International law and statehood: A performative view

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1 International Law and Statehood: A Performative View

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There is little need to make an argument about the centrality of statehood to international legal doctrine and practice. Although there is some controversy about when one should date the beginning of 'modern' international law, there is no doubt that the process was historically and conceptually connected with the emergence of sovereign statehood. That idea, again, arose in different places at different moments and in relation to a varying set of circumstances: in defence of the *de facto* autonomy of Northern Italian city-states against the Holy Roman Empire; to support the territorial rule of the French kings claiming the right to rule as 'emperors' in their realm; in order to understand the extent of the *Landeshoheit* of the estates of the German–Roman empire after the Thirty Years' War; to give sense to the way the 'King's two bodies' separated to mark a distinction between regalia and jurisdiction. The etymology of the notion of 'state' (*status*, estate, *Staat*, *état*) is complex and partly confusing but its major strand expresses the independence of the abstract (legal) subject not only against the powers of the church or the empire but also against the factual holder of domestic authority.[1] Louis XIV was not the only ruler who failed to make the distinction between himself and his state – which is not to say that it would not have been made by such theorists of early modern politics and law as Suárez, Grotius, Hobbes, Pufendorf and Vattel. None of them possessed a very clear notion of political statehood nor was fully consistent

in the use of that locution but each linked it conceptually to the idea of a law of nations regulating not the personal relations of princes so much as those of the collectivities they ruled. Their law of nations would also differ from the old *jus gentium* to the extent that it would not deal with a universal law generally but with the specific rules that were applicable between states as independent collective units, a '*jus inter gentes*'.[2]

A relatively firm notion of law of nations (international law, *Völkerrecht*, *Droit public de l'Europe*) as a law between independent, 'sovereign' entities called 'states' (often confusingly addressed as '*gentes*', *Völker* or nations), existing like so many individuals juxtaposed against each other in peace and war, became rooted in the legal and diplomatic language of the early nineteenth century. It was then taken as the self-evident starting-point for the professionalisation of international law in the last third of the century in public administrations, foreign ministries and the academy. Although the rise of the profession was connected with liberal and cosmopolitan tendencies among European intelligentsias, and its members were committed against the 'great power primacy' of the old regime, its views on statehood were always ambivalent. On the one hand, the development of a Europe of formally independent and equal states resonated with their moderate nationalism and did not appear to counter the push towards increasing economic and technological cooperation across boundaries. Together with (public) international law the state was part of the emerging institutional 'modernity'. On the other hand, jurists and politicians often referred to the sovereign independence of their states to defend policies that went against the accepted 'international' position. The great difficulties in moving towards international legislation, coordinating colonisation or even in agreeing upon the limitation or humanisation of warfare at the end of the nineteenth and beginning of the twentieth century gave rise to an incipient anti-state rhetoric among international jurists. After the First World War, this rhetoric emerged as a major strand in the international legal project. Even as international law was still understood as a law among independent 'states', statehood was now increasingly seen as a definite obstacle to the further development of that law, allowing states a veto right to rid themselves

of their obligations.[3] In one of its first cases, the newly established Permanent Court of International Justice confirmed the view that international law was a law between sovereign states: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . Restrictions upon the independence of States cannot therefore be presumed.'[4] Ever since then, jurists have attacked the central suggestion in the so-called 'Lotus principle' that states are bound by the law only if and to the extent that they will.

Twentieth-century international jurisprudence may be summarised as an extensive effort of trying to fit the view that states are sovereign with the view that they are still 'bound' by an international law. But the problem has not been limited to jurisprudence. Most international disputes involve one side invoking its sovereign right and the other side referring to some international rule allegedly overriding that right. Even today, international lawyers are both committed to statehood as the foundation of their field – and to the critique of that statehood as obstructive of their international projects on peace and security, human rights, free trade, clean environment, abolishing impunity for serious crimes, protecting investment, etc. Much of this ambivalence has a moral-political quality: is statehood good or is it bad? Are established states the pillars of a peaceful international and domestic order or the fig leaf of random rule by a specific social class or group? And are nationalist demands for new states signs of fragmentation, 'ethnic' or otherwise, or are they justified calls for the emancipation of 'the peoples'? On the one hand, the right of identifiable communities to enjoy self-determination appears as a founding explanation for why there should be anything like international law in the first place. The idea that communities have a right to lead their own lives in accordance with their preferences – their religious or political commitments – and to rule themselves autonomously, with laws they have enacted and through officials of their own choosing, seems quite fundamental. One need not go further than the de-colonisation period to realise the political power of this idea. On the other hand, statehood also provides a protective veil to all kinds of moral and political abomination,

