A ROSE IS A ROSE IS A ROSE. INTERNATIONAL LEGAL FUNCTIONALISM AS A METHOD OF STATEHOOD ANALYSIS

Professor Volker Roeben and Sava Janković*

Statehood is a foundational concept of international law. This Article argues that what is considered a State within the realm of international law is best explained by its external effectiveness in the international legal order, rather than, as so far accepted, by internal facts of people, government, and territory. Against this background, an alternative method of cognizance of statehood in international law is advanced, termed International Legal Functionalism (ILF). ILF suggests that in order for a State to be regarded as such, it should join international organizations, create international law (conclude international agreements), send diplomatic and consular agents, avail itself of the international judiciary, and exercise its inherent rights and obligations. This has implications for the normative steering of statehood as an objectives-driven process.

INTRODUCTION

The State has always occupied international lawyers. Although there exists a consensus that States are the primary subjects of international law, it is still difficult to conclusively define what is a State. Examples of such difficulty to conclusively define statehood include the debates over whether Somaliland, Taiwan, Kosovo, Palestine, or Catalonia qualify as "States." This situation is practically inconvenient and also implicates the integrity of international law. For if international law is defined by its subjects, then the lack of a sound definition of a State impinges on its quality and completeness.[1]

The International Law Commission (ILC) has endeavored a few times to fashion an appropriate and universally acceptable definition of statehood, but has ultimately concluded that "no useful purpose would be served by an effort to define the term 'State.'"[2] During its work on the Draft Declaration of Rights and Duties of States and the Vienna Convention on the Law of Treaties, the Commission declined to provide a legal definition of a State.[3] According to the Commission, any definition proposed by States, other than the definition "commonly accepted in the international practice," would cause misunderstandings.[4]

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*Professor Volker Roeben, Dean and Professor of International Law at Durham Law School. Dr. Sava Janković, Assistant Professor at the Institute of Law Studies, Polish Academy of Sciences, where he pursues research under the National Science Centre grant No 2020/37/K/HS5/02762. The authors thank Professor Brad Roth for insightful comments on an earlier draft.

[1] *See* Lech Antonwicz, *Zagadnienie Podmiotowosci Prawa Miedzynarodwoego,* 32 Annales Universitatis Mariae Curie-Skłodowska 7 (1998); CHRISTIAN N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 215–227 (1974); DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 49 (2002) (describing clear rules for what subjects of international law are necessary for the construction of an international legal system).

[2] Int'l L. Comm'n, Rep. of the Int'l L. Comm'n on the work of its 1st Session, U.N. Doc. A/925 (Apr. 12, 1949).

[3] The meaning of statehood was again discussed in the ILC during its work on the Vienna Convention on the Law of Treaties (VCLT), yet likewise ended without agreement. Rep. of the Comm'n to the Gen. Assembly, [1956] 2 Y.B. Int'l L. Comm'n 107, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

[4] Special Rapporteur Alfaro criticized the criterion of permanent population for excluding nomadic peoples. Sir Bengal Rau demanded an institution to assess statehood issues. Mr. Koretsky thought only the international community capable of deciding on statehood matters. *See Summary Records and Documents of the First Session including the report of the Commission to the General Assembly,*

Article 1 of the Montevideo Convention on the Rights and Duties of States (Montevideo Convention) stipulates that "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."[5] This definition of a State has not been rethought as of late in the literature and attempts at reconceptualizing statehood have not brought a breakthrough.[6] As observed by D'Aspremont, today's disputes about statehood arise either within a strict legal sphere between facticists (who advocate for minimal requirements of statehood in line with the Montevideo Convention) and legalists (who propose the more elaborate legal version of a State). Or they arise within a more political ambit between inter-subjectivists (who accept statehood only upon its recognition) and objectivists (who argue that a State exists as an object independent of recognition).[7] The ontological perplexities have been resolved by the conciliatory approach, that a State is primarily an effective social reality as envisaged by Article 1 of the Montevideo Convention. However, some international legal principles, especially the prohibition of the use of force and the right of self-determination, likewise have an impact on statehood status.[8] The 'great debate' on the value and nature of recognition has been resolved in favor of the declaratory camp, which claims that statehood cannot be determined by the will of others and is an ascertainable social construct mirrored in Article 1 of the Montevideo Convention.[9] In other words, the 1933 Montevideo Convention idea of statehood remains intellectually dominant, such that reference to the Convention "is nearly a reflex."[10] All proffered addenda (democracy, legitimacy

[1949] 1 Y.B. Int'l L. Comm'n ¶¶ 63, 68, 70, U.N. Doc. A/CN.4/SR.1/1949. Special Rapporteur Fitzmaurice proposed that in addition to the case of entities recognized as being States on special grounds, the term 'State' corresponds to the Montevideo Convention vision. This should have been the formulation of Article 3 of the VCLT. Later propositions were aimed at adding to Article 6 of the VCLT that "the term ''State'' is used in this paragraph with the same meaning as in a) the Charter of the United Nations; b) the Statute of the Court; c) the Geneva Conventions on the Law of the Sea; d) the Vienna Convention on Diplomatic Relations, i.e. means a State for the purposes of international law." 2 Y.B. Int'l L. Comm'n 107 ¶ 4, U.N. Doc. A/CN.4/SER.A/1956/Add.1; Summary records of the eighteenth session, [1966] 1 Y.B. Int'l L. Comm'n 192, U.N. Doc. A/CN.4/SER.A/1966.

[5] Signed 26 December 1933, entered into force 26 December 1934. Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention), December 26, 1933, 165 L.N.T.S. 19.

[6] *Cf.* Mathias Forteau, *L'Etat Selon Le Droit International: Une Figure À Géométrie Variable,* 111 Revue Générale De Droit International Public 737–770 (2007); Steven Wheatley, *The Emergence of New States in International Law: The Insights from Complexity Theory*, 15 Chinese J. Int'l L. 579–606 (2016); Janis Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law,* 28 EUR. J. INT'L L. 419–432 (2017).

[7] Jean d'Aspremont, *The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society,* 29 CONN. J. INT'L L. 205–210 (2014).

[8] Anne Peters, *Statehood After 1989: 'Effectivités' Between Legality and Virtuality,* 3 SEL. PROC. EUR. SOC'Y INT'L L. 175–177 (J. Crawford & S. Nouwen ed., 2012).

[9] Stefan Talmon, *The Constitutive Versus the Declaratory Doctrine of Recognition: Tertium Non Datur*, 75 BRIT. Y.B. INT'L L. 101 (2004).

[10] Thomas D. Grant, *Defining Statehood: the Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 415 (1999).

of government, economic viability, constitution, and proceduralization) have been regarded as criteria for recognition of a State or at best de lege ferenda criteria for statehood.[11] They do not alter the existing conception.

Rather than contest the Montevideo definition, the International Court of Justice (ICJ) in the *Kosovo Opinion* has conspicuously avoided any foray into the substance of statehood. Taking a *Lotus*-style approach, it has only identified marginal parameters that may prevent an entity from attaining that status.[12] However, the Montevideo definition has very limited congruence with international law, at least in marginal cases where an entity's claim to statehood is questioned. We submit that the Montevideo's statehood construction—with corresponding legal precepts—does not sufficiently reflect a State's characterization in international law. First, as a socio-theoretical construct, it does not correspond to the functionality notion dominating contemporary international law.[13] Second, as a mechanism, it is frequently unable to capture and categorize relevant phenomena.

This Article, therefore, moves beyond the Montevideo proposition. To this effect, it draws a parallel with international organizations, secondary subjects of international law, focusing on the aspect of functionality. Functionality remains the *raison d'être* of international organizations.[14] We submit that the functionality approach might be extended to States. Accordingly, States in international law should be perceived as ontic geopolitical entities which operate within the international legal system and exercise their international rights and obligations. Accordingly, International Legal Functionalism (ILF) assesses the State's international legal existence. ILF does not reject the Montevideo definition but shifts the emphasis to the crucial aspect of functionality in the sense of its external effectiveness. It enhances legal certainty in international relations because the external effectiveness of a State can be assessed with somewhat greater accuracy

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[11] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 148–155 (2nd ed. 2006); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 130 (9th ed. 2019); JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE (2013).

[12] The *Lotus* Principle entails that the non-prohibition of a certain course of conduct is equal to that conduct being permitted. For the ICJ, no 'rule prohibiting the making of a declaration of independence' can be inferred, neither from state practice, nor from the practice of the Security Council. Such a declaration could only be invalid if connected to the breach of a peremptory norm of international law. Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. REP. 403, ¶¶ 79, 81, 84 (July 22).

[13] In this Article the words 'functionality' and 'effectiveness' should be construed as synonyms. Functionality underpins the functionalist concept employed in international organizations law as well as our correlative concept of international legal functionalism (ILF). It is performance/functionality that lies at the core of certain phenomena and is capable of determining/defining their existence. A broader explanation will follow in the next section.

[14] Raison d'être (fr) - the most important reason or purpose for someone or something's existence. See *Functionalism (international relations)*, *in* Britannica https://www.britannica.com/topic/functionalism-international-organizations.

than the internal. More fundamentally, ILF develops a normative conception of statehood.

The Article proceeds as follows. Part I defines ILF, positions it within the functionalist literature, and explains that ILF refers to the State being externally effective by engaging with the international legal order. Then, it points out that ILF is not as much a doctrine as a method that requires indicators. Part II will then explore those indicators in depth. On that basis, Part III points out that ILF advances international legal certainty, connects the concept of the State with international law, and that its scope of application comprises all States. The purpose of the Article is conceptual, not prescriptive. Therefore, it does not reach conclusions on controversial or hard cases of putative statehood, but it does discuss these cases to evidence general points.

I.
DEFINING INTERNATIONAL LEGAL FUNCTIONALISM

For the purpose of this Article, the simplest definition of ILF is the ability of a State to function in international law. ILF defines a State in international law from an empirical point of view. Hence, a State is not merely a theoretical construct of rules for what it takes to be a State (Montevideo criteria and legality facets) but is predominantly a practical phenomenon defined by the notion of what it means to be a State in a world of States (functionalism). As in the duck test, a duck would not be a duck if it only looked like a duck. It also has to swim like a duck and quack like a duck in concert with other ducks; it has to behave like a duck.[15] We submit that construing States through their international legal functions and attributes is not only more comprehensive but also more accurate from the standpoint of international law.

A. Positioning ILF

We can position ILF against established theories of law and social sciences, especially the functionalist theory. With regard to legal theories, ILF is more closely associated with legal realism than with positivism. Legal realism sees law as the "output of decisions and behavior by judges and others."[16] Realists predict and appraise the law empirically as it actually emanates from courts instead of studying or developing a set of doctrines.[17] Like legal realism, ILF is practical in nature and rejects formalism. And like legal realism, ILF perceives a branch of

[15] The "duck test" is a form of abductive reasoning attributed to James Whitcomb Riley. *See* JAMES WHITMAN RILEY, POEMS & PROSE SKETCHES: "WHEN I SEE A BIRD THAT WALKS LIKE A DUCK AND SWIMS LIKE A DUCK AND QUACKS LIKE A DUCK, I CALL THAT BIRD A DUCK." (2017).

[16] Steven R. Ratner, *Legal Realism School*, 6 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 801 (2012).

[17] Samuel Mermin, *Legal Functionalism*, Anuario De Filosofía Del Derecho 81–92 (1973).

law (the international law of statehood) through the prism of the real behavior of States rather than through doctrine.

With regard to theories of social sciences, ILF resembles the functionalist theory proffering that all aspects of a society (institutions, roles, norms, etc.) serve a purpose and that all are indispensable for the long-term survival of the society.[18] In sociology and anthropology, the functionalist theory conceives society as a system consisting of interconnected parts, each of which performs a specific function in this system.[19] Stated differently, the functions are part of a society and in a specific way, determine and define the society. In psychology, the functionalist theory posits that mental processes must fulfill certain functions, and these functions organize them.[20] The interdependence between the performance of functions and certain phenomena and their existence manifests itself also in legal and international relations disciplines. The functionalist theory of international law "correlates the development and study of international law with the satisfaction of certain social functions in the international system" and "separates interests seen by States as vital from non-vital interests, with non-vital interests, such as communications, health, safety, being entrusted to international rules."[21] In international relations, the functionalist theory arose during the interwar period with the aim of securing peace and stability in an increasingly interconnected world.[22] The theory claims that international organizations, due to their international character, conferred competencies, and technical focus can perform certain functions more efficiently than individual States.[23] The European Union is the classic example of an international organization, where the functionalist approach is seen as a driving force towards securing the integrationist agenda, peace, and stability.[24] That is why it seems plausible to connect ILF with the functionalist theories in social sciences disciplines since all of them predicate upon the performance of functions, which are material for the existence of certain phenomena and thereby expressly or impliedly define these phenomena. No author has gone so far as to extend the notion of functionalism to

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[18] *See Functionalism (social sciences), in* Britannica, https://www.britannica.com/topic/functionalism-social-science.

