission to exercise diplomatic protection over claims by their "nationals".[193] This in itself was not too shocking in that the ICJ has since 1948 recognized that an international organization could exercise protection over claims where the

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189. *See generally* The Northern Ireland Peace Agreement, U.K.-Ir., Apr. 10, 1998, 37 I.L.M. 751

> The participants . . . will . . . recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

190. *See* Comp. Comm'n Governing Council, art. 5.1, U.N. Doc. S/AC.26/1992/10 (June 26, 1992) (permitting a government to "submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory"). *See generally* Carmel Whelton, *The United Nations Compensation Commission and International Claims Law: A Fresh Approach*, 25 OTTAWA L. REV. 607, (1993).

191. *See generally* Whelton, *supra* note 190.

192. *See* Intl' Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, at 18, U.N. Doc. A/61/10 (2006); Comp. Comm'n Governing Council, U.N. Doc. S/AC.26/Dec.225 (July 2, 2004).

193. *See* Comp. Comm'n Governing Council, *supra* note 190, at 5, ¶ 2 (permitting claims by an appointed body or authority on behalf of individuals where the state of nationality will not or cannot claim).

international organization is responsible for the person.[194] This modest extension of the practice could now cover de facto states in addition to international organizations. On this basis, the Palestinian Authority was authorized to submit claims on behalf of its "nationals" as if it were a state.[195] Perhaps this change in direction evidences a softening on general opposition to the Palestinian claim to statehood or perhaps it simply acknowledges that Palestine is, at the least, a quasi-state with sufficient functional capacity to take up the claims of its people. Similar considerations may appear in the pending ICC case, the *Situation in Palestine*, if the Court seeks to exercise its jurisdiction over Palestinians on the basis of nationality.

6. International Criminal Law

Although not per se human rights law, international criminal law considerations might also justify treating certain entities as if they were states. International humanitarian law already applies to non-state actors, along with the rules on war crimes, crimes against humanity and genocide.[196] For one international criminal offense in particular, however, statehood is critical: aggression. The crime of aggression applies to individuals acting in a state leadership position.[197] Perhaps in order to continue its campaign against impunity, the ICC may wish to interpret "state" liberally to include state-like entities.[198] While it is widely understood that state-like entities—since they are not

194. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 187 (Apr. 11).

195. *See* Linda A. Taylor, *The United Nations Compensation Commission*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 197, 202 (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009) (noting that the Palestinian Authority was permitted to file claims); Comp. Comm'n Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Palestinian "Late Claims" for Damages Up to USD 100,000 (Category "C" Claims), at 4, U.N. Doc. S/AC.26/2003/26 (2003).

196. *See* Marco Sassòli, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, 10 Y.B. INT'L HUMANITARIAN L. 45, 63 (2007).

197. *See* Int'l Crim. Ct., *Res. 6: The Crime of Aggression*, ICC Doc. RC/Res.6 (June 11, 2010); G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

198. *See* Worster, *supra* note 51; *Cooks Islands*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/cook%20islands.aspx (last visited Nov. 25, 2020).

formally states—do not have an obligation to enforce and punish international criminal law,[199] this view appears to be changing with some authorities concluding that a quasi-state incurs this state obligation.[200] Once one obliges state-like entities to act like states in prosecuting international criminal law, one might also be obliged to accord *ne bis in idem* effect, where applicable, to their judgments.[201] This concern over the crime of aggression leads to the next issue, the use of force.

7. Use of Force and Armed Conflict

Another situation where an entity not understood to be a state might nonetheless be treated as if it were a state is where there is a risk of the use of force by the entity or against it.[202] Traditionally the prohibition on the use of force, usually with reference to the UN Charter Article 2(4), though also generally under customary international law, is understood to apply only to states.[203] States remain free to use force in their internal affairs to maintain law and order—for example, by resisting an armed rebel faction, civil war, or terrorist group,[204] —so that,

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199. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), at 240, 289, June 8, 1977, 1125 U.N.T.S. 3; Claus Kreß & Kimberly Prost, *Article 87*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1517, 1523 (2d ed., 2008); 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 607 (2005).

200. *See, e.g.,* Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 1633, U.N. Doc. A/HRC/12/48 (Sep. 15, 2009) (any entity in the Gaza Strip that functions as a government is responsible for enforcing international humanitarian law and human rights law on armed groups in Gaza).