shielding corrupt or oppressive governments from outside scrutiny, consolidating and protecting tyrannical regimes. Thus, while for some the state means peace and security from outside aggression and internal turmoil, a 'home to one's own people', others regard it as a barrier to their own political (national or international) aspirations and an instrument of suppression. Hence the interminable recent debates on 'responsibility to protect' – that is, the question of the right or duty of the 'international community' to intervene in the government of states in internal turmoil.[5] But whether the state is ultimately a promise for the emancipation of the 'Wretched of the Earth' (Frantz Fanon)[6] or a means to preserve the status quo against endless 'fratricidal struggles' (ICJ Burkina Faso vs. Mali 1986)[7] cannot be decided *a priori*. The diverging views that are involved in any dispute are accepted or rejected as part of broader – read political – considerations. For example, the question of the statehood of Slovenia, Croatia, and Bosnia and Herzegovina in the 1990s turned on disagreements about how to react to the violent fragmentation of the former Socialist Federal Republic of Yugoslavia (SFRY). The problem resurfaced with the Kosovo question, intensely debated within the advisory proceedings of the International Court of Justice in 2009, with the twist that Kosovo had not been a constituent republic of the SFRY. The recent history of the Balkans shows nicely that whether 'the state' is to be defended or challenged is no question answerable *in abstracto* but depends on context and vantage-point; we could also say that it is political.

The elusive concept of the state

Statehood is not only morally contested and caught in an ambiguous relationship with international law; its very ontology lingers uncomfortably between notions of empirical fact and power, and notions of legal validity and moral purpose. What is statehood? After centuries of debate, intellectuals still disagree about this – is statehood a social fact or a social norm? Nobody has of course ever 'seen' states. They are constructions, pieces of human imagination, forms of shorthand by which aspects of experience

are rationalised. And yet, of course, this does not signify that they could be simply wiped out of our world without something quite important being lost. As C. A. W. Manning once pointed out, to think of the world without reference to statehood would be like thinking of a fleet at sea only by reference to a lot of sailors acting – without any reference to the performance of ships.[8] But if we cannot understand the world without statehood, what character has it? According to a 'realist' tradition, the state is a 'fact', the fact of power above all, finding expression in the ability of the 'Machiavellian' Prince to seize, retain and extend control over a city, in the 'Hobbesian' Sovereign's ability to pacify his warring subjects, or in the 'Weberian' government's monopoly of legitimate force over a population on a definite territory. To contemplate the 'deeper' moral purpose of statehood would only dangerously conceal the reality of power. But then, a whole tradition from Aquinas onwards points out that mere 'facts' do not create the moral compulsion we associate with statehood – that instead we understand statehood as a particular kind of 'authority' vested in men (indeed, almost always men) by a set of principles through which coercion is translated into legally valid control. Indeed, in this 'idealist' tradition it is utterly absurd to claim that the state is real in any factual sense; rather, empirical behaviour, causes and materials take a coherent shape only to the extent to which this shape has a legal or ideal form. But whether we can make this formal assumption in any specific case depends on whether it is lawful or justified; validity, not power, defines 'the essence' of the state.[9] The juxtaposition of the two views is as old as theorisation about statehood, reminding us of the controversies between Grotius and Hobbes, Leibniz and Pufendorf, Kant and Hegel, Kelsen and Schmitt, and most of the twentieth- century controversy between 'idealists' and 'realists'. Which one is right? The answer to this question has not accidentally been deferred from one round of debate to the next. Ambiguity persists. There is no reason to re-enter the debates; in some respect both positions are right – and wrong. Perhaps the more interesting task lies not in taking a position but examining how one is able to manage statehood in a social reality that can neither be reduced to facts nor to norms, by holding on to the ambiguity.