[19] *See* Józef Obrębski, *O Metodzie Funkcjonalnej Bronisława Malinowskiego*, 2 STUDIA SOCJOLOGICZNE 35–63 (2004).

[20] In psychology of mind, mental states (beliefs, desires, being in pain, etc.) are constituted solely by their functional role, which means their causal relations with other mental states, sensory inputs and behavioral outputs. See *Functionalism, in* Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/functionalism.

[21] JOHN P. GRANT & J CRAIG BARKER, PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 231 (3d ed. 2009). *See ALSO* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

[22] David Long & Lucian M. Ashworth, *Working for Peace: The Functional Approach, Functionalism and Beyond*, *in* NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM 1–2 (1999).

[23] Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT'L L. 645 (2014).

[24] Liesbet Hooghe & Gary Marks, *Grand Theories of European Integration in the Twenty-first Century,* 26 J. EUR. PUB. POL'Y 1113–1133 (2019).

statehood analysis,[25] although it has become a developing and polysemic concept (e.g., neo-functionalism).[26] However, the extension is justifiable. ILF maintains that the State fulfils its *raison d'être* of providing security and services in cooperation with others through international law. The flipside is also true; a dysfunctional State loses its reason for existence.[27] Furthermore, the notion of (functional) integration connects both the concept of international organization and the State. Integration within an organization or the international community of States will enable States to fulfil their functions and corroborate the reason for their existence.

B. External Effectiveness as the Linchpin of ILF

Effectiveness, which some authors connect with Machiavelli and Hegel,[28] is a linchpin of international law.[29] International law is a legal system that endows with legal consequences primarily, if not always, situations and claims that are effective.[30] A situation is considered effective when it is solidly implanted in real life.[31] As remarked by Lauterpacht, international law "cannot lag for long behind facts."[32] It is devoid of any central power to enforce duties and rights; therefore the reliance on effectiveness is much greater.[33] Koskenniemi has argued that the dialectic oscillation between concreteness and normativity could not be explained better than by the concept of effectiveness.[34] Visscher shared this view, propounding: "L'effectivité …suggère à la fois l'idée d'une certaine tension et celle d'une ultime adéquation entre le fait et le droit."[35]

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[25] Long & Ashworth, *supra* note 22, at 9–11.

[26] *See* Laurence Boisson de Chazournes, *Functionalism! Functionalism! Do I Look Like Functionalism?*, 26 EUR. J. INT'L L. 954 (2016).

[27] *See* Volker Roeben, *What About Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power*, *in* LEGITIMACY IN INTERNATIONAL LAW 353–367 (R. Wolfrum & V. Roeben eds., 2008).

[28] FLORIAN COUVEINHES-MATSUMOTO, L'EFFECTIVITE EN DROIT INTERNATIONAL 5–14 (2014).

[29] HEIKE KRIEGER, DAS EFFEKTIVITÄTSPRINZIP IM VÖLKERRECHT 173 (2000).

[30] ANTONIO CASSESE, INTERNATIONAL LAW 12–13 (2d ed. 2005).

[31] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 426 (1947).

[32] *Id.*

[33] Karl Doehring, *Effectiveness*, *in* THE ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 44–45 (1995).

[34] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 284 (2006).

[35] "Effectiveness ... suggests both the idea of a certain tension and that of an ultimate adequacy between fact and law'' (own translation). Charles de Visscher, *Observations Sur L'effectivité Un Droit International Public*, 62 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 601 (1958).

The notion of effectiveness as an argument for the evaluation of facts has been used in relation to government,[36] treaties,[37] acquisition of territorial title,[38] nationality[39] and, finally, to statehood itself.[40] Governmental effectiveness as a statehood criterion has been conceived as the ability to maintain control internally and provide goods, security, and services to the people within the State's borders, and to an extent externally, predominantly denoting independence from other subjects of international law.[41] Since the Aaland Islands case, in which the International Committee of Jurists questioned Finnish statehood in 1917 on the basis of internal disorder and the lack of independence,[42] scholars have continued to determine statehood primarily through internal effectiveness.[43] It has been maintained that statehood status is acquired when a seceding entity exhibits durable and real control over the community.[44] Conversely, statehood status is said to be lost when the governmental effectiveness has disappeared and cannot be re-established.[45] Whether governmental effectiveness disappears in times of forceful occupation, as was the case in Ethiopia, Austria, and Poland in the period from 1936 to 1940, is disputed.[46] However, the *ex injuria jus non oritur* maxim[47] would exclude that occupation can affect statehood. There has not been much of an attempt to unravel the specifics of external effectiveness, with the exception of an enduring attempt to understand independence.

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[36] Peters*, supra* note 8, at 171–175.

[37] ICJ Rep. 65, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 65, 229 (July 18, 1950).

[38] Hiroshi Taki, *Effectiveness*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 348 (Vol. III, 2012).

[39] Nottebohm case (*Liech. v. Guat.*), 1950, ICJ REP. 4, 22 (Apr. 6); Merge Case (*United States v. Italy)* Italy and United States Conciliation Commission, 1955, 14 RIAA 236, 247; Iran-United States Claims Tribunal, Case No. A/18, 1984, Decision No. DEC 32-A18-FT (Apr. 6), reprt. in 5 IRAN-US CL. TRIB. REP 251, 263 (1984).

[40] Gleider I. Hernández*, Effectiveness, in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 246 (Jean d'Aspremont & Sahib Singh eds., 2019).

[41] Stein Sundstøl Eriksen, *State Failure' in Theory and Practice: The Idea of the State and the Contradictions of State Formation,* 37 REV. OF INT'L STUD. 229–237 (2011).

[42] "It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops". *Aaland Islands* case, 3 League of Nations Official J, Spec. Supp. 3, at 8–9 (1920).

[43] *See* ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 60–61 (2005) (the state is "a stable and organized political community" and internal effectiveness is "material" for statehood).

[44] CASSESE, *supra* note 30, at 13.

[45] Doehring, *supra* note 33, at 45.

[46] Recognition/Non-Recognition in International Law, 78 Int'l L. Ass'n Rep. Conf. 461 (2018).

[47] Illegal acts do not create law. See Michel Virelly, *Le Rôle Des « principes » Dans Le Développement Du Droit International, in* LE DROIT INTERNATIONAL EN DEVENIR. ESSAIS ÉCRITS AU FIL DES ANS 195–212 (Michel Virally ed., 1990) ; *see generally* ANNE LAGERWALL, LE PRINCIPE EX INJURIA JUS NON ORITUR EN DROIT INTERNATIONAL (2016).

Effectiveness in the context of statehood assessment by ILF takes a different meaning and form than so far accepted. It validates a State's external legal functionality that embraces a whole range of activities in the international arena, as well as in the State's bilateral and multilateral interactions. The international effectiveness of a State can be reliably measured against this scope of legal activities. A State's effectiveness on the international level is expressed in its ability to create and use international law, implying the conclusion of bilateral and multilateral agreements, membership in international organizations, and the utilization of international rights and obligations, all of which are inherent to a State and acquired subsequently.

For a State to function in a legal sphere—engage in treaties, have access to global courts and otherwise exercise relations with other States— "it must be accepted and treated as independent by other States."[48] Only if the international community in this way embraces the 'questionable' internal situation of the State, can it be approved or legally validated. The principle of *ex injuria jus non oritur* is a factor,[49] but ultimately a decision by the system's central actors about whether to acquiesce is what controls, such as when, the United Nations General Assembly (UNGA) finally credentialed the Soviet-installed Hungarian government in 1963.[50]

C. ILF as Method. Indicators of Progress to Statehood

Following Czapliński and Wyrozumska, subjects of international law could be defined by the degree of their *modus operandi* in international law.[51] Consequently, international legal personality—the capacity of being a bearer of international rights and duties—is linked also to the manifestation of the personality, that is, the capacity to act, which may determine participants of the international legal order. States are meant to possess full, unrestricted international legal personality *and* be able to use its attributes to act in

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[48] Ermira Mehmeti, *Recognition in International Law: Recognition of States and European Integration - Legal and Political Considerations,* 2 EUR. J. INTERDISCIP. STUD. 240 (2016) ("independence alone is not sufficient (…) and recognition is a precondition to secure the functioning of a State in the international order").

[49] *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 53 (2001). Article 41 of the ILC Articles on State Responsibility stipulates "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

[50] G.A. Res. 1857 (XVII) (Dec. 20, 1962). In the remaining part of the article, we will return to the issue of the recognition of states and governments and how such recognition impacts on the question of functionality.

[51] WŁADYSŁAW CZAPLIŃSKI & ANNA WYROZUMSKA, PRAWO MIĘDZYNARODOWE PUBLICZNE. ZAGADNIENIA SYSTEMOWE 167–170 (2014).

international law, whereas other subjects will dispose of lesser levels of personality, which will accordingly translate to their international status.[52]

ILF connects the legal concept of a State with the capacity to act in international law, and the effective exercise of that capacity. International functionality and external effectiveness of an entity as a State are not static affairs. Rather, they are objectives the State in question pursues on the international plane. ILF then becomes a method for assessing statehood, rather than a doctrine that can be directly applied. This method calls for developing indicators to assess a State's progress towards the objective of statehood. Like all indicators, these should be valid and measurable. The next Section will identify indicators that measure the functionality of the State in the international arena.

II.
INDICATORS OF INTERNATIONAL LEGAL FUNCTIONALISM

ILF denotes the exercise of functions of a State in the international legal context, which presupposes the interaction with other subjects of international law, in particular States, as well as the exercise of rights and fulfilment of obligations under international law. International legal functionality of a State (a feature of functionalism understood as a concept) is, therefore, a composite of the legal actions of a State in its international relations.[53] A State can be considered functional within the international legal sphere if it: (A) concludes international agreements and accesses to multilateral treaties; (B) maintains diplomatic and consular relations; (C) exercises State immunity and other privileges; (D) accesses the international judiciary and resolves international disputes in a peaceful manner; (E) joins international organizations; (F) manifests fundamental rights and obligations; and (G) is recognized.

The Article will now consider these indicators. It will present each indicator, explain why it is important for statehood, and give examples with a focus on marginal cases.

A. The Conclusion of International Agreements and Accession to Multilateral Treaties

The conclusion of treaties and particular multilateral treaties is the first indicator that may determine statehood and is conducive to its achievement. The

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[52] Y.B. INT'L L. COMM'N 24 para. 26 (1965). ("[Mr. Lachs] certainly could not accept the comment of the Government of Finland (A/CN.4/175, Section 1.8) which suggested that there might be States which were not subjects of international law. Every State possessed *ex definitione* the right to conclude treaties; no State could suffer such a *capitis diminutio*. The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right; an international organization could have the right to conclude treaties conferred upon it by States.")

[53] *Cf.* Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393–440 (2010).

capacity to conclude treaties (*ius tractatuum*, treaty-making power) is a landmark feature of States as primary subjects of international law, is considered part of their sovereign competencies,[54] and has been enshrined in Article 6 of the 1969 Vienna Convention on the Law of Treaties.[55] Conversely, the absence of the contractual capacity of an entity claiming statehood, empirically evidenced by the non-conclusion of treaties, will cast doubt on the legal status of the entity. Thus, as a general rule, statehood may be confirmed if *ius tractatuum* is exercised. To the contrary, it may be denied if the treaty-making power does not exist or is limited.

In particular, the treaty-making power of constituent units of a State, such as the States or *Länder* in a federal system or provinces in a decentralized system, is not original, comprehensive, or rooted directly in international law, but is delegated by the federation.[56] For instance, the Spanish Constitutional Court, ruling on a conflict of competence brought by the Spanish government against certain precepts of a Decree 89 promulgated by the Basque government, delineated competencies vested in the Spanish State and those vested in its Autonomous Communities.[57] The Court observed that the content and subject of international legal relations of a State are determined by the rules of both general and particular international law applicable to Spain under Art. 149.1.3 of the Constitution.[58] They include signing treaties (*ius contrahendi*), representation of the State in other countries (*ius legationis*), and the creation of international obligations for a State, linked with its international responsibility.[59] On the other hand, the Court noted that the Autonomous Communities in Spain either do not have such competencies or cannot realize them to the full extent because they are limited by particular statutes and predominantly by the Spanish Constitution itself.[60]

In borderline cases, *ius tractatuum* is often used as *arguendo*, corroborating or refuting the status of an entity. Palestine's recent accession to multilateral treaties, many of which are only open to States, arguably confirmed Palestine's statehood at least for the purposes of these treaties.[61] It has acceded to the Vienna

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[54] SS 'Wimbledon [Government of His Britannic Majesty v. German Empire] PCIJ Series A No. 1, 35 ("the right of entering into international engagements is an attribute of State sovereignty"); *see also* JAROSŁAW SOZAŃSKI, WSPÓŁCZESNE PRAWO TRAKTATÓW 27 (2005).