201. *See, e.g.,* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (providing that an accused may not be tried again for the same offense).

202. *See* Anthony Cullen & Steven Wheatley, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 691 (2013); Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 491, 492, 494, 498 (1998).

203. *See* IIFFMCG Report, *supra* note 72, at 239.

204. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 80 (July 22); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opin-

usually in order for a use of force to violate Article 2(4), some state-to-state involvement is required.[205] However, some authorities are now asserting that Article 2(4) and/or customary international law also prohibit the use of force by or against a sufficiently state-like entity.[206] Even though the prohibition is addressed to "states," it has been argued that this term should not be understood to be judged only by recognition or UN membership, i.e. a functional approach should be taken.[207] Here the entity may be assimilated to a state, although for all other purposes it would not be considered a state.[208] What may be key to

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ion, 2004 I.C.J. 136 (July 9); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) Albrecht Randelzhofer, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1397 (Bruno Simma et al. eds., 2002).

205. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb & Montenegro), Judgment, 2007 I.C.J. 397 (June 1); *Dem. Rep. Congo v. Uganda*, 2005 I.C.J. 168, ¶ 146–47; *Nicar. v. U.S.*, 1986 I.C.J. 14; SC Res 262 (XXIII), ¶ 1 (Dec. 31, 1968); U.N. Dept. Pol. & Security Council Aff., Repertoire of the Practice of the Security Council Supplement 1966-1968, at 146, 163–64. U.N. Doc. ST/PSCA/1/Add.5 (1971; Jörg Kammerhofer, *The Armed Activities Case and Non-State Actors in Self-Defence Law*, 20 LEIDEN J. INT'L L. 89, 98–112 (2007).

206. *See* G.A. Res. 2625 (XXV), at 122 (Oct. 24, 1970) ("Every State [...] has the duty to refrain from the threat or use of force to violate international lines of demarcation."); Christian J. Tams & Antonios Tzanakopoulos, *Use of Force*, *in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD (Jean D'Aspremont & Jörg Kammerhofer eds., 2013) (arguing that the prohibition on the use of force includes force against "stabilized territorial entities that are not States"); O. CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 160 (2010); J. Frowein, *De Facto Regime*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 61–62 (Rüdiger Wolfrum ed., 2009); Jonathan I. Charney & J.R.V. Prescott, *Resolving Cross Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 474 (2000).

207. *See* Nicolai N. Petro, *The Legal Case for Russian Intervention in Georgia*, 32 FORDHAM INT'L L.J. 1524, 1526–28 (2009) ("[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression" and, "[a] war of aggression is a crime against inter-national peace. Aggression gives rise to international responsibility.").

208. *See* Stefan Talmon, *The Constitutive Versus The Declaratory Theory of Recognition: Tertium Non Datur?*, 75 BRIT. Y.B. INT'L L. 101, 104 (2004) (discussing the theory of de facto states as special entities:

> The legal position of a *de facto* regime corresponds to that of a State, i.e. it *ipso jure* has those minimum rights and obligations that are concomitant with statehood. If there are differences to a recognized State in its legal standing, these

this position is that the entity has achieved its own de facto independence,[209] excluding sham national liberations orchestrated by external states which might mask Article 2(4) violations.

This argument actually has some historical precedent. For example, consider the UN Security Council discussions over the use of force by India against Hyderabad, discussed above.[210] The Security Council could have dismissed the matter out of hand by concluding that Hyderabad was simply not a state. Instead, the Security Council applied a flexible interpretation of the UN Charter Articles 32 and 35(2), effectively finding that an entity whose statehood is questionable, but who has some statehood functions, could complain on the international level about the use of force against it.[211] In addition, James Crawford has concluded that the UN Charter prohibits the use of force by PR China against RO China, despite RO China not being generally understood to be a state and not being a party to the UN Charter—or rather, no longer being party.[212]

In contemporary times, this argument has been invoked to cover entities such as Abkhazia and South Ossetia.[213] The In-

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> are found in the area of optional relations, that is within States' discretion. (footnote omitted).)

209. *See* Jonathan I. Charney & J. R.V. Prescott, *Resolving Cross Strait Relations between China and Taiwan*, 94 AM. J. INT'L L. 453, 469 (2000).