The same concerns the doctrinal controversy about the legal institution of recognition of states. Is statehood an effect of the fact that an entity has been 'recognised' as such by others? Or is it merely an empirical process that is not brought about by recognition but to which the latter may add an imprimatur of cognition or acceptance? As is well known, the 'constitutive' theory had its heyday as part of the imperial world of the nineteenth century where access to statehood and the benefits of European public law was guarded by the Great Powers. Since then, the use of international law as an instrument of empire has of course been publicly rejected and with it most jurists have moved to think that recognition does not 'create' states but only 'declares' the presence of a novel state whose emergence has been a matter of the factual combination of the elements of territory, population and efficient government.[10] But is this really so different? Where do those elements come from (and like all important legal rules, their basis and substance have been contested), and what authority have existing states to interpret them? An entity that is 'declared' to be a state by no state, and with which none of them engages in relations, has very little to gain from its 'statehood'. So is recognition 'constitutive' or 'declaratory'? Again, there is as little interest in choosing a position as there is to decide once and for all, whether states are good or bad or whether their ontology is that of facts or norms.

The moral and analytical shortcomings of the state (concept) have produced frustration among scholars for a long time. If the semantic of the state does not provide us with either a clear moral vision or accurate empirical description, if it cannot firmly tell justice from injustice, reality from fiction, of what use is it then? Should we not rid our political and legal vocabulary of the state and replace it by a semantic of justice and morality, on the one hand, and instruments of empirical description and measures of effectiveness, on the other? No doubt, to get rid of the (concept of the) state is a recurrent fantasy of modern legal, political and sociological thought. From Bakunin to Miéville and from Kelsen to Allott, the state appears in one way or another as an illusion or ideology, serving and preserving an irrational or unwarranted political order which would best be dissolved.[11] There is substan-

tial doubt, however, whether the category of the state can really be disposed of that easily, whether cutting off the King's head, in Foucault's words,[12] would actually preclude the reappearance of the state's body in the form of variegated 'doubles' – as delineated system, subject, authority, etc. – and haunt our notions of politics, justice and law, if 'in a very ghostly shape'.[13] We do not aim at any conclusion of this theoretical discussion. To the contrary, perhaps seeking the 'truth' about state morality and state ontology is very much beside the point. Lamenting our obsession with truth, Nietzsche once maintained that the falsity of a conviction would not constitute sufficient reason to reject it and he speculated that the most erroneous of our convictions were also the most necessary ones.[14]

On a more practical note, then, it is remarkable that statehood, notwithstanding all the conceptual and moral ills of the notion, retains its importance in advancing and rejecting claims and justifying decisions in international law and politics.[15] Instead of asking whether states in general or any states in particular are 'really' good or bad, 'really' exist or not as empirical facts or legal subjects, we want to ask how international law 'performs' statehood precisely by *pretending* that we could provide final answers to the aforementioned questions. In other words, we readily agree that the state is not some clearly intelligible matter, empirical or legal, and accept the proposition that it is 'merely' a metaphor. However, as Koschorke et al. have put it, the point is precisely not to judge metaphors for whether they accurately capture the reality they purport to represent but to investigate what they *do*.[16] For professionals, that is, lawyers, judges, diplomats, activists and politicians, the point is not to find the 'truth' or commit to one or another fixed position, but rather to move between them; although ostensibly referring to some objective (legal or empirical) reality of statehood, they actually enact it themselves. This is not because they tweak or misinterpret some 'objective' reality of empirical facts or legal norms, but because statehood has no ontological status apart from the claims, representations, assumptions and routines performing it in political and legal practice.

A 'performative' view

In this essay we wish to defend a 'performative' view of statehood. We do this as an incident of the larger view we share that international law is above all a language, a professional vocabulary through which arguments can be made and decisions taken with regard to legal problems – including problems relating to statehood. Contrary to popular belief, international law has not already resolved the world's problems so that we could, merely by 'applying' international legal rules or principles, resolve international disputes in an 'objective' or 'scientific' way. The law does not provide 'true' statements about the world but (professionally) persuasive arguments for addressing disputes, a repository of considerations for resolving them in one way or another that link the process of resolution itself to the larger historical and political patterns of which it is a part. International law is still 'politics' in the sense that *how* the law is used – treaties are applied, customary rules are delineated and principles are developed – still depends on the 'choices' and more or less silent presuppositions of those doing this. The users of legal language operate under many kinds of social constraints. Authoritative institutions are typically biased in favour of certain types of outcomes and professional jurists are able to operate the language so as to fit those biases. But the choice of the language, and the available arguments, are not free. They are given by the legal tradition that distinguishes between what is and what is not a good (in the sense of 'valid') argument. For instance, to refer to the religious beliefs of a people to defend or deny their statehood is not a valid legal argument, while pointing to the 'effectiveness' of their government is.