[55] During the discussion on the law of treaties in the ILC, Mr. Lachs shared Mr. Ago's view on the legal and political importance of stating the principle that every State possessed the *ius tractatuum.* Y.B. INT'L L. COMM'N 24 para. 25 (1965).

[56] *See* Anne Peters, *Treaty Making Power*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, vol. X para. 19 (2012).

[57] STC 165/94, BOE 25.6.94.

[58] 3 SPANISH Y.B. INT'L L. 383 (1993-1994); The Spanish Constitution, BOE No. 311, 29.12.1978.

[59] *Id.* at 69; *see also* Spanish Constitutional Court decisions SS. TC 137/1987; 153/1989 and 80/1993; *Cf* 228/2016.

[60] Judicial Decisions*,* 3 SPANISH Y.B. INT'L L. 381 (1993-94).

[61] *See* Shadi Sakran & Hayashi Mika, *Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and Its Consequences,* 25 J. INT'L COOP. STUD. 91–92

Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, and the United Nations Framework Convention on Climate Change.[62] On the other hand, an entity not concluding its own treaties indicates a lack of statehood. For instance, in 1991 a United States Court of Appeal while analyzing Palau's plea for sovereign immunity concluded that Palau did not have the attributes of statehood because the United Nations Trusteeship Agreement delegated the United States "full power of administration, legislation and jurisdiction over the territory" meaning that all the agreements, mainly fisheries and marine resources, must be concluded with the approval of the US.[63] In fact, at the time of the judgment, Palau was still the Pacific Trust Territory, preparing for independence. It could be added though that even at the time of Palau's independence (1994), it was still heavily connected with the US by the Compact of Free Association Agreement and had no say in certain important matters.[64]

Egypt, in a similar vein, could hardly be considered a State until the mid-1950s despite its arranged independence in 1922. It remained under British political and military control, which also performed external affairs, including treaties.[65] Taiwan is a contemporary example; almost all of its international affairs, including treaties, are conducted by the People's Republic of China in line with the One-China Policy.[66] Treaties signed by Taiwan create substantial ambiguities

(2017); *see also* Yael Ronen, *Recognition of the State of Palestine: Still Too Much Too Soon*?, *in* SOVEREIGNTY STATEHOOD AND STATE RESPONSIBILITY – ESSAYS IN HONOUR OF JAMES CRAWFORD 244 (Christine Chinkin & Freya Baetens eds., 2015).

[62] VIENNA CONVENTION ON THE LAW OF TREATIES, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (indicating that Palestine acceded to the Vienna Convention on the Law of Treaties on April 2, 2014) (last visited Apr. 22, 2021); VIENNA CONVENTION ON DIPLOMATIC RELATIONS, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en (indicating that Palestine acceded to the Vienna Convention on Diplomatic Relations on April 2, 2014) (last visited Apr. 22, 2021); UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (indicating that Palestine acceded to the United Nations Framework Convention on Climate Change on December 18, 2015) (last visited Apr. 22, 2021).

[63] *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991).

[64] Aristoteles Constantinides, *Statehood and Recognition*, *in* INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK 36–37 (André Nollkaemper ed., 2018).

[65] *See* Editorial Comment, *Egypt a British Protectorate*, 9 AM. J. INT'L L. 202–04 (1915). According to the Declaration to Egypt by His Britannic Majesty's Government of 28 February 1922, the following matters are absolutely reserved to the discretion of His Majesty's Government: (a) the security of the communications of the British Empire in Egypt; (b) the defence of Egypt against all foreign aggression or interference, direct or indirect; (c) the protection of foreign interests in Egypt and the protection of minorities; and (d) the Soudan. *Id.*

[66] *See Indem. Ins. Co. of N. Am. v. Expeditors Int'l of Washington Inc.*, No. 17-CV-2575, 2019 WL 6842073 (S.D.N.Y. Feb. 19, 2019) (holding that for purposes of international dispute resolution adjudicated in the US, China cannot bind Taiwan to international treaties, even though the State Department has expressly recognized that Taiwan is a part of China).

if somebody were to infer statehood status therefrom.[67] Namely, the Taiwanese name hardly ever appears on these instruments. This was the case with Taiwanese accession to the Agreement Establishing the World Trade Organization, where Taiwan appears under the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).[68]

Beyond the (in)ability to conclude treaties, a State's international legal functionality, *ergo* the substance of statehood, is shaped by the content of certain multilateral law-making treaties.[69] In the first instance, the rights and obligations stemming from a treaty may be of such interest and value for statehood that they can be considered constitutive. One example is the 1982 UN Convention on the Law of the Sea (UNCLOS)[70]. This treaty allocates sovereign rights over critical marine living and non-living resources, such as oil, gas, and offshore wind. The direct relevance of this treaty for statehood claims is evidenced in the Eastern Mediterranean where rich gas deposits exist off the coast of Cyprus and Gaza. Unlike Cyprus and Greece, Turkey is not a signatory to the UNCLOS.[71] It has concluded a bilateral delimitation agreement on the continental shelf with Northern Cyprus that the UN Secretariat, the institutional guardian of the Convention, has not recognized.[72] The practice in this case instantiates that ILF fits with the international community exercising legal control over what entities should attain statehood.[73] Boyle has clearly articulated the importance of certain law-making treaties so that, for instance, Palestine, by acceding to UNCLOS, would get "legal access and a legal right to these enormous gas supplies right off the coast of Gaza, which Israel has access to."[74] Further, "they can become a party to the International Civil Aviation Organization and get legal, sovereign control

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[67] *See e.g.*, Pasha L. Hsieh, *Rethinking Non-Recognition: The EU's Investment Agreement with Taiwan Under the One-China Policy*, 33 LEIDEN J. INT'L L. 689–712 (2020).

[68] Kuan-Hsiung Wang, *Current International Legal Issues: Taiwan*, 23 ASIAN Y.B. INT'L L. 63–64 (2017). In a similar vein, Taiwan acceded in 2002 to the Metre Convention, which created the International Bureau of Weights and Measures as Chinese Taipei and is listed under the category of "Associate States and Economies." Taiwan has also concluded a couple of bilateral free trade agreements (with El Salvador, Guatemala, Honduras Nicaragua, New Zealand, Singapore, Panama) mainly as "Chinese Taipei."

[69] JAROSŁAW SOZAŃSKI, PRAWO TRAKTATÓW: ZARYS WSPÓŁCZESNY 33, 81 (2009).

[70] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[71] *See id.* at 397–98.

[72] ÇAĞATAY ERCIYES, MARITIME DELIMITATION & OFFSHORE ACTIVITIES IN THE EASTERN MEDITERRANEAN 26 (2012), http://www.mfa.gov.tr/site_media/html/maritime_delimitation.pdf. The agreement has not been published in the Law of the Sea Bulletin (LSB), where official submissions by states regarding the law of the sea are published, and it has not been listed as an official deposit on the website of the UN Department of Oceans and the Law of the Sea.

[73] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion I.C.J. Reports 2010, ¶ 81 (July 22, 2010). The Turkish Republic of Northern Cyprus, which has been occupied by the Turkish Armed Forces since 1974, is deemed invalid by the UN Security Council in Security Council resolution 541/83. *See id.*

[74] Dennis Bernstein, *An Interview with Professor Francis Boyle,* COUNTERPUNCH (Dec. 4, 2012), https://www.counterpunch.org/2012/12/04/an-interview-with-professor-francis-boyle/. The same would be the case for Northern Cyprus.

over their own air space. By becoming a member of the International Telecommunications Union, they will get control of their air waves, phone lines, bandwidths for the internet, satellite access, and things of this nature."[75]

The actual capability to carry out the obligations from a treaty affects the international legal functionality of a State.[76] This capability hinges upon the internal situation and factors, such as high crime rates, internal armed conflict, political corruption, ineffective State apparatuses, poor financial assets, or military interference in politics, may render a State legally ineffective. States, like Angola, Liberia, the Democratic Republic of Congo, and Somalia, all went through protracted periods of internal strife and inefficacy. The UN Secretary-General has observed that "since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees, and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity, and peace for its peoples."[77]

The debilitating internal situation has affected the external relations of the affected African States. Other States were disinclined to establish relations with them.[78] The States concerned were unable to fulfil the existing obligations or take upon new ones.[79] They often failed to protect human rights and international humanitarian obligations under treaty and customary law.[80] They also defaulted on their payment obligations to international organizations. For instance, Somalia did not fulfill its financial obligations toward the United Nations under Article

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[75] *Id.*

[76] Vienna Convention on the Law of Treaties art. 26, May 22, 1969, 1155 U.N.T.S. 331. The United States observed that the *pacta sunt servanda* principle was "the keystone that supports the towering arch of confidence among States." 2 Y.B. INT'L L. COMM'N 356 (1966).

[77] U.N. Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, U.N. Doc. S/1998/318. *See also* Ali A. Mazrui, *The Blood of Experience: The Failed State and Political Collapse in Africa*, 12 WORLD POL'Y J. 28–34 (1995).

[78] NEYIRE AKPINARLI, THE FRAGILITY OF THE 'FAILED STATE' PARADIGM: A DIFFERENT INTERNATIONAL LAW PERCEPTION OF THE ABSENCE OF EFFECTIVE GOVERNMENT 25–26 (2010).

[79] Sierra Leone closed 18 embassies in 1989 for material reasons. When the Embassy of Somalia in Bonn could not pay its diplomats in 1992, the Superior Administrative Court of North Rhine-Westphalia received an application for social security assistance from a Somali diplomat. *See also* GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 237–290 (2004).

[80] Daniel Thürer, *The "Failed State" and International Law*, INT'L REV. RED CROSS 836 (1999); Oriol Casanovas y la Rosa, *Los Estados Fracasados*, *in* LA SEGURIDAD COMPROMETIDA NUEVOS DESAFÍOS, AMENAZAS Y CONFLICTOS ARMADOS 83 (Caterina García & Angel Rodrigo eds., 2008). Jackson noted that there are many places around the globe where "[r]eports of international humanitarian organizations annually catalogue arbitrary detentions, beatings, political killings, torture, terror, political prisoners, disappearances, refugees, death squads, destruction of livelihood, and various other human rights violations which fill the pages of substantial volumes." ROBERT H. JACKSON, QUASI-STATES SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 139–163 (2011).

17(2) of the UN Charter between 1993-2001, while Liberia did not pay for two years, as observed by the Contribution Committee in 1997.[81] The absence of contribution to the UN may result in revocation of the voting right in the General Assembly under Article 19 of the UN Charter.[82] Similarly, an ineffective State could be unable to protect diplomatic facilities, archives, and other property of sending States, to which it is obliged by Articles 44-45 of the Vienna Convention on Diplomatic Relations (VCDR).[83] Internal instability may also deter other States from entering into closer relations with the affected one. Bakke, referring to some post-Soviet republics, noted that the prolongation of internal conflict makes such a State unable to integrate with international political and legal structures.[84] Lynch, Zabyelina, and Markovska refer to four post-Soviet breakaway territories (Abkhazia, South Ossetia, Transnistria, and Nagorno Karabakh) in this vein.[85] The European Union has engaged in initiatives to solve some of the ongoing conflicts but is far from entering into legal relations or political integration with regions troubled by the conflict. For instance, while the EU maintains relations with Ukraine, it does not with the Donetsk Republic, which separated unilaterally from Ukraine after the 2014 Euromaidan revolution.[86]

Internal ineffectiveness has been marginally effective. While States that fail to meet their contractual obligations have acquired disparaging appellations in the legal parlance (e.g., collapsed, failed, quasi, or disorientated States),[87] they persist. International law prefers continuity and hence continuity of State parties.

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[81] On Somalia, *see* U.N. Secretary-General, *Letter dated 28 Feb. 1996 from the Secretary-General addressed to the President of the General Assembly*, U.N. Doc. A/50/888 (Feb. 28, 1996) and U.N. Secretary-General, *Letter dated 17 March 1998 from the Secretary-General to the President of the General Assembly*, U.N. Doc. A/ES-10/25 (Mar. 17, 1998). On Liberia *see* ROBIN GEISS, "FAILED STATES": DIE NORMATIVE ERFASSUNG GESCHEITERTER STAATEN 149 (2005).

[82] This hardly ever happens, however, as the Organization prioritizes maintaining the membership. In G.A. Res. 74/1, 5–6 (Oct. 10, 2019), the General Assembly decided that the following three Member States—Comoros, Sao Tome and Principe, and Somalia—shall be permitted to vote in the Assembly until the end of its 74th session and revoked the right only to Venezuela.

[83] *See* U.N. Secretary-General, *Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives*, U.N. Doc. A/69/185 (2014).