210. *See* U.N. SCOR 357th mtg. No. 109, 3–21 (Sept. 16, 1948); *see also* G.A. Res. 2626 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970), Principle I, para. 6 ("States have a duty to refrain from acts of reprisal involving the use of force."), para. 7 ("Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."). *But see id.* at para. 13 ("Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.").

211. *See* CRAWFORD, *supra* note 3, at 191; HIGGINS, *supra* note 134, at 42–43.

212. *See* CRAWFORD, *supra* note 3, at 219, 221 ("the suppression by force of 23 million people cannot be consistent with the [United Nations] Charter," and that therefore "[t]o that extent there must be a cross-Strait boundary for the purposes of the use of force.")

213. *See generally* Anthony Cullen & Steven Wheatley, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, 13(4) HUM. RTS. L. REV. 691 (2013); Frowein, *supra* note 206, at ¶ 1.

dependent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG) concluded in its report that South Ossetia, being "an entity short of statehood,"[214] and Abkhazia, being "a state-like entity," could benefit from the prohibition on the use of force in international law.[215] Similarly, South Ossetia should be protected by the prohibition on acts of aggression[216] and should also benefit from the right of self-defense.[217] This conclusion was supported by the 1992 Sochi Agreement between Georgia and Russia on the armed hostilities in South Ossetia acknowledging "the commitment to the UN Charter and the Helsinki Final Act."[218] Russia has pledged to Abkhazia and South Ossetia that it considers them states under international law and as such it is constrained by the international law norm prohibiting the use of force. The IIFFMCG also cited the 1994 Agreement on the Georgian-Ossetian conflict where Georgia and Russia (as well as North and South Ossetia) pledged that they would not use force in the situation in South Ossetia.[219] In the case of Abkhazia, the IIFMCG cited the 1994 Moscow Agreement similarly obliging the parties to "refrain from all military operations against each other."[220] The

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214. *See* IIFFMCG Report, *supra* note 72, at 134.

215. *See id.* at 229–42. *See also* The Agreement on Principles of Settlement of the Georgian-Ossetia Conflict, June 24, 1992 ("Sochi Agreement") *reprinted in* TAMAZ DIASAMIDZE, REGIONAL CONFLICTS IN GEORGIA (THE AUTONOMOUS OBLAST OF SOUTH OSSETIA, THE AUTONOMOUS SSR OF ABKHAZIA 1989-2008): THE COLLECTION OF POLITICAL-LEGAL ACTS 110 (2d ed., 2008); The Agreement on the Further Development on the Process of the Peaceful Regulation of the Georgia-Ossetian Conflict and on the Joint Control Commission, Oct. 31, 1994 *reprinted in id.* at 192; The Memorandum on Necessary Measures to be Undertaken in Order to Ensure Security and Strengthening of Mutual Trust between the Parties to the Georgian-Ossetian Conflict, May 16, 1996 *reprinted in id.* at 244.

216. *See* G.A. Res. 3314 (XIXX), Definition of Aggression (Dec. 14, 1974).

217. *See* IIFFMCG Report, *supra* note 72, at 241.

218. *See* IIFFMCG Report, *supra* note 72, at 240; *see generally* The Agreement on Principles of Settlement of the Georgian-Ossetia Conflict, *supra* note 215.

219. *See* IIFFMCG Report, *supra* note 72, at 240; *see generally* The Agreement on the Further Development on the Process of the Peaceful Regulation of the Georgia-Ossetian Conflict and on the Joint Control Commission, *supra* note 215; The Memorandum on Necessary Measures to be Undertaken in Order to Ensure Security and Strengthening of Mutual Trust between the Parties to the Georgian-Ossetia Conflict, *supra* note 215.

220. *See* IIFFMCG Report, *supra* note 72, at 291; Agreement on a ceasefire and separation of forces, May 14, 1994 *reprinted in* TAMAZ DIASAMIDZE,

IIFFMCG interpreted the agreement to be an acceptance that Article 2(4) applied to any conflict with South Ossetia or Abkhazia. [221]

While this view holds that state-like entities might benefit from the protection against the use of force, the corollary question is whether the prohibition on the use of force prohibits these entities from using force themselves.[222] Again, historically this view has some precedent. North Korea was not widely understood to be a state in 1950; when the UN Security Council took action, it did so on the basis of the vague notion that there had been a "breach of the peace", though not an Article 2(4) violation, necessarily.[223] By 2013, however, North Korean threats have been articulated as violations of Article 2(4),[224] notwithstanding the fact that North Korea is still not recognized as a state by South Korea and Japan.[225] The IIFFMCG