It is a well-known quality of legal language (the repertory of 'valid' arguments) that its elements come in pairs: for every rule, there is an exception, for every principle a counter-principle. Even where a concept does not appear to have an opposite pair, the concept itself is invariably understood in two contrasting ways (often by using denominations such as 'subjective' and 'objective', '*stricto sensu*' and '*lato sensu*'). This is merely a restatement of the position that international law has not already resolved the

world's problems but provides a means whereby resolution can proceed. Again, any such 'resolution' is hegemonic to the extent that it is 'imposed' on rather than 'found' in the materials. The ambivalence about statehood is an incident of this – there is no definite view of whether states pre-exist or are constituted by international law. It all depends, and in any concrete instance contestants may of course come to different conclusions just as they may differ on whether statehood is a 'mere fact' or a normative quality. Even if they, for whatever reason, may have committed to the 'factual' or the 'normative' view (typically because the institution in which they argue has pronounced itself in favour of one or the other) they may still disagree about *how to interpret the available facts or norms*. They may even agree on what the interpretative canons are (that is, literal, historical, teleological . . .) but find that they may use them in contrasting ways. No matter how deep we engage with the legal language we shall never find the solution to our dispute within it. It will recede interminably, until we make it ourselves. This is why we have decided to label ours a 'performative' view of statehood. From the legal perspective, statehood is a 'performance' in the legal vocabulary, the point of which is either to defend or deny some entity the rights, duties, privileges and competences that statehood endows.

This is not to say that statehood is *exclusively* performed by international law or even that international law would perform statehood in a uniform way – as if legal imagination, once some (arbitrary) legal decision has been reached, would simply 'make' social reality. For one, how 'successful' a particular performance of statehood is vis-à-vis the international community or the population in the territory depends on multiple factors, from historical discourses on 'national' or other collective identities to the professionalism of the administrative staff and the material infrastructure – none of which would in turn be decisive. International law thus interacts with a social reality which it cannot entirely subordinate. For another, international law is not centred on one single authoritative speaker whose words would in the last instance decide what is real and what is not. It is a 'fragmented' or a decentralised system whose elements – states, courts and other institutions – often come to different conclu-

sions about some state of affairs. Moreover, even already 'disappeared' as well as just 'emerging' entities may voice claims for 'statehood' without a possibility to prevent them *a priori* from taking the stage of international law. Indeed, statehood is primarily performed by the entity itself – that is to say, its lawyers and other representatives – as well as by others, the representatives of a neighbouring state, an ally, a national or international court, an international institution or any other interested party. In the remainder of this chapter we would like to illustrate the operation of this performative view in the context of actual disputes: the annexation, legal continuity and re-emergence of the Baltic States; the dissolution and contested successions of the Soviet Union and Federal Republic of Yugoslavia; the unrecognised self-enactment of the Republic of Somaliland; and the controversy over Palestinian statehood. In each, we shall try to show that statehood has not been derived either from 'facts' or 'norms', that the positions of external parties cannot be cited in favour of the 'constitutive' or the 'declaratory' theory. Instead, the cases can best be understood as a series of performances before different audiences that interact with and influence each other but do not necessarily converge on a uniform view about what that statehood would *mean* to each of them.