[84] Kristin M. Bakke, *After the War Ends: Violence in Post-Soviet Unrecognized States*, *in* UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM 90, 102–03 (Nina Caspersen & Gareth R. V. Stansfield eds., 2011).

[85] Yuliya Zabyelina & Anna Markovska, *Ukraine: Organised Crime, Politics and Frozen Conflicts*, *in* HANDBOOK OF ORGANISED CRIME AND POLITICS 106–107 (Felia Allum & Stan Gilmour eds., 2018); Dov Lynch, *De facto 'States' around the Black Sea: The Importance of Fear*, 7 SE. EUR. AND BLACK SEA STUD. 483, 489–91 (2007).

[86] *See e.g.*, Council of the EU Press release, Declaration by the High Representative on behalf of the EU on the "elections" planned in the so-called "Luhansk People's Republic" and "Donetsk People's Republic" for 11 November 2018 (Nov. 10, 2018).

[87] Daniel Thürer, Der Wegfall effektiver Staatsgewalt: "The Failed State," 34 BERICHTE DGVR 9–48 (1996); Nii Lante Wallace-Bruce, Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law, NETHERLANDS INT'L L. REV. 53–73 (2000); AKPINARLI, *supra* note 78, at 27–28, 84–85. These authors mainly focus on the internal sphere. Rotberg defined failed States as "tense, deeply conflicted, dangerous, and contested bitterly by warring factions . . . Occasionally, the official authorities in a failed state face two or more insurgencies, varieties of civil unrest, . . . and a plethora

B. Maintenance of Diplomatic and Consular Relations

ILF emphasizes that the maintenance of diplomatic and consular relations between States is a key feature of international effectiveness. The capacity to send and receive consuls and diplomats (*ius legationis),* is inherent in a State,[88] and generally reserved for States.[89] Both the 1961 VCDR and the 1963 Vienna Convention on Consular Relations (VCCR) in Article 2 stipulate that States establish diplomatic or consular relations with one another by mutual consent.[90]

The codified rules that circumscribe this legal functionality of a State in precise terms make them valid indicators of statehood, measuring a State's internationally effective exercise.[91] Accordingly, as a part of their diplomatic relations, two States send diplomats to work in each other's country and deal with each other formally. Diplomatic missions must be protected against any interference. Their staff are generally exempt from civil and criminal jurisdiction, taxation,[92] and customs duties.[93] A State exercising consular relations enjoys functional immunity, and consular premises are inviolable and exempt from

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of dissent directed at the state . . ." ROBERT ROTBERG, STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 5 (2003). Kreijen, after also focusing on the internal situation, refers to the external side, saying, "failed States are dysfunctional from the perspective of international law because they are the explicit denial of the basic legal presumption that States must possess at least a minimum of positive capacity in order to be meaningful subjects of international law." KREIJEN, *supra* note 79, at 375.

[88] The earliest expressions of international law were the rules of war and diplomatic relations. See C. H. Alexander, International Law in India, 1 INT'L & COMP. L.Q. 289 (1952).

[89] International Organizations can also send and receive representatives, who likewise enjoy privileges. *See* U.N. Charter art. 105; Treaty on the Functioning of the European Union art. 221, June 7, 2016, 2016 O.J. (C 202). Certain specific subjects of international law, like the Sovereign Military Order of Malta or the Holy See, also possess the legation right. See Code of Canon Law, cc. 361–363, in CODE OF CANON LAW, LATIN-ENGLISH EDITION (Canon L. Soc'y of Am. ed.,1999).

[90] *See* Zdzisław Galicki, Kodyfikacja Międzynarodowego Prawa Dyplomatycznego, in 50 LAT KONWENCJI WIEDEŃSKIEJ – AKTUALNA KONDYCJA UREGULOWAŃ DOTYCZĄCYCH STOSUNKÓW DYPLOMATYCZNYCH 15–22 (Zdzisław Galicki, Tomasz Kamiński & Katarzyna Myszona Kostrzewa eds., 2012).

[91] MICHAEL RICHTSTEIG, WIENER ÜBEREINKOMMEN ÜBER DIPLOMATISCHE UND KONSULARISCHE BEZIEHUNGEN: ENTSTEHUNGSGESCHICHTE, KOMMENTIERUNG 17 (2010).

[92] See ILC Commentary to Article 41(1) regarding personal inviolability of consular officials "The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks—which is particularly serious inasmuch as many of the matters calling for consular action will not admit of delay (e.g., the issue of visas, passports and other travel documents; the legalization of signatures…)." Int'l Law Comm'n, Rep. on the Work of Its Thirteenth Session, U.N. Doc. A/4843 (1961).

[93] "There is no more fundamental prerequisite for the conduct of relations between States… than the inviolability of diplomatic envoys and embassies..." Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*,* Judgment*,* 1980 I.C.J. 42 (May 24). *See also* VCDR art. 22, 24, 27, 29, 34, 36.

taxation.[94] Maintaining consular relations benefits the State's citizens. For example, they enjoy legal care in case of arrest or other deprivation of freedom.[95] Consuls are also entitled to perform in civil matters[96] and provide protection to tourists.[97] The rights and obligations stemming from customary international law and the conventions endow States and their citizens with legal functionality. By participating in this law, States become effectively capacitated. States cooperate on their consular and diplomatic representation—powerfully so in the European Union, where the EU citizens can avail themselves of another member State's representation—if their country is not represented in a third State.[98] On the other hand, States not partaking in these regimes will not be considered functional to this end. They will not benefit from the privileges and immunities reserved for diplomatic missions or consular posts and their staff during the performance of their functions.[99]

For example, a Greek court in 1924 held that two defendants charged with attempted murder could not object to the jurisdiction of the court on the basis of possessing diplomatic immunity as Armenian diplomats. The court reasoned that because the Treaty of Sèvres, which in Articles 88-93 established the independent State of Armenia, had not been ratified. Consequently, the accused persons could not invoke diplomatic status and ensuing immunities.[100] In a similar vein, a UK minister in February 1991, while answering parliamentary questions on granting diplomatic accreditation to Baltic States representatives, stated that "the Baltic States do not fulfil the condition for recognition as independent sovereign States. The question of diplomatic accreditation for their representatives, therefore, does not arise."[101] And in 2002, a diplomat accredited to the Palestinian Authority was not in a position to invoke immunity so as not to appear before the French court

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[94] Vienna Convention on Consular Relations, art. 31–33, 40–43, 21 U.S.T. 77, 596 U.N.T.S. 261; STEFAN SAWICKI, IMMUNITET JURYSDYKCYJNY KONSULA: STUDIUM PRAWNOMIĘDZYNARODOWE (1987).

[95] LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27).

[96] TEFAN SAWICKI, UNKCJE KONSULA: STUDIUM PRAWNOMIĘDZYNARODOWE (1992); Piotr Cybula & Mariusz Załucki, *Funkcje Konsula w Sprawach Spadkowych, in* WYBRANE ZAGADNIENIA WSPÓŁCZESNEGO PRAWA KONSULARNEGO 107–125 (Paweł Czubik & Wojciech Burek eds., 2014).

[97] Piotr Cybula & Paweł Czubik, *Opieka Konsularna nad Turystami, in* PRAWO W PRAKTYCE BIUR PODRÓŻY 380 (Piotr Cybula ed., 2006).

[98] Pursuant to Article 1 of the 2015 Council Directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries' citizens of the Union to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that Member State. Council Directive 2015/637, on the Coordination and Cooperation Measures to Facilitate Consular Protection for Unrepresented Citizens of the Union in Third Countries and Repealing Decision 95/553/EC, 2015 O.J. (L 106) 1.

[99] EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 19–21, 367–373 (3d ed. 2016).

[100] Re Armenian Chargé d'Affaires, ANN. DIG. OF PUB. INT'L L. CASES 301 (1923-24).

[101] HC Deb (26 Feb. 1991), col. 459W.

in a divorce case instituted by his wife.[102] Accreditation is a prerequisite for immunity under both domestic and international law.

Nonparticipation in consular and diplomatic intercourse can also negatively bear on legal transactions. This is the case, for instance, with the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents (Apostille Convention) to which most unrecognized and partially recognized States are not parties.[103] In fact, nonparties to the Apostille Convention can still legalize their official documents at consulates; however, many States have yet to establish consular relations with contested States. Sometimes, a paradoxical situation might appear in which the government recognizes another State yet does not exercise diplomatic or consular relations with it because the accreditation of diplomatic staff lies within the competence of another State organ such as the President of the Republic, as is the case in Poland.[104] Consequently, although Poland recognizes Kosovo, there are no formal consular and diplomatic relations between them.[105] Diplomatic and consular relations governed by customary law and treaties corroborate States' legal functionality using these rules,but States not involved in such intercourse will be legally incapacitated.

C. State Immunities

A State cannot exist without possessing legal immunities.[106] The law of immunity is predominantly customary international law, shaped by decisions of domestic courts or domestic legislation.[107] States enjoy immunity from the jurisdiction of courts of other States (*par in parem non habet imperium*), even if accused of serious violations of international human rights law or the international law of armed conflict, as ruled by the ICJ in *Jurisdictional Immunities of the State*.[108] This strict immunity reinforces the international legal functionality of

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[102] Al Hassan c Nahila el Yafi 2001/18887, 108 REVUE GENERALE DE DROIT INTERNATIONALE PUBLIC 1066 (2004) (Fr.).

[103] Hague Conference on Private Int'l L, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, https://www.hcch.net/en/instruments/conventions/status-table/?cid=41.

[104] Recognition is a two-phased process - the first being an official declaration, whereas the second the constitutive establishment of relations. ALFRED VERDROSS, VÖLKERRECHT 246 (1964).

[105] The Apostille Convention became effective on 14th of June 2016 for Kosovo and while Poland has not put any reservation (unlike, for example, Germany) the documents do not need to be legalized by consulates any longer. *See* Paweł Czubik, *Dokumenty z Państw Nieuznanych w Obrocie Cywilnoprawnym,* VII PWPM 119–134 (2009).

[106] ''Immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.' Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 63, ¶ 75 (Feb. 14) (joint separate opinion by Higgins, J., Kooijmans, J., and Buergenthal, J.).

[107] Christopher Greenwood, J., Int'l Ct. of Just., Immunities from Jurisdiction in U.N. Audiovisual Libr. of Int'l L. Lecture Series.

[108] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), 2012 I.C.J. 99, 122 (Feb. 3).

States solving disputes through negotiation and international law-making.[109] States remain immune for their sovereign actions (*acta iure imperii*), while commercial activities enjoy restricted immunity (*acta iure gestionis*).[110] State immunity extends to a certain group of individuals representing the State, such as the heads of States and governments, ministers of foreign affairs, ambassadors, and consuls.[111] In principle, these high-ranking officials for the sake of properly exercising their functions are exempt from the jurisdiction of a court seeking to enforce the domestic law.[112] It is questionable whether personal immunity is revocable for the commission of terrorist activities or grave human rights violations by State officials.[113]

State immunity serves as an indicator of statehood status. This is not to say that only States possess immunities under international law,[114] but that States must *exhibit* them in order to be termed as such. The possession of immunities also affects the legal functionality of a State. Immunity is precisely envisaged for the purpose of the proper functioning of State and its organs externally. Both aspects are correlated. McGuiness noted that an entity not enjoying immunity "would find any legal benefits of statehood weakened substantially," and the extension of immunity by a foreign court in fact "serves to validate an entity's claim to be a [S]tate."[115] Thus, States with no recognition or limited recognition (de facto States) may not have their immunities respected. Such States and their officials could be subject to administrative, civil, and criminal proceedings as well as enforcement measures in courts of other States or international courts.

For example, in *Knox v. Palestine Liberation Organization,* before the New York district court, defendants (Palestine Liberation Organization, or PLO) claimed sovereign immunity against criminal charges under the Foreign Sovereign Immunities Act (28 U.S.C. § 1602) by virtue of being a "foreign State."

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[109] Volker Roeben, *Institutions of International Law: How International Law Secures Orderliness in International Affairs*, 22 MAX PLANCK Y.B. OF U.N. L. 189, 199–200, 203–204 (2018). *See also* U.N. Convention on Jurisdictional Immunities of States and Their Property, *adopted* Dec. 2, 2004, U.N. Doc. A/RES/59/38, Art. 27 [hereinafter United Nations Convention].

[110] On restrictive immunity, *see* Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] QB 529 (Eng.); U.N. Convention, *supra* note 109, Art. 10.

[111] Peter-Tobias Stoll, *State Immunity*, *in* 10 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 498 (2012).

[112] Slightly different is the case of former heads of States. The British courts rejected Pinochet's claim that he was entitled to immunity as a former head of State and ruled that he could be extradited to Spain to stand trial. R (Pinochet Ugarte) v. Bow St Metro. Stipendiary Magistrate [2000] 1 AC 147.