REGIONAL CONFLICTS IN GEORGIA (THE AUTONOMOUS OBLAST OF SOUTH OSSETIA, THE AUTONOMOUS SSR OF ABKHAZIA 1989-2008): THE COLLECTION OF POLITICAL-LEGAL ACTS 179–81 (2nd ed., 2008); Declaration on Measures for a Political Settlement of the Georgian-Abkhaz Conflict, Apr. 4, 1994 *reprinted in id.* at 175; Quadripartite agreement on voluntary return of refugees and displaced persons, *reprinted in id.* at 172–74.

221. *See* IIFFMCG Report, *supra* note 72, at 240, 291; S.C. Res. 876, ¶¶ 2, 4 (Oct. 19, 1993) (UNSC "demands that all parties refrain from the use of force" and condemns violations of the ceasefire agreement between Georgia and forces in Abkhazia); S.C. Res. 1187, ¶ 11 (1998) (UNSC "calls upon the parties …to refrain from the use of force"); S.C. Res. 1494, ¶ 19 (July 30, 2003); S.C. Res. 1524, ¶ 22 (Jan. 30, 2004); S.C. Res. 1554, ¶ 22 (July 29, 2004); S.C. Res. 1582, ¶ 24 (Jan. 28, 2005); S.C. Res. 1615, ¶ 25 (July 29, 2005).

222. *See* Nicholas Tsagourias, *Non-state Actors in International Peace and Security: Non-state Actors and the Use of Force*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 326 (Jean D'Aspremont ed., 2011); Colin Warbrick, *States and Recognition in International Law*, *in* INTERNATIONAL LAW 205–56 (Malcolm Evans ed., 2003).

223. *See* CRAWFORD, *supra* note 3, at 470; S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); S.C. Res. 84 (July 7, 1950).

224. *See* Tom Miles, *North Korea threatens South with "final destruction"*, REUTERS (Feb. 19, 2013, 7:46 AM), http://www.reuters.com/article/2013/02/19/us-nkorea-threat-idUSBRE91I0J520130219 (reporting on the threat of North Korea against South Korea of a "final destruction" at the United Nations Conference on Disarmament in 2013 and the reactions of the governments of South Korea, France, Germany, Spain Poland US and Britain that the threat was a breach of article 2(4)).

225. *See* Amended 1952 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 3 (July, 7 1952) (S. Kor.) (defining the Republic of Korea

took a similar approach when it found that the use of force by South Ossetia was unlawful.[226] The IFFMCG considered that, even where an entity has a right to self-determination, that right does not give rise to a right to use force in an attempt to secede, excepting cases of de-colonialization or illegal occupation.[227] Whether a state would in turn have a right to self-defense from a quasi-state using force remains an open question.[228]

In addition to the *jus ad bellum*, there is also the *jus in bello*. This field of law originally only applied to international armed conflict; that is, conflict between states. However, as some non-state actors grew in military capability, and conflicts within states evolved from police to military action, international hu-

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as the entire Korean peninsula); Treaty on Basic Relations between Japan and the Republic of Korea, June 22, 1965, Japan-Korea, art. III, June 22, 1965, T.S. No. 8473. Joyakushu Shouwa 40 (Nikokukan) 237-392, 2 JAPAN'S FOREIGN RELATIONS-BASIC DOCUMENTS 569-572 ("It is confirmed that the Government of the Republic of Korea is the only lawful Government in Korea as specified in the Resolution 195 (III) of the United Nations General Assembly.").

226. *See* IIFFMCG Report, *supra* note 72, at 279.

227. *See id. See also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 68–72 (4th ed., 2018); *but see* G.A. Res. 2625 (XXV) (Oct. 24, 1970).