State performances

Today it is widely held that Lithuania, Latvia and Estonia had been illegally occupied by the Soviet Union between 1940 and 1990; according to the so-called 'continuity thesis', the sovereignty of the Baltic States had legally persisted even through the long years of occupation and could thus be 'restored'.[17] But after Stalin's troops had occupied the erstwhile sovereign states in 1940, the latter effectively vanished from the international scene. The annexation was neither uniformly rejected nor accepted. In 1940, the United States denied any recognition of the effective occupation by the Soviet Union, with the State Department rejecting 'any form of intervention on the part of one state, however powerful, in the domestic concerns of any other sovereign state, however

weak'. Without respect for these foundational 'principles', the statement read, 'the basis of modern civilization itself [. . .] cannot be preserved'.[18] The validity of legal status should take precedent over established facts – *ex injuria jus non oritur*. On the other side, the governments of the Netherlands, Sweden, and – later – Spain and New Zealand formally recognised the USSR's jurisdiction over the Baltic States by establishing diplomatic relations without reservations. Most states, including the UK, France, Italy and West Germany, took a middle ground by accepting the Soviet claim on a *de facto* basis but withholding *de jure* recognition. The thin red line walked by most states was illustrated by the wording of the Helsinki Final Act (HFA) in 1975.[19] Instead of accepting the forcefully imposed 'de facto' borders in Eastern Europe as unambiguous and legally sanctioned reality, the Accords spoke of 'frontiers' which should be 'inviolable' (HFA a), 3) but could be changed 'by peaceful means and by agreement' (HFA a), 1). The Accords thus avoided a final word on the legal status in terms of statehood. Meanwhile, exile governments of the formerly independent Baltic States continued to maintain – more or less fictitious – diplomatic missions after 1940 in various countries, including in some European countries and the US. These diverging performances kept the contested issue alive and sometimes led to particularly intricate diplomatic performances to accommodate both versions; for instance, the UK removed delegates from the exiled Baltic governments from the official diplomats list but retained their diplomatic status in the UK.[20]

After the 'restoration' of independence in 1991, the continuity thesis would not entirely erase the history of diplomatic relations the Soviet Union developed, also on behalf of the Baltic republics, with other states, even though many states had never formally accepted the Soviet annexation. The insistence of the Baltic States that they had been occupied and 'did not lose [. . .] statehood in terms of *de jure*',[21] as the Latvian government put it, logically implied the restoration of legal relations from the moment preceding the (illegal) occupation of 1940. However, very little of this became a reality. Quite predictably, the continuity claim was denied by Russia, which therefore also rejected the validity of treaties concluded with Baltic inter-war governments, such as the

Treaty of Tartu (1920).[22] The conflicting histories put forward on the two sides were likewise manifested in conflicting claims about territory and issues of citizenship,[23] as well as in the failure of the negotiations of border settlements between Estonia and Russia and Latvia and Russia in 2005. On the other hand, even for a country such as Finland, for example, that had remained silent in regard to the occupation and out of reasons of solidarity immediately accepted the continuation thesis in 1992, that fact did not bring about the legal situation that had existed between the two countries in 1940. Instead, it was agreed that a number of agreements made with the Soviet Union would remain provisionally in force, while the bilateral inter-war treaties would be considered to have lapsed. The same was true of inter-war treaty relations with other states, too; they mostly did not resurface but were replaced by new treaty relationships. Neither the denial nor the acceptance of state continuity signified the persistence of legal relationships.[24]

Even with Baltic sovereignty fully restored, the diverging histories cast their shadows, imposing one vision of statehood over another. In 2006, the European Court of Human Rights examined the case of a Latvian politician who had been banned from running in national elections because of her engagement in the Communist Party's efforts to prevent the re-establishment of independent statehood up to the late summer of 1991.[25] The Court found that the disqualification to stand for parliamentary elections did not constitute a violation of the politician's 'passive' right to run in democratic elections.[26] The history of occupation was crucial for the Court to allow a large margin of appreciation for the government; 'the national authorities of Latvia, both legislative and judicial, are better placed to assess the difficulties faced in establishing and safeguarding the democratic order' (§134). More importantly still, the Court accepted the Latvian narrative that any resistance to the independence movement after January 1991 was 'unconstitutional' (§32, a) – although recognition by the Soviet Union and even the US was only granted by September that year. In his dissenting opinion, Judge Zupančič pointed out that resistance to Latvia's independence in 1991 constituted merely loyalty to the valid legal order of the Soviet Union.[27] He maintained that 'even international law does not have the power to

wipe away the history of some fifty years'. The question is, of course, *which* history or, indeed, *whose* history? With no neutral arbiter of history available, the contested trajectory of the Baltic States oscillates between competing notions of fact and norm, effective territorial control and legally recognised subjectivity. The hegemony of particular interpretations may change, of course, and while some regard this as justice, others feel betrayed. Ultimately, we cannot grasp in some final instance which realities and histories of statehood we are dealing with. Instead, we can only understand them as performances that all actors, including observers of 'legal norms' and 'historical facts', constantly engage in.