[113] *See* Philippa Webb, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, 27 EUR. J. INT'L L. 745 (2016); *see also* Concepción Escobar Hernández (Special Rapporteur), Sixth Rep. on Immunity of State Officials From Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/722 (June 12, 2018).

[114] Some international organizations have them too. *SEE* NIELS BLOKKER & NICO SCHRIJVER, IMMUNITY OF INTERNATIONAL ORGANIZATIONS (2015).

[115] Margaret E. McGuinness, *Non-recognition and State Immunities: Toward a Functional Theory*, *in* UNRECOGNISED SUBJECTS IN INTERNATIONAL LAW 284 (Władysław Czapliński & Agata Kleczkowska eds., 2019).

The court concluded that the PLO (and the Palestinian Authority, or PA) were not entitled to sovereign immunity because the State of Palestine did not meet the legal criteria for statehood. The court went further to say that:

> Even assuming for the sake of argument that, as Defendants contend, there exists a sovereign 'State of Palestine under international law,' it does not follow that Defendants are entitled to the immunity they seek from the exercise of this Court's subject matter jurisdiction. Defendants have presented no evidence, and the Court is not aware of any, establishing that Palestine, whatever its status in other jurisdictions, has been recognized, or otherwise treated as a sovereign State, by the United States. Nor is there any indication that the United States has conferred upon the PLO and PA recognition as official representatives of the government of the purported Palestinian State, thereby entitling them to assert the privileges and immunities ordinarily accorded to specified officials and agents of sovereign entities.[116]

The judicial status of an unrecognized entity arises generally when that entity seeks access to property located in the forum State or seeks access to the forum court or otherwise tries to assert immunity as a defense to a suit before a forum court. Courts need not necessarily agree with the executive on the "existence" of an entity.[117]

D. Accessing International Judicial Fora

Access to the international judiciary is another indicator of statehood. International judiciary is understood here as comprising both courts and tribunals, which are permanent, established by a legal instrument, operating on the basis of international law, and producing legally binding decisions.[118] Although access to such bodies has historically been restricted to sovereign States, they have recently become more available to non-state actors, especially international organizations and individuals, albeit only to a limited extent.[119] Yet States should be able to make comprehensive use of international judicial bodies designed for them.[120] *Locus*

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[116] *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 438–39 (S.D.N.Y. 2004) (citations omitted).

[117] *See* The Dora and the Annette [1919] 35 TLR 288 (Eng.); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 138 N.E. 24 (N.Y. 1923); *see also* Julius H. Hines, *Why do Unrecognized Governments Enjoy Sovereign Immunity? A Reassessment of the Wulfsohn Case,* 31 VA. J. OF INT'L L. 717 (1991).

[118] Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,* 31 N.Y.U. J. OF INT'L L. & POL 709, 713-714 (1999).

[119] Christian Tomuschat, *International Courts and Tribunals*, *in 5* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 499 (2013); *see also* Francisco Orrego Vicuña, *Individuals and Non-State Entities before International Courts and Tribunals*, 5 MAX PLANCK Y.B. OF U.N. L. 53 (2001).

[120] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (April 11). On whether *jus standi* is a prerequisite for legal capacity or *vice versa*. *See. e.g.*, ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 58 (2001).

standi before international courts and tribunals is construed as part of State's sovereignty and bears on the legal functionality of a State.[121] To be a subject of a system of law necessitates the capacity of "claiming the benefit of the rights conferred by the content of the law."[122] Lack of standing conversely prompts questions as to status of such an entity. States or other entities unable to exhibit international *locus standi* suffer important defects within the sphere of international law. Without access to justice, States cannot claim rights under international law. They would also not be able to be held accountable judicially for unlawful actions.[123] The inability to access international dispute settlement mechanisms reduces the capacity of a State to interact in international law and is conducive to the prolongation of conflicts.

International courts and tribunals exist at multiple levels. At the global level, there are courts with general jurisdiction (ICJ) or specialized jurisdictions (Administrative Tribunal of the International Labour Organization, International Tribunal for the Law of the Sea). Courts and tribunals can be of a regional character (Court of Justice of the European Union, African Court on Human and Peoples' Rights). They can be autonomous institutions or affiliated to a particular international organization. They can have different criteria for membership, but their shared aim is to secure the international rule of law.[124] Contested States, like Kosovo or Taiwan, have limited avenues to take advantage of the international judiciary and, most notably, the International Court of Justice.[125] They cannot institute any proceedings *in foro* against other States or be sued by other States, with the exception of compromissory clauses.[126]

Several avenues exist to access the ICJ. Article 35(1) of the ICJ Statute provides that the Court shall be open to the States parties to the Statute, while Article 93(1) of the UN Charter sets forth that "[a]ll Members of the United

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[121] MACIEJ PERKOWSKI, PODMIOTOWOŚĆ PRAWA MIĘDZYNARODOWEGO WSPÓŁCZESNEGO UNIWERSALIZMU W ZŁOŻONYM MODELU KLASYFIKACYJNYM 199 (2008).

[122] OKEKE, *supra* note 1, at 19. *Cf.* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27 (1950). Lauterpacht, referring to individuals though, observed the "fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law.''

[123] U.N. Charter art. 33.

[124] *Cf.* Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L 264-98 (1997); Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung,* 70 ZAÖRV [HEIDELBERG J. INT'L L.] 1-49 (2010)

[125] Charles F. Whitman, *Palestine's Statehood and Ability to Litigate in the ICJ,* 40 CAL.W.INT'L L.J. 74, 89ff. (2013).

[126] *In foro* – before the court. Hsieh argues that in line with Article 36(1) of the ICJ Statute, the ICJ can hear "all matters provided for in the treaties and conventions in force." Hence, Taiwan falls within the ICJ jurisdiction, inter alia, by virtue of Article XXVIII of the 1946 ROC-U.S. Treaty of Friendship providing that any disputes regarding the interpretation of the Treaty should be submitted to the ICJ. Pasha L. Hsieh. *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan,* 28 MICH. J. INT'L L. 765, 796-97 (2007).

Nations are *ipso facto* parties to the Statute."[127] There are two additional avenues for access to the ICJ. First, Article 93(2) of the UN Charter provides that "[a] State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."[128] This was the case of Nauru, Japan, Lichtenstein, San Marino, and Switzerland.[129] The Security Council issued recommendations, and the General Assembly determined conditions for access for these States.[130] However, such a scenario is barely conceivable in the case of contested States primarily because of the extreme difficulty in receiving the Security Council recommendation, but also, in most cases, because of insufficient diplomatic support in the General Assembly. For example, a legal action brought by the FR Yugoslavia against NATO members was rejected on the grounds of it not being a party to the ICJ Statute.[131] Second, Article 35(2) of the ICJ Statute stipulates that States not parties to the Statute may make use of the Court subject to conditions adopted by the Security Council. In Resolution 9 of 1946, the Security Council enabled access to the Court if a nonparty deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.[132] Palestine has been attempting to gain access to the ICJ by this avenue, depositing a declaration of acceptance of the ICJ jurisdiction in a pending case relating to the US Embassy in Jerusalem.[133] If it receives recognition by the ICJ, Palestine bolsters its claims to statehood on the international stage.

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[127]U.N. Charter art. 93 ¶ 1.

[128] U.N. Charter art. 93 ¶ 2.

[129] Karin Oellers-Frahm, *Article 93*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 179, 183 (Andreas Zimmermann et al. eds., 2012).

[130] They regarded a) acceptance of the provisions of the ICJ Statute; b) acceptance of all the obligations under Article 94 of the UN Charter; c) contribution to the expenses of the Court. *See* G.A. Res. 91(I) (Dec. 11, 1946) (Switzerland); G.A. Res. 363(IV) (Dec. 1, 1949) (Lichtenstein); G.A. Res. 805(VIII) (Dec. 9, 1953) (Japan); G.A. Res. 806(VIII) (Dec. 9, 1953) (San Marino).

[131] Legality of Use of Force (Serb. and Montenegro v. Cana.) (Preliminary Objections), 2004 ICJ REP. 429, para. 114 (Dec. 15).

[132] SC Res. 9 (Oct. 15, 1946).

[133] On 28 September 2018, Palestine instituted proceedings against the USA before the ICJ. They relate to the establishment of the US embassy in Jerusalem, which is arguably contrary to the VCDR. The submission states that on 4 July 2018, ''in accordance with Security Council Resolution (1946) and Article 35 (2) of the Statute of the Court [Palestine] submitted a Declaration recognizing the Competence of the International Court of Justice.'' ICJ Press Release No. 2018/47.

E. Membership in International Organizations

Membership in an international organization indicates a State's international legal functionality in a specific domain. On the reverse, non-membership deprives an entity of distinct legal rights and duties, consequently diminishing its international legal functionality.[134] By the exercise of one of their attributes of international legal personality, namely, *ius contrahendi*, States are meant to be able to join international organizations. As Peters has noted, States use international law to constitute, empower, and constrain international organizations.[135] In principle, States are generally superior to international organizations. In practice, international organizations have gained more and more competences in realization of the objectives which they pursue in the global public interest,[136] increasing their independence from States but decreasing their accountability.[137] International organizations now regulate issues related to culture (UNESCO), sports (IOC, FIFA), human rights (UNICEF, OHCHR), food (FAO), security (OSCE, INTERPOL), politics (UN, EU), transport (IATA), military (NATO), the economy (WTO), environment (IUCN, UNEP), health (WHO), justice (ICJ, ICC), social rights (ILO), and many other issues. International organizations are likely to assume a greater role in the future.[138]

International organizations are embedded in the structure of international law-making and application, hence a State's membership is a good indicator of international legal functionality. International organizations deliver justice (courts and tribunals), create international law (assemblies), and are responsible for its development and supervision (councils, commissions). International organizations belong to the sphere of international law because they adopt resolutions and decisions that may be considered a source of international law[139] enact international law subject to acceptance (e.g., treaties). However, they belong to the international sphere predominantly because they are based on a founding instrument that regulates the work of the organization and endows members of

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[134] Christoph Schreuer, *Die Bedeutung internationaler Organisationen im heutigen Völkerrecht*, 22 ARCHIV DES VÖLKERRECHTS 363-404 (1984).

[135] Anne Peters, *International Organizations and International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 33 (Jacob Katz Cogan et al., ed., 2016).

[136] Evelyne Lagrange, *La Catégorie "organisation internationale*", *in* DROIT DES ORGANISATIONS INTERNATIONALES 64, 67 (Evelyne Lagrange & Marc Sorel eds., 2013).

[137] René-Jean Dupuy, *L'organisation Internationale Et L'expression De La Volonté Générale*, 61 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 563, 574 (1957); JAN KLABBERS, INTERNATIONAL ORGANIZATIONS LAW (2015). On accountability *see* Peters, *supra* note 135, at 41.

[138] Malcolm Shaw, *International Organization*s, *in* ENCYCLOPEDIA BRITANNICA https://www.britannica.com/topic/international-law/International-organizations.

[139] Jochen Frowein, *The Internal and External Effects of Resolutions by International Organizations,* 49 ZAÖRV [HEIDELBERG J. INT'L L.] 778-790 (1989); Natalia Buchowska, *Uchwały Organizacji Międzynarodowych Jako Źródło Prawa Międzynarodowego*, 3 RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY 49-60 (2001).

the organization with a wealth of international rights and obligations.[140] Therefore, States will be considered more legally effective on the international plane if they join international organizations. For instance, States prepare treaties for ratification within the International Maritime Organization (IMO). There have been more than fifty international conventions and agreements adopted within the IMO so far.[141] Furthermore, by joining the IMO States acquire a right to co-operate in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping as well as the obligation to remove discriminatory action and unnecessary restrictions affecting shipping engaged in international trade.[142]

It is understandable that an entity claiming statehood would seek to join international organizations, claiming the right to do so before international judicial bodies if contested. This was the case when North Macedonia (known then as the Former Yugoslav Republic of Macedonia) sued Greece in the ICJ, invoking the violation of Article 11, paragraph 1, of the Interim Accord (1995) and demanding that the Court confirm the State's right to join NATO as well as all other international, multilateral, and regional organizations.[143] Palestine, by joining UNESCO in 2011, significantly expanded its functionality within the international legal order.[144] Essentially, Palestine could then become a party to international agreements employing the so-called "Vienna formula" that is, those open for signature to "all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the UN to become a party to the Convention."[145] Palestine's landmark membership of UNESCO has also paved its access to the ICJ, pursuant to Article 35(2) of the ICJ Statute, and impliedly confirmed Palestine's statehood.[146]

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[140] Voting is an example of a right, whereas financial contribution is an obligation. *See* NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 131-156 (2005).

[141] Conventions, INTERNATIONAL MARITIME ORGANIZATION, https://www.imo.org/en/About/Conventions/Pages/Default.aspx (last accessed Aug. 31, 2021).