228. *See* Armed Acts. on the Terr. of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 147. (Dec. 19) (refusing to address the question); [*id.* (separate opinion by Judge Kooijmans); *id.* (separate opinion by Judge Simma); *id.* (separate opinion by Judge Koroma) (discussing right to self-defense of a non-state); Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136; S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1373 (Sept. 28, 2001); HCJ 769/02 Publ. Comm. Against Torture in Israel & Others v. Gov't of Israel & Others (2005) (Isr.); IIFFMCG Report, *supra* note 72, at 241–42; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 204–08, 247 (4th ed., 2005). *See generally* Christian J Tams, *The Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359 (2009); Kimberley N Trapp, *Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, (2007). *See also* Letter dated 7 June 2016 from the Permanent Representative of Belgium [Bénédicte Frankinet, Amb.] to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2016/523 (June 6, 2016) (claiming that Belgium was taking collective self-defense measures under art. 51 against ISIL, a non-state actor exercising effective control over territory) (citing S.C. Res. 2249 (Nov. 20, 2015)); Letter dated 10 December 2015 from the Chargé d'affaires a.i. [Heiko Thoms] of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2015/946 (Dec. 10, 2015) (claiming that Germany was taking identical measures against ISIL).

manitarian law expanded to apply to quasi-states or entities short of statehood.[229] Certainly international humanitarian law pertaining to non-international armed conflict applies to non-state actors, but where the non-state entity is an NLM, it will be bound by the rules on "international" armed conflict.[230] In any event, a quasi-state, though unrecognized as a state, must comply with international humanitarian law.

8. Immunity

This next section will briefly observe how issues of immunity can arise in cases of quasi-states. Lack of recognition can be an impediment to lawsuit, since the entity has no personality in the domestic legal order. However, courts are sometimes willing to go behind the political posture and identify the real facts.[231] Conversely, an entity might be recognized as a person but not as a state entitled to immunity.[232] There is also the practice of sometimes permitting the executive to certify that an entity is a "state,"[233] regardless of whether it has been rec-

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229. *See* Jean S. Pictet, (ed.), *The Geneva Conventions of 12 August 1949*, *Commentary, Volume 1, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva, 1952).

230. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts, art. 1, June 8, 1977, 1125 UNTS 3; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 115–46 (July 15, 1999); Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 YB INT'L HUMANITARIAN LAW 3, 7 (1998) ("[I]t is at least arguable that, under customary law, is not a precondition distance of international conflict that all parties must be states, although it is necessary that they possess some kind of international status, at least *de facto*."); OPPENHEIM, *supra* note 41, at 203–04.

231. *See* Limbin Hteik Tin Lat v. Burma, Shō 28 (yo) no. 9952, 5 *Kakyū saibansho minji saiban reish*ū [*Kaminsh*ū] 836 (Japan) (Tōkyō Chihō Saibansho [Dist. Ct., Tokyo], June 9, 1954) *translated at* 32 INT'L L. REPS. 124.

232. *See* SIR ROBERT JENNINGS & ARTHUR WATTS EDS., 1 OPPENHEIM'S INTERNATIONAL LAW 158–59 (9th ed. 1992).

233. *See* State Immunity Act, R.S.C. 1985, c. S-18 (Can.) ("[A] certificate issued by the Minister of Foreign Affairs . . . with respect to … whether a country is a foreign state for the purposes of this Act . . . is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question."); State Immunity Act, 1978, c. 33 (U.K.) ("[A] certificate by or on behalf of the Secretary of States shall be conclusive evidence on any question . . . whether any country is a State for the purposes of Part I of this Act").

ognized or not. [234] Similarly, the UN State Immunity Convention can be applied regardless of recognition.[235] Thus, once again, one sees that an entity not widely understood to be a state might benefit from a partial, functional, recognition as a state.

9. Recognition of a Contribution to Forming Customary International Law

Yet another way in which state-like entities may be partially or functionally recognized as states is for purposes of contributing their practice and *opinio juris* to customary international law. Notwithstanding the submissions of some scholars that customary international law may be formed by international organizations,[236] customary international law is generally un-

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234. *See* Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, No. 60 (Feb. 4, 1982)

> There could be situations in which, for policy reasons, the Secretary of State for External Affairs might wish to issue a certificate stating that country x, although not recognized, is a foreign state for the purposes of the act . . . . So if you were to include as a requirement that the certificate should deal with the question of recognition, that could restrict the political discretion in this area.

235. *See* Inst. Int'l L., *Resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law*, art. 12 (2001) reprinted at 69 ANN. INST. DROIT INT'L 750 (2000-01) ("[T]his Resolution is without prejudice to the effect of recognition or non-recognition of a foreign State or government on the application of its provisions"). *But see* Worster, *supra* note 54 (arguing that international organizations do contribute to customary international law in certain situations such as "internal" acts and cases where the organization exercises delegated state authority or an international territorial administration).