A rather different instance where statehood is legally contested with manifest implications is the succession of a dissolving state, as exemplified by the Soviet Union/Russia. In the Alma-Ata Declaration of 21 December 1991, the former republics of the Union had declared the Soviet Union dissolved.[28] Only a few days thereafter, Russia's President Yeltsin sent a letter to the UN Secretary-General informing him that 'the membership of the USSR in the United Nations including the Security Council [. . .] is being continued by the Russian Federation'.[29] The continuation was mostly accepted either expressly or tacitly by most UN members, and mostly with a sigh of relief, even if the 'real life terms' continuity might have been contested. If Russia's territory was still 76.3 per cent of that of the defunct USSR, its population was only slightly above half (51.7 per cent). And of course, the constitution had collapsed. When does a country lose so much of its territory or population that it ceases be the one it used to be and becomes a new one? If a socialist constitutional system was an important part of the Union, could it survive the collapse of socialism? Of course, there is no rule. Two countries took advantage of the situation by denying that Russia could 'continue' the statehood of the USSR, Ukraine and Austria. Especially in view of the dispute concerning the apportionment of the resources of the former USSR – for example, the navy situated in Ukrainian ports – Ukraine insisted that all the successor republics were to be treated similarly and as 'new' states, as indeed the Alma-Ata Declaration seemed to suggest. They would thus each have a similar right to those resources. Even as the question of the division of Soviet

property has thereafter been disposed of by agreement between the different classes of successor states – and Ukraine failed to have its position stick – the significance of Russia's claimed 'continuation' status still remains in part obscure. For example, Russia was listed as a 'new member' in the World Intellectual Property Organization (WIPO) as of 25 December 1991.[30]

As for Austria, it rejected initially the continuation thesis because this seemed to enable it to qualify the 1955 Austrian State Treaty as no longer applicable. For Austria, then, denial of continuation seemed to enable it to recover its independence and to end the embarrassing linkage of Austria's sovereignty to the post-war settlement. Although Austria tried vigorously to keep to its position it was nevertheless compelled to give it up as a consequence of joining the European Union in 1995, when it was called upon to accept the Union's *acquis politique* and with it Russia's claim to continuity.[31] The fact that Austria initially tried to deny that the Russian performance of its statehood counted as identical or continuous with the earlier performance of the USSR was related to complex concerns of Austria's foreign and domestic policy. 'Getting rid of' the USSR in a peaceful way, and at the same time of the embarrassing suggestion implicit in the State Treaty that Austria's independence was conditioned by the continuous approval of the allies from the Second World War, would have been a significant victory for Austrian foreign policy. Although it was not to be, the remark of an Austrian diplomat in this context highlighted the discretionary and contextual – that it to say, the political – nature of what statehood means: 'Acceptance [of identity] in one area does not necessarily prejudice the issue of 'identity' in other areas, as 'identity' is not a simple fact that can be assessed objectively, but, rather, the grant of a special status by the members of the international community.'[32]

How successfully an entity performs as a state depends upon the audience that surveys the performance and is or is not willing to reward it by the grant of rights and privileges accompanied by that status. For example, Kosovo would probably not have emerged as a state without international intervention, assistance and recognition. During the period of UN administration following NATO intervention in 1999, and in the face of Kosovar

determination to establish an independent state, many Western states came eventually to the conclusion that this would indeed be the only viable outcome and thus quickly granted recognition after the territory was declared independent in 2008.[33] Although it never formally acknowledged this 'solution', Serbia was forced to accept it for practical purposes, especially after the ICJ opined in 2010 that the Kosovar declaration of independence did not violate international law.[34] While the ICJ refrained from voicing any opinion as to whether or not Kosovo was actually a state, the one hundred or so states that recognised Kosovo since 2008 made their own decision precisely by granting recognition