[142] Convention on the International Maritime Organization (signed 06 March 1948, entered into force 17 March 1958, as amended) 289 U.N.T.S. 3, Art. 1.

[143] Greece used to persistently block Macedonia's international relations as it objected to the use of the name Macedonia, which is historically linked to the Greek territory. Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), 2011 ICJ REP 644, para. 12 (Dec. 5).

[144] According to Article 2(2) of the UNESCO Constitution, a two-thirds majority vote of the General Conference is required for admission of a new member. The vote was carried by 107 votes in favor of admission and 14 votes against, with 52 abstentions.

[145] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331 (hereinafter cited as VCLT) Art. 81.

[146] For Vidmar, only the purposes of the treaties that Palestine has signed should confirm its statehood. *See* Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood,* 12 CHINESE J. INT'L L. 19–41 (2013) ("State creation cannot be implicit and it cannot result from procedural tricks via international treaties and organizations.").

It remains doubtful whether membership of a particular international organization can be tantamount to statehood. If the organization is universal and significant, like the United Nations or the League of Nations before it, and admits new members contingent upon their ability to function independently within the organization and to carry out membership obligations, then there is merit in such a proposition.[147] Statehood can be inferred not only from the fact that UN membership is open only to States, but also from the admission process, which constitutes a "screening phase" of legal functionality of an aspiring entity.[148] Such screening has been evident in the admission of microstates to the UN and the League of Nations, which were not considered as totally sovereign and functional as their participation in organized international relations was limited and they were largely dependent on more powerful neighbors.[149] As Bartmann noted, against traditional models of statehood, microstates appeared as caricatures.[150] Good, commenting on the geopolitical realities of his time, observed that "new microstates appear as more hope than actuality."[151] Higgins observed that the ability and willingness to obey international law prescribed by Article 4 of the UN Charter do not suffice for the admission of an entity which is not truly independent (microstate). That contributed to the nonappearance of such entities as Andorra, Monaco, San Marino, and Liechtenstein upon the list of UN members.[152] The same holds true for the earlier debates within the League of Nations, where the Fifth Committee often questioned the sovereignty and viability of microstates to function within international law, emphasizing their seeming inability to fulfill obligations arising out of membership. There, the Committee rejected Liechtenstein's application for membership on the grounds of the Principality's

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[147] THOMAS D. GRANT, ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION 251 (2009).

[148] "Article 4(1) of the UN Charter explicitly mentions the ability and willingness 'in the judgment of the Organization' to carry out international obligations as a criterion for admission of new members to the United Nations, and by doing so merely stipulates what constitutes statehood in accordance with international law." Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 499 (1998).

[149] JOHN BARTMANN, MICRO-STATES IN THE INTERNATIONAL SYSTEM 22 (2014).

[150] *Id.* at 70; *see* Roger Fisher, *The Participation of Microstates in International Affairs,* ASIL PROCEEDINGS 166 (1968) (One other author observed that "there is inevitably an attempt on the part of lawyers and others who look at the microstate problem to adopt the solution of Procrustes (...) we tend to insist that a small entity fit the bed that we have constructed. If it is not big enough to be a traditional state, 'a viable international unit', then it should go back where it came from.").

[151] Robert C. Good, *State-Building as a Determinant of Foreign Policy in the New States*, *in* NEUTRALISM AND NON-ALIGNMENT 3 (Laurence W. Martin ed., 1962). Farran connected the status of microstates to their limited and inhibited participation in international diplomacy; D'Olivier Farran, *The Position of Diminutive States in International Law, in* INTERNATIONALRECHTLICHE UND STAATSRECHTLICHE ABHANDLUNGEN-FESTSCHRIFT FUR WALTER SCHATZEL 131-147 (Erik Briiel et al. eds., 1960).

[152] Rosalyn Cohen (later Higgins), *Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1147 (1961).

contractual bonds with Switzerland.[153] Similarly, Iceland's application for membership was rejected in 1920 because Denmark was still responsible for her foreign relations and League membership would seem to require a departure from her traditional neutrality in order that she could fulfil the obligations of the Covenant.[154] Therefore, smallness was often synonymous with legal inefficacy.

F. Exercise of the Fundamental Rights and Duties of a State

The penultimate indicator of statehood is the manifestation of fundamental rights and duties by a State. The idea that States possess certain innate absolute rights and obligations (*absolus, primitifs ou éthique*) by virtue of their existence, dates back to the seventeenth and eighteenth century.[155] Natural law scholars (Grotius, Vettel, Wolf, and Martens) articulate that among fundamental (intrinsic) rights of States are the right to self-preservation, the right to independence, the right to equality, the right to respect, and the right to international commerce.[156] Positivists, like Grégoire and Bentham, add sovereignty, jurisdiction, nonintervention, self-defence, mutual respect of the rights of all, immunity of ambassadors, and the precept *pacta sunt servanda*.[157] These rights and obligations could be termed as prelaw (*Urrecht*), which are valid against other States and without which no international society could exist.[158] They are attributes or

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[153] "There can be no doubt that juridically the Principality of Liechtenstein is a sovereign State, but by reason of her very limited area, small population, and her geographic position, she has chosen to depute to others some of the attributes of sovereignty. For instance, she has contracted with other Powers for the control of her Customs, the administration of her Posts, Telegraphs and Telephone Services, for the diplomatic representation of her subjects in foreign countries, other than Switzerland and Austria, and for final decisions in certain judicial cases. Liechtenstein has no army. For the above reasons, we are of the opinion that the Principality of Liechtenstein could not discharge all the international obligations which would be imposed on her by the Covenant." Rep. of the Second Sub-Comm. to the Fifth Comm., League of Nations, Records of the First Assembly, Plenary Meetings 667 (1920). Liechtenstein is, however, a member of the UN and it actively discharging its membership obligations, not least in the context of the Crime of Aggression under the Rome Statute.

[154] Only Switzerland had been able to reserve neutrality. Switzerland and the United Nations, Rep. of the Federal Council to the Federal Assembly concerning Switzerland's Relations with the United Nations 8-11, 141- 144, 153-155 (Berne 1969).

[155] CHARLES CALVO, LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE 193 (1887-1896). Nijman argued that Leibniz, as the proponent of the idea that only strong sovereign States possess rights and duties, could be considered as the forerunner of "personalization" of international law. JANNE E NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 449 (2004); *see also* REMIGIUSZ BIERZANEK, STUDIA NAD SPOŁECZNOŚCIĄ MIĘDZYNARODOWĄ: ŹRÓDŁA PRAWA MIĘDZYNARODOWEGO 99 (1991).

[156] Sergio M. Carbone & Lorenzo Schiano di Pepe, *States, Fundamental Rights and Duties, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 562, 564 (4th ed. 2012); *see also* A Pillet, *Les Droits Fondamentaux des États*, 1 REVUE GENERALE DE DROIT INTERNATIONAL Public 77, 86 (1898); Gilbert Gidel, *Droits Et Devoirs Des Nations, Théorie Classique Des Droits Fondamentaux Des États,* 10 RECUEIL DES COURS 537 (1925).

[157] Carbone & di Pepe, *supra* note 156, at 564.

[158] JOHANN LUDWIG KLÜBER, EUROPÄISCHES VÖLKERRECHT 46 (1851).

qualities inherent in the State.[159] In 1919, the Institut de Droit International invited Mr. Lapradelle to work on the Draft Declaration of Rights and Duties of Nations, where he, inter alia, stressed the nonrecourse to illegitimate force.[160] In 1939, at its thirty-ninth session, the International Law Association adopted a declaration regarding rights and obligations of States, including the right to self-defense.[161] In the twentieth century, three regional legally binding agreements outlining fundamental rights and obligations of States were adopted: the Montevideo Convention on the Rights and Duties of States (1933),[162] the Charter of the Organization of American States (1948),[163] and the Constitutive Act of the African Union (2000).[164] At the universal level, the ILC's 1949 Draft Declaration on Rights and Duties of States, submitted to the General Assembly,[165] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, unanimously adopted by the General Assembly on 24 October 1970,[166] reaffirm these fundamental rights and obligations.

There is, then, a strong relation between the inherent rights and obligations and the legal functionality of a State. These create the guaranteed legal sphere within which the State functions. The more a State manifests its rights and obligations against other participants of international relations, the more "law-effective" it becomes. The less a State exercises these rights, the less legally functional it is. By way of example, Northern Cyprus or Taiwan could be considered partially legally dysfunctional as they are bereft of fundamental State

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[159] Ricardo J Alfaro, *The Rights and Duties of States*, 97 RECUEIL DES COURS 96 (1959). In a similar way Katzenstein notes: "In some situations norms operate like rules that define the identity of an actor. . ." Peter Katzenstein, *Introduction: Alternative Perspectives on National Security*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 5 (Peter Katzenstein ed., 1996).

[160] Albert de Lapradelle, *Declaration of Rights and Duties of Nations*, 28 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 205 (1921).

[161] "Projet définitif de Déclaration sur les Données fondamentales et les grands Principes du Droit international moderne." 39th Conference, Int'l L. Ass'n Rep. 333-339 (1939).

[162] Montevideo Convention, *supra* note 5, Art. 8 (the obligation of non-intervention in the internal or external affairs of other States), Art. 10 (the obligation of settling the disputes by recognized pacific methods), Art. 11 (the obligation of non-recognition of territorial acquisitions or special advantages which have been obtained by force).

[163] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 U.N.T.S. 3 (Article 13 provides for the right to preservation and prosperity, independence and organization of internal affairs as a State sees fit, while Article 18 for the right to development).

[164] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15 (hereinafter AU Constitutive Act). In Article 4, the Constitutive Act sets out the principles on which the African Union is based. Member States enjoy sovereign equality, have a right to live in peace and security – if such is endangered, they have a right to seek intervention from the Union in order to restore peace and security, have a right to resolve their disputes peacefully and are entitled to the protection of territorial integrity in line with the *uti possidetis juris* principle. They are obliged not to interfere in the internal affairs of another Member State and not to use force or threaten to use force against another Member State of the Union.

[165] Y.B. INT'L L. COMM'N 286-290 (1949).

[166] G.A. Res. 2625 (XXV) (Oct. 24, 1970).

rights, such as the right to nonintervention (Taiwan)[167] and the right to title itself as a State (Turkish Republic of North Cyprus).[168]

Independence is mentioned as a right in Article 1 of the ILC Draft Declaration on Rights and Duties of States and entails both the prohibition of any foreign intervention and the freedom to choose one's own form of government.[169] Independence signifies a range of additional entitlements. First, and unwritten, the right to existence, as some ILC members tried to express it.[170] Independence also entails rights to sovereignty, equality with other States, liberty in internal affairs within its own territory, enacting laws, drawing up and amending its own constitution, autonomous self-governance, choosing officials, appointing and accrediting its representatives to other States, and similar functions.[171]

The Sahrawi Arab Democratic Republic (SADR) can hardly be described as a legally functional State if the right to independence is relativized. The UN's official consideration of Western Sahara as "non-self-governing territory" and the many States' refusal to recognize the SADR as a State substantially lessens the SADR's enjoyment of independence and rights associated with it.[172] States who have aligned themselves with Morocco in the Western Sahara conflict, *ipso facto*, reject SADR's right to independence (US, France, Spain, Poland, Serbia, Egypt, Senegal).[173] At the forty-second session of the Human Rights Council in 2019, a group of States supporting "Morocco's territorial integrity" stressed the relevance of the autonomy initiative proposed by the Kingdom of Morocco to definitively put an end to the conflict over the "Moroccan Sahara"(Saudi Arabia, United Arab Emirates, Qatar, Bahrain, Kuwait, Sultanate of Oman, Jordan, the Comoros, the Democratic Republic of Congo, Gabon, Burkina Faso, Burundi, Djibouti, Senegal, the Central African Republic, Guinea, Côte d'Ivoire, Sao Tome and

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[167] Christopher J. Carolan, *The "Republic of Taiwan": Legal-Historical Justification for a Taiwanese Declaration of Independence,* 75 N.Y.U. L. REV. 430 (2000). *See also* Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AJIL 471-472 (2000).

[168] When the Finnish Foreign Minister Alexander Stubb met the President of Northern Cyprus in 2009, it was officially classified by the Ministry of Foreign Affairs of Finland as a meeting with the leader of the Turkish Cypriot community. In a similar vein, President Joe Biden, while serving as Vice President, stressed during his visit to the northern part of the Republic of Cyprus in 2014 that his visit to the north would not constitute recognition of "the Turkish Cypriot administration." More in James Ker-Lindsay, *Engagement Without Recognition: The Limits of Diplomatic Interaction with Contested States*, 91(2) INT'L AFF., 1-16 (2015).

[169] Independence as a right of a State appears in a similar form in Principle 1 of the U.N. Declaration on Friendly Relations.