236. All of the foregoing sets aside the contemporary argument that the practice and *opinio juris* of international organizations in their own independent capacity (and not expressing the practice of states by and through international organizations) as evidentiary of customary international law. *See, e.g.,* Reservations to the Convention on the Prevention & Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 25 (May 28) (considering the depositary practice of the UNSG); Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT'L L. 408 (2000); Kenneth S. Gallant, *International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individu-*

derstood to be the practice and *opinio juris* of states.[237] But there are now a few places where non-states can contribute and some scholars are less categorical about the exclusion of non-states.[238] Initially, perhaps it is important to observe that this

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als, 43 J. MARSHALL L. REV. 603 (2010) (setting aside the argument that the practice and opinio juris (if we can speak of such a thing) of the ICRC can contribute to the formation of CIL); *See, e.g.,* Letter from US Dep't of State, Initial Response of U.S. to ICRC Study on Customary International Humanitarian Law with Illustrative Comments (Nov. 3, 2006) *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (Sally J. Cummins, ed., 2007) ("the [ICRC] Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.").

237. *See* Michael Wood (Special Rapporteur on Identification of Customary International Law), *Second Rep. on Identification of Customary International Law,* ¶¶ 34–36, U.N. Doc. A/CN.4/672 (May 22, 2014) ("[I]t is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law."); *See* Comm. on Formation of Customary (Gen.) International Law, *Final Report of the Committee Statement of Principles Applicable to the Formation of General Customary International Law*, 69 INT'L L. ASS'N REP. CONF. 729 (2000) ("Although international courts and tribunals ultimately derive their authority from States, it is not appropriate to regard their decisions as a form of State practice."); William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEORGETOWN J. INT'L L. 445, 484 (2014); Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 135, 144 (2007) ("What is remarkable in this literature is that virtually all of it has accepted the core premise that only states can form CIL"); Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 267 (2006) ("[States] have a quasimonopoly over the formation of custom … [I]nternational judicial bodies — not being the organs of any single State — never contribute as such to the practice of States"); Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* RÜDIGER WOLFRUM & VOLKER RUBEN EDS., DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 19–24 (2005) (observing non-state participation in forming customary international law).

238. *See* Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 267 (2006); Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 28–29 (Rüdiger Wolfrum & Volker Röben eds., 2005)("Because the question of whether international law will be effective in a particular dispute will increasingly depend upon the arena or forum in which the dispute is heard, scholarly and practitioner statements of what the law is … will increasingly have to be qualified by reference to *where*

is not a discussion of the relative weight of practice of certain "specially interested"[239] states. In that argument, the relative interests of different states influence the weight of their practice in forming customary international law.[240] This discussion focuses on whether state-like entities, with a relative personality, can make any contribution at all. The ICJ and International Law Commission have held that the practice of an international organization—specifically the United Nations Secretariat—could contribute to customary international law in the narrow category of the organization's functions.[241] This is distinct from the role of international organization acts as evidence of customary international law,[242] since here we are discussing the legal act of creating international law. Sir Michael Wood, in

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a potential dispute in the future may be initially characterized in terms of law and *where* those characterizations will thereafter be put to political use.").

239. *See* Worster, *supra* note 237, at 497–98.

240. *See* North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20)(explaining that states that are especially invested in an issue play a larger role in creating the relevant customary international law than do states that are disengaged); Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81–2, 84 (2001) (explaining that powerful states can play an outsized role). *See generally* William Thomas Worster, *The Transformation of Quantity to Quality: Critical Mass in the Formation of Customary International Law*, 31 BOSTON UNIV. INT'L L.J. 62 (2013).

241. *See* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

242. *See, e.g.,* Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, para. 70 (July 8) ("General Assembly resolutions . . . can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*"); Military & Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J., ¶¶ 188, 190–92, 195, 202, 204 (June 27); North Sea Cont. Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 33–6 (Feb. 20); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 495 (Int'l Crim. Trib. For Rwanda, Sept. 2, 1998) (citing an ICJ decision to find that the Genocide Convention reflects customary international law); Panel Report, *Korea – Measures Affecting Government Procurement*, para. 7.123, WTO Doc. WT/DS163/R (May 1, 2000) ("Since this article has been derived largely from the case law of the . . . PCIJ and the ICJ, there can be little doubt that it presently represents customary international law . . . ."); Sedco, Inc. v. Nat'l Iranian Oil Co. (Iran-U.S. Cl. Trib., 1986) *reprinted in* 25 I.L.M. 633; Kuwait v. Am. Indep. Oil Co. (ad hoc arb. Trib., 1982) *reprinted in* 21 I.L.M. 976, 1032-33; Texaco Overseas Petroleum Co. v. Libya (U.S. v. Libya) Award, ¶ 78 (ad hoc arb. Trib., 1977) *reprinted in* 17 I.L.M. 30.