[170] In the end, the ILC did not accept the Panamanian draft proposal and deemed it to be tautological to say that an "existing State has the right to exist." For the debate on Article 1 of the Draft *see* Preparatory Study Concerning a Draft Declaration on the Rights and Duties, U.N. Doc. A/CN.4/2, at 49-52 (Dec. 15, 1948); Y.B. INT'L L. COMM'N 287 (1949).

[171] Preparatory Study, *supra* note 170 at 61-62.

[172] Press Release, U.N. General Assembly, Fourth Committee (Special Political and Decolonization) Taking Backward Steps on Western Sahara Question, says Namibia's Representative, amid Continuing Debate on Decolonization Issues, U.N. Press Release GA/SPD/695 (Oct. 11, 2019).

[173] Reuters, *U.S. Supports Moroccan Autonomy Plan for Western Sahara,* Mar. 16, 2016.

Principe, Paraguay, Guatemala, Saint Lucia, and El Salvador).[174] In a similar vein, those States who pronounced neutrality on the issue cannot be counted as supporters of the SADR's independence. Therefore, the right to independence is very subjective in nonrecognition cases and is exacerbated by the involvement of international missions in the conflict (MINURSO, whose mandate keeps being extended).[175] It could therefore be concluded that the SADR's claim to independence does not exist *erga omnes* against all other States, which affects its role in the international legal sphere and its status as a State.[176] On the other hand, there are indicators of independence from Morocco. An illustration is the line of case law of the European Court of Justice (ECJ) concerning agreements of the EU with Morocco.[177] The ECJ has consistently ruled that these treaties cannot apply to Western Sahara as a matter of international law, on the ground of the *pacta tertiis* principle of the law of treaties (a treaty binds only the parties, art. 34 Vienna Convention on the Law of Treaties). The Court accepts that Western Sahara is in that sense a third party because of the right to self-determination of its population.

G. Recognition of a State

The final indicator is recognition of a State by its peers. There is a clear overlap with independence discussed above, as well as the possession and exercise of other inborn State's international rights and duties. As argued by Williams, the doctrine of recognition provides "a common system of international rights and duties binding on all members of the Family of Nations," meaning that the unrecognized or partially recognized entities will be positioned outside the full legal interrelationship.[178] Non-recognizing States take very limited account of the entity and will not treat it as equal. What Scelle aptly calls "equality before the rule of law" will not be enjoyed.[179] This dynamic is enshrined within the international legal structure. Article 2(1) of the UN Charter provides that "the Organization is based on the principle of the sovereign equality of all its

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[174] *42nd Session of HRC: Support Group of Morocco's Territorial Integrity Highlights Relevance of Autonomy Initiative*, *Sahara Question*, (11 Sep. 2019) https://sahara-question.com/en/news/19204.

[175] S.C. Res. 2494 (Oct. 30, 2019).

[176] *Cf.* Jure Vidmar, *The Concept of the State and its Right of Existence*, 4(3) CAM. J. INT'L COM. L. 547, 552 (2015).

[177] Judgment of the European Court of Justice (Grand Chamber) of 21 December 2016, Council of the European Union v. Front Populaire Pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario), Case C-104/16 P (Feb. 27, 2018); The Queen, on the Application of Western Sahara Campaign UK v. Comm'rs for Her Majesty's Revenue and Customs and Sec'y of State for Env't, Food and Rural Affs., Case C-266/16 (Apr. 16, 2018).

[178] John Fischer Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 HARV. L. REV. 776, 777 (1933-34).

[179] GEORGES SCELLES, MANUEL DE DROIT INTERNATIONAL PUBLIC 116 (1948). Before, the American Institute of International Law declared "Every nation is in law and before law the equal of every other State composing the society of nations." PHILIP M. BROWN, THE RIGHTS OF STATES UNDER INTERNATIONAL LAW, 26 YALE L. J. 91 (1916).

Members."[180] The Charter does not require recognition and indirectly does not require Member States to treat members equally.[181] Regardless of the rather stale debate about whether recognition is constitutive or declaratory, it is clearly normatively relevant for the ability of a State to function internationally. Recognition substantially impacts legal relations of a State (affects the ILF's indicators of statehood). Recognition by other States then is an indicator of statehood within ILF, but it needs to be applied with caution in three respects.[182]

First, recognition of a State must be distinguished from recognition of a government.[183] Although they coincide, it is recognition of a State that provides the firm, long-term foundation for the State's legal effectiveness. By contrast, rejecting legitimacy of a government is usually not universal, but transient, and does not affect the international legal personality of a State in question to considerable extent.[184]

Second, recognition is not absolute but relative and incommensurable. Thus, questions arise as to how many States need to accord recognition to a State for it to be regarded as a State in general terms,[185] whether recognition from certain members of the international community is more valuable,[186] and what the status of partially recognized States should be.[187] In response to these questions, some have argued that partially recognized States should be States only in relation to

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[180] U.N. Charter art. 2 ¶ 1.

[181] Still, the U.N. members are more likely to enjoy certain equality standards than non-members, most of which are conventionally not even treated as States.

[182] Using recognition as an indicator for statehood within the ILF concept might trigger some questions. First, because it is more of a factor, alongside smallness, financial capacity, internal disorders, skilled political cadre, etc., which determines all the other statehood indicators. Second, because it is distinct from other indicators, which stipulate what a State should "do" in order to be considered effective. On the other hand, recognition has an international character and, broadly speaking, makes the State effective/ineffective in a demonstrable way.

[183] On other forms of recognition, such as the recognition of a capital city, *see* Marco Pertile & Sondra Faccio, *What we talk about when we talk about Jerusalem: The duty of non-recognition and the prospects for peace after the US embassy's relocation to the Holy City*, 33 LEIDEN J. INT'L L. 621-647 (2020).

[184] *See* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 21-24 (1998).

[185] *See* RENÉ LE NORMAND, LA RECONNAISSANCE INTERNATIONALE ET SES DIVERSES APPLICATIONS, 24-25 (1899); Scipione Gemma, *Les Gouvernements de fait,* 4 RECUEIL DES COURS 333 (1924); TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 41, 45-46 (1951).

[186] "Recognition by the great powers has normally preceded, and carried far more weight than, recognition by other states. Indeed, the latter have normally looked to the former for direction; where they did not, their expeditiousness was likely of little import." MIKULAS FABRY, RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776, 8 (2010).

[187] Kelsen argued that there is no such thing as "absolute existence." He even added that a State that proclaimed itself "becomes a subject of international law for itself and not in relation to others." Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AJIL 605, 609 (1941). Baty disagreed, stressing that either a State exists, or it does not, and "the opinion of other people on the subject does not alter the fact". THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 205 (1930).

recognized States while others claim that partially recognized States will be de facto States, contested States, or non-universally recognized States for "everyone."[188] Others still argue that non-universally recognized States are legally dysfunctional.[189] It is not clear, however, how many recognitions and by whom would make an entity/State legally functional. From the point of view of the ILF, the more recognitions, including those from important global players, the better, but that recognition alone would not render a State legally functional.

Third, and most critically, recognition is considerably less formal than often assumed. Talmon, Chen, and Roth highlight that a formally unrecognized State may nevertheless realize the benefits of recognition in alternative, informal ways.[190] These scholars, among others, refer to the ability of unrecognized States to informally exercise diplomatic and consular relations with comparable results. Talmon discusses the decision of the United Kingdom to maintain diplomatic relations with Israel, despite according only de facto recognition to the new State.[191] Chen notes that the most common method of establishing *relations officieuses* (official relations) by receiving and sending nondiplomatic agents. Chen refers to informal relations between the US and Spain's Supreme Junta in 1809 and between the US and the Revolutionary Party in Ecuador in 1895.[192] Chen also argues that informal relations are so similar to formal legal relations that even the rights and prerogatives of public officials, such as the possession of juridical immunity, may apply.[193] One such example Chen provides is that of the American Minister who retained diplomatic immunities despite the unrecognized status of the Rivas-Walker Government in Nicaragua.[194] Roth notes that Taiwan maintains scores of semi-official relations with other States which do not differ from the official ones, noting that one commentator termed them "a veritable network of alternative missions or ersatz embassies, usually on a reciprocal basis."[195] These

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[188] For terminological variances *see* Scott Pegg, INTERNATIONAL SOCIETY AND THE DE FACTO STATE (1998); Vladimir Kolossov & John O'Loughlin, *Pseudo-States as Harbingers of a New Geopolitics: The Example of the Trans-Dniester Moldovan Republic (TMR), in* BOUNDARIES, TERRITORY AND POSTMODERNITY, 151–176 (David Newman ed., 1999); Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. OF PEACE RSCH. 273-40 (2006); Marc Weller, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE INDEPENDENCE (2009); Stefan Talmon, KOLLEKTIVE NICHTANERKENNUNG ILLEGALER STAATEN: GRUNDLAGEN UND RECHTSFOLGEN EINER INTERNATIONAL KOORDINIERTEN SANKTION, DARGESTELLT AM BEISPIEL DER TÜRKISCHEN REPUBLIK NORD-ZYPERN (2006); Petra Minnerop, *The Classification of States and the Creation of Status within the International Community*, 7 MAX PLANCK Y.B. UN. L 79-182 (2003).

[189] More details in NINA CASPERSEN & GARETH R. V. STANSFIELD, UNRECOGNIZED STATES INTERNATIONAL SYSTEM (2011).

[190] CHEN, *supra* note 185, at 41; Talmon, *supra* note 9*,* at 101-105; Brad R. Roth, *The Entity that Dare Not Speak its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 98 (2009).

[191] Talmon, *supra* note 9*,* at 104.

[192] CHEN, *supra* note 185, at 217-18.

[193] *Id.* at 140-44, 218.

[194] *Id.* at 218.

[195] Roth, *supra* note 190, at 110.

(semi-official) offices and their counterparts in the Republic of China "are accorded privileges and immunities characteristic of those accorded to official diplomatic missions."[196] This informality decreases the importance of recognition in evaluating statehood.

III.
PRACTICAL ADVANTAGES, CONCEPTUAL ATTRACTIVENESS, AND THE SCOPE OF APPLICATION OF ILF

The previous part has demonstrated that ILF provides workable indicators for evaluating statehood. On this basis, Part III discusses arguments for and against adopting ILF. It first outlines the methodological advantages and potential downsides. Some advantages include objectivity and ease of use of ILF. Some potential downsides include the difficulties in determining the exact level of functionality to confirm statehood and the possibility of circumvention of the formal indicators. The next section turns to the most attractive feature of ILF, its conceptual connection with international law. The final section describes the scope of application of ILF to entities, ranging from existing States to those in *statu nascendi,* or potential States.

A. Objectivity and Ease of Use of ILF and Potential Drawbacks

A significant advantage of ILF is that it is a transparent method. The indicators by which it is measured are formal and can be objectively applied in practice. The State is either a member of an international organization or it is not. The State either is a party to an international treaty or it is not. Similarly, the State either maintains diplomatic relations with another State or it does not. This is a zero-one model of assessment which does not involve a complicated analysis. Certainly, there are various types of membership of international organizations or ways of entering into relations between States, but they can only impact the level of functionality and not the existence of functionality. In that sense, scholars, States, and other relevant subjects can use the concept to confirm or reject statehood claims avoiding the accusation of manipulation or subjectivity.

The concomitant advantage of objectivity is the ease of use. Scholars tend to use some of the indicators of ILF in their works or statements, especially in the fields of political sciences and international relations, but also in law. Although statehood analysis is generally not conducted in an "all-embracing" manner because authors tend to employ selective indicators, the analysis is nevertheless conducted. The use of the statehood analysis may even have surpassed the Montevideo recital, especially in nonlegal environments.[197] Politicians continue to

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[196] *Id.* at 111.

[197] *See* Edward Newman & Gezim Visoka, *The Foreign Policy of State Recognition: Kosovo's Diplomatic Strategy to Join International Society*, 14 FOREIGN POL'Y ANALYSIS 367–387 (2018);

invoke the ILF indicators in public discourse, at international fora, and within international organizations as a result of the convenience and persuasiveness of ILF indicators. Statespersons have tried to justify statehood of an entity relying on some of the ILF indicators. For instance, the Foreign Minister of Kosovo claimed that Kosovo has received widespread recognition, established diplomatic relations with 70 States, and become a member of many international and regional organizations, and therefore, it is a State.[198] Similarly, Taiwanese high-ranking officials asserted that membership in international organizations has a "very positive effect on Taiwanese international status."[199] The US State Department website contains information about the relations between the US and other States as well as the list of treaties and organizations that a particular State has joined, which can be apprehended as status-confirming elements.