his reports to the International Law Commission as Special Rapporteur on the Formation of Customary International Law, has concluded that the European Union would also contribute to customary international law where it acts as a state-like entity.[243] The ILC has previously cited to the practice of quasi-states for evidence of customary international law.[244] Similarly, this author has consulted practice and concluded that when an international organization, usually the UN, governs through an international territory administration, such as UNMIK, UNTAET, UNTAES, and others, its practice has been considered to contribute to customary international law.[245] In addition, the practice of non-state actors is certainly relevant in the field of international humanitarian law,[246] as noted above, and the practice of the Holy See is often examined,[247] even though not a state. Thus, there is considerable existing practice of quasi-states or functional state-like governance entities contributing to customary international law.

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243. *See* Michael Wood (Special Rapporteur on Identification of Customary International Law), *Second Rep. on Identification of Customary International Law*, ¶44 n. 135, U.N. Doc. A/CN.4/672 (May 22, 2014).

244. For citations to the practice of the Saar as if it was a state, *see* Roberto Cordova (Special Rapporteur on the Elimination or Reduction of Statelessness), *Rep. on the Elimination or Reduction of Statelessness*, U.N. Doc. A/CN.4/64 (Mar. 30, 1953); Roberto Ago (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, U.N. Doc. A/CN.4/264 & Add.l, II Y.B. Int'l L. Comm'n 111 (1972), U.N. Doc. A/CN.4/SER.A/1972/Add.1; Ivan S. Kerno (Expert of the Int'l L. Comm'n), *Nationality, including Statelessness – Analysis of Changes in Nationality Legislation of States since 1930*, U.N. Doc. A/CN.4/67, 2, 4–5 (Apr. 6, 1953). For citations to the practice of the Free City of Danzig as if it was a state, *see* U.N. Secretariat, *Digest of Decisions of National Courts Relating to Succession of States and Governments*, U.N. Doc. A/CN.4/157, II Y.B. Int'l L. Comm'n 97 (1963), U.N. Doc. A/CN.4/Ser.A/1963/Add.1; Int'l L. Comm'n, Rep. on the Work of Its Twenty-Fifth Session, U.N. Doc. A/9010/Rev.1, II Y.B. Int'l L. Comm'n (1973).

245. *See* Worster, *supra* note 54 (arguing that one exception to disregarding international organization practice for the formation of customary international law is when an international organization is administering a territory as its effective government, i.e. through a functional analysis).

246. *See* Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 126–32 (2012).

247. *See* Worster, *supra* note 237, at 484; Alain Pellet, Special Rapp., Int'l L. Comm'n, *Third Report on Reservations to Treaties*, U.N. Doc. A/CN.4/491, para. 6 (Apr. 30, 1998).

CONCLUSION

This article questioned the standard legal view that statehood is an objective phenomenon. If the cases of subjective statehood were isolated and truly sui generis, then that position might hold, but many proliferating cases, across all parts of the world, argue against that position. At some point the tired label of sui generis becomes so common that it stretches credulity.

Politics has taken over where the law is stumbling and states simply treat these entities as if they were states to solve their pragmatic needs. They are all being dealt with in the same way: via a functional analysis. If a territorial entity is operating as if it were a state, then a de facto statehood status is applied to it insofar as it functions as such. Because legal personality should flow from rights and duties, then the limited, functional rights and duties suggest limited personality—i.e., functional statehood. Subjective legal personality is now increasingly the norm as a solution to a wide variety of situations in many regions of the globe.

The widespread practice of engaging with questionable entities as states for some purposes and not for others is building a regime of second-class, quasi-statehood. This quasi-statehood practice measures international personality in much the same way as the personality of non-state actors is measured: by functionality. This practice then leads to the strange result that statehood, at least for quasi-state entities, is a functional personality. The next step is to bring this doctrine into the law more fully by developing standards for assessing functions to provide greater legal clarity.