Of course, we anticipate potential drawbacks of ILF. One relates to the threshold of its indicators for statehood.[200] So, how many international organizations should a would-be State join in order to be considered as a State? Is only the quantitative aspect important? Perhaps there exist some more important organizations or treaties than others? Does membership of the United Nations confirm statehood? Is membership of the UN specialized agencies more important than membership in regional organizations? In the same vein, how many treaties does an entity need to sign or ratify in order to acquire the status of a legally functional State? Are economic treaties more significant than environmental ones? There is also the difficulty of weighing different indicators. For instance, does the ability to conduct diplomatic relations with other States make a State more legally functional than its ability to access international judiciary? Another question that can be posed in this context is whether the functionality should be calculated solely by actual practice, although a State may voluntarily refrain from acceding to that treaty. Equally, what if a State does not wish to send a diplomatic envoy to another State due to the severance of mutual relations?[201] None of these questions are followed by an easy answer and the problem is familiar as the principle of effectiveness on which ILF is based is subject to similar problems of

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James Ker Lindsay, *The Stigmatisation of de facto States: Disapproval and 'Engagement without Recognition*,' 4 ETHNOPOLITICS 362-372 (2018). Nevertheless, almost all authors analyzing statehood from the perspective of international law referred in one way or another to some indicators of ILF. *See* ELŻBIETA DYNIA, UZNANIE PAŃSTWA W PRAWIE MIĘDZYNARODOWYM. ZARYS PROBLEMATYKI (2017), chapters 4 and 5; Piotr Łaski, *Secesja Części Terytorium Państwa W Świetle Prawa Międzynarodowego Publicznego. Zarys Problematyki,* 25 ACTA IURIS STETINENSIS 79 (2019).

[198] Emphasis added. Interview conducted by Visoka, and quoted from Newman & Visoka, *supra* note 197, at 368.

[199] Cited by Dennis van Vranken Hickey, *Taiwan's Return to International Organizations: Policies, Problems, and Prospects, in* THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS 72 (Jean-Marie Henckaerts ed., 1996).

[200] *See generally* Andraž Zidar, *Interpretation and the International Legal Profession*, *in* INTERPRETATION IN INTERNATIONAL LAW 133-146 (Andrea Bianchi, Daniel Peat, Matthew Windsor eds., 2015).

[201] Chen concluded that "the establishment of diplomatic relations is a super-addition to international personality, not its essence." CHEN, *supra* note 185, at 16.

measurement. It is equally unclear exactly how much independence the government needs to possess.[202] Arguably, the answer in both external and internal effectiveness is that practice over time will tell.[203] For the time being, it is suggested that the more internationally legally functional an entity is, the more marks of statehood it exhibits. Statehood becomes an objective, and progress towards this objective is made over time through accumulated functionalities. At a minimum, entities which are legally ineffective overall can hardly be termed as States. Partially legally effective entities would constitute a particular sphere of borderline entities, called de facto States, as in the case of partially recognized States. This last category will necessitate the most attention, especially with regard to providing a conclusive statement of when an ineffective entity becomes partially effective and when a de facto State turns into a normal State in international law according to the ILF gauge.

A second difficulty is that entities may be tempted to circumvent the formal indicators of ILF. Yet, the rationale of ILF centers on formal legal functionality and not on para-legal forms replacing it. For instance, an entity/nonmember State may attain an observer status within the UN and participate in the sessions and the work of the General Assembly, yet it will not be able to enjoy benefits stemming from full membership in the United Nations (e.g. be elected to the Security Council).[204] To furnish another example, since 1997 Northern Cyprus's delegates to the Parliamentary Assembly of the Council of Europe (PACE) have the right to express views on all issues under discussion, but no right to vote.[205] An entity may obtain a particular status for that purpose which is still short of full accession. It would be difficult to treat the legal functionality of such an entity as comprehensive. The functionality will exist, but it will be lower.

B. The Connection with International Law

However, the main attraction of ILF is conceptual. It directly connects a normative concept of statehood with modern international law, distinguishing ILF from alternative approaches such as facticist, legalist, objectivist, and subjectivist.[206] What these have in common is that international law has only a limited role to play in what essentially remains a factual conception of statehood.

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[202] CRAWFORD, *supra* note 11, at 55-88; Jean d'Aspremont, "*Effectivity" in International Law: Self-Empowerment against Epistemological Claustrophobia*, 108 AJIL UNBOUND 103-05 (2017).

[203] In the similar way, certain permissible thresholds have been established with reference to the Montevideo Convention criteria of the defined borders and permanence of the population.

[204] *See* G.A. Res. 67/19 (Nov. 29, 2012). In 2012 Palestine's observer status was changed from "non-member observer entity" to "non-member observer State." See e.g., John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, 16(37) ASIL INSIGHTS (2012).

[205] *See* Council of Europe, Parliamentary Assembly Resolution 1113 (1997); Council of Europe, Parliamentary Assembly Resolution 1376 (2004).

[206] *See Part I* Introduction.

The Montevideo conception is facticist. The criteria articulated in Article 1 of the Convention of population, government, territory, and the capacity to enter into relation with the other States, are socio-political and geographical categories.[207] They are without a substantial link with international law.[208] What makes statehood a legal fact in this conception is that it implies legal entitlements. Legalists are more normatively interested. For them, a putative State must comply with fundamental principles of international law, in particular the prohibition of the use of force and the respect for self-determination.[209] This connects statehood with international law, but only to the very limited portion that has acquired peremptory status and demarcates the outer boundaries of factuality. The objectivist and (inter)subjectivist views of statehood have limited congruence with international law. The basic assumption of the (inter)subjectivist vision of statehood is that it transpires between the mutually recognized States.[210] By definition, the question of legality is excluded from its scope. It only indirectly permeates the concept given that States usually resort to legality analysis prior to extending recognition. The case is different with the objectivist vision, where certain objective categories—the Montevideo criteria—carry determinative weight.[211]

The difference between these conceptions and the ILF conception lies in that the ILF conception positions statehood squarely within international law. Analytically, a State in the ILF model is conceptually constituted and practically evidenced by the utilization of international law. ILF incorporates the full spectrum of international law, not just a limited number of principles. To be termed as such, a State operates in international law. That is, the State creates international law, enforces it, and participates in the institutions of international law such as international organizations and international judicial systems. Indeed, the cardinal feature of ILF is the creation of international law by the entity while attaining statehood. ILF then establishes reflexivity, where entities treated by States as having international legal personality, acquire such status.

ILF connects the State with international law as a particular legal order with landmarks ranging from its sources; methods of creation and execution; the body

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[207] See Ngaire Naffine, *Can Women be Legal Persons*?, *in* VISIBLE WOMEN: ESSAYS ON FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY 72 (Susan James, Stephanie Palmer ed., 2002). Naffine noted that the State is a legal fiction much like a person is. "It is a contingently constructed socio legal complex."

[208] DAVID RAIČ, STATEHOOD AND THE LAW OF SELF DETERMINATION (2002). For some, the Montevideo criteria apart from being factual are for the most part legal. "A State is not an international person because it satisfies the criteria for statehood, but because international law attributes full international personality to such a factual situation."

[209] Jean d'Aspremont, *The International Law of Statehood and Recognition: A Post-Colonial Invention, in* LA RECONNAISSANCE DU STATUT D'ETAT À DES ENTITES CONTESTEES 22-23 (T. Garcia ed., 2018)

[210] TANJA E. AALBERTS, CONSTRUCTING SOVEREIGNTY BETWEEN POLITICS AND LAW 83-85 (2012).

[211] d'Aspremont, *supra* note 7, at 207.

of rights and obligations; instruments and institutions; and general principles.[212] International Law extends these landmarks to States to order their international affairs. Comprehensive involvement in and use of this international law defines a State in the ILF model. As an increasingly institutional legal order, international law constitutes States as its subjects and principal organs of law-making and law-application, and if this law could not be applied by and in relation to States, then the existence of such States would be tantamount to legal fiction.

Normatively, ILF postulates that subjects of international law should meaningfully utilize the attributes attached to their existence. ILF closely connects to the foundational self-determination and the aspiration of a people to express this in the form of statehood. ILF permits each person to obtain statehood through action that in the first instance makes the proposition of statehood so attractive.[213] But, critically, the success of this action remains in the hands of the international community whose members are the other parties to a treaty or that decide on admission to an international organization. It also advances the maxim *ex injuria jus non oritur*. Facts on the ground related to the population and territory (internal effectiveness) might be validated by effective governance (even under occupation),[214] but facts in the international arena in order to become operative need to gain acceptance of the international community. ILF hence turns the factual process of gaining statehood short of armed struggle into a normatively guided one.

C. The Scope of Application of ILF

This Section will turn to the final question of the scope of application of ILF to various entities. ILF as a method of statehood evaluation embraces all statehood-related subjects of international law. It could be used to assess the statehood of potential future states, nascent States, existing States, entities with long-lasting claims to statehood, federal/confederal compounds, national liberation movements fighting for independence, States in the process of disintegration, partially recognized States, occupied States, non-self-governing territories, and failed States.

Undoubtedly, most of the extant States, perhaps to the exclusion of diminutive and failed States, would "pass" the statehood test. More interesting is its practical usefulness in hard or marginal cases. Here the main contribution of ILF is to recognize statehood as a process for which there are indicators. Potential

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[212] Consult Oleg I. Tiunov, *Concepts and Features of International Law: Its Relation to Norms of the National Law of the State*, 38 ST. LOUIS U. L. J. 915-928 (1994); United Nations, INTERNATIONAL LAW AS LANGUAGE FOR INTERNATIONAL RELATIONS (1996); Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31-50 (1999).

[213] M. Craven, *Statehood. Self-Determination and Recognition, in* INTERNATIONAL LAW 177, 193 (M. Evans ed., 2019).

[214] Marten Breuer, *Effektivitätsprinzip*, *in* VÖLKERRECHT: LEXIKON ZENTRALER BEGRIFFE UND THEMEN 72 (Burkhard Schöbener ed., 2014).

statehood claims can be assessed against the level of international legal functionality at any point in time. The same would pertain to national liberation movements and partially recognized States which are in the process of entering the legal sphere of functionality and struggle for the acknowledgement of their rights and postulates by others.[215]

A similar position has been expressed towards the Montevideo Convention criteria that were designed for the assessment of newcomers, not only already existing States.[216] Nascent States or partially recognized Sates will encounter difficulties in meeting the Montevideo Convention criteria, and that amounts to doctrinal bankruptcy if combined with newcomers that were accepted when they really did not satisfy the criteria.[217] This is not to say that the Montevideo Convention version of statehood should cease to be used. Indeed, a State is inconceivable without territory, people, and government. Rather, the basis for statehood should be developed as put forward by the ILF model.

IV.
CONCLUSIONS

What is a State in international law, or rather, how do we know when statehood is attained and maintained? This Article has offered a novel conceptualization of the State in international law, which almost fell into oblivion after the ILC abandoned the project. This Article proposes International Legal Functionalism as a method that can contribute to better cognition of statehood, particularly in hard or marginal cases. The conceptual framework comprises a definition of ILF that sees statehood as an objective-driven normative process rather than being frozen in time and factual. ILF is substantially correlated with the principle of effectiveness to the extent that functionalism and effectiveness could be used interchangeably. ILF broadens the ordinary application of the principle of effectiveness to statehood assessment under the Montevideo definition to the external legal relations of an entity. This positions ILF against the functionalist theory of international organization, with which it shares the aspect of effective integration into the international community of States. This Article has also identified and applied indicators of international legal functionality of an entity, and hence, progress towards statehood: the conclusion of international agreements, membership in international organizations, the

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[215] W.H. ALEKJIAN, DIE EFFEKTIVITÄT UND DIE STELLUNG NICHTANERKANNTER STAATEN IM VÖLKERRECHT 206 (1970). The international legal personality of a state is, in the total absence of inter-state relations and international intercourse, a total abstraction, because the domestic effectiveness of an entity as state is not *per se* identical with the effectiveness of the same as a subject of international law, and cannot *per se* induce, without the willingness of other states, the establishment of inter-State relations.

[216] CRAWFORD, *supra* note 11, at 45, 667; *see generally*, KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (1968).

[217] Examples of the latter are Congo in 1960, Angola in 1975, and Bosnia in 1992.

exercise of inherent rights and duties, accessing the international judiciary, and recognition. With reference to advantages of the ILF concept, the Article identified greater ease of use in cases of entities aspiring to statehood while noting that measurement and threshold definitions will eventually be established mainly through *consuetudo* (practice) of the existing States.

The persuasiveness of ILF rests on its proposition to emphasize the external viewpoint of statehood over the traditionally dominant internal one. ILF provides a method of evaluating statehood in the context of the development of international law towards a more objective legal order that assesses its members for whether they actively contribute to it. What really ought to matter is whether an entity can effectively avail itself of key facets of contemporary international law, thus functioning as a member of the international community of States, rather than being a factual success. Processes of attaining statehood remain in the hands of the international community whose members are the other parties to a treaty or decide on admission to an international organization.