However, if it is conceded that statehood can, in this very limited way, be reduced to a partial consideration of functional personality, then what impact on the statehood of the states whose status is not in question? Does this growing practice of quasi-statehood, and the selective refusal and acceptance of certain entities as states lead to an understanding that all statehood is a functional and relative phenomenon? This problem is the classic distinction between essential and existential thought: whether an entity exists as such because of its inherent character or because it interacts with others.[248] Some psy-

248. *See generally* Susan A. Gelman & Gil Diesendruck, *A Reconsideration of Concepts: On the Compatibility of Psychological Essentialism and Context*

chologists have suggested that essentialist thought is only used because it is a useful, perhaps evolved construct,[249] suggesting that it does not reflect reality, but rather a means of dealing with reality. With an essentialist view, the object would have qualities that are caused by some underlying essential characteristics.[250] An existential view, on the other hand, would not merely treat an entity as if it were a state when it behaves as if it were a state, but it would actually consider an entity *to be a state if it behaves as a state* with other international actors. This article has not gone so far. It has only concluded that some entities exist that are treated as if they were states for certain purposes, and that international law is flexible enough to accommodate this practice. It may even be showing the nas-

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Sensitivity, in CONCEPTUAL DEVELOPMENT: PIAGET'S LEGACY 79 (Ellin Kofsky Scholnick, Katherine Nelson, Susan A. Gelman & Patricia H. Miller ed., 1999); Susan A. Gelman & Lawrence A. Hirschfeld, *How Biological is Essentialism?*, *in* FOLK BIOLOGY 403 (S. Atran & D. Medin ed., 1999); Susan A. Gelman, John D. Coley & Gail M. Gottfried, *Essentialist Beliefs in Children: The Acquisition of Concepts and Theories, in* MAPPING THE MIND: DOMAIN SPECIFICITY IN COGNITION AND CULTURE, 341 (Lawrence A. Hirschfeld & Susan A. Gelman ed., 1994); Frank C. Keil, *The Birth and Nurturance of Concepts by Domains: The Origins of Concepts of Living Things, in* MAPPING THE MIND, 252, 234; FRANK C. KEIL, CONCEPTS, KINDS, AND COGNITIVE DEVELOPMENT (1989); Douglas L. Medin, *Concepts and Conceptual Structure, in* 44 AM. PSYCHOL., 1469 (1989); Douglas Medin & Andrew Ortony, *Psychological Essentialism, in* SIMILARITY AND ANALOGICAL REASONING, 179 (Stella Vosniadou & Andrew Ortony, eds. 1989).

249. *See generally* Scott Atran, *Folk biology and the anthropology of science: Cognitive universals and cultural particulars*, 21 BEHAV. & BRAIN SCI. 547 (1998); Frank C. Keil, *The growth of causal understandings of natural kinds*, *in* CAUSAL COGNITION: A MULTIDISCIPLINARY DEBATE (D. Sperber, D. Premack & A. Premack ed., 1995); Scott Atran, *Core domains versus scientific theories*, *in* MAPPING THE MIND: DOMAIN SPECIFICITY IN COGNITION AND CULTURE (Lawrence A. Hirschfeld & Susan A. Gelman, eds. 1994); Frank C. Keil, *The birth and nurturance of concepts by domains: The origins of concepts of living things*, *in* MAPPING THE MIND: DOMAIN SPECIFICITY IN COGNITION AND CULTURE (Lawrence A. Hirschfeld & Susan A. Gelman, eds. 1994); D. Sperber, *The modularity of thought and the epidemiology of representations, in* MAPPING THE MIND: DOMAIN SPECIFICITY IN COGNITION AND CULTURE (Lawrence A. Hirschfeld & Susan A. Gelman, eds. 1994); Susan A. Gelman & Henry M. Wellman, *Insides and Essences: Early Understandings of the Nonobvious, in* 38 COGNITION, 213–44 (1991).

250. *See* Michael Strevens, *The Essentialist Aspects of Naïve Theories, in* 74 COGNITION, 149–175 (2000); *see generally* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (6th ed. 1995).

cent signs of coalescing into a consistent doctrine. In turn, it necessarily forces the question of whether objective statehood will continue. But whether this practice suggests that all states are necessarily relative is an argument for another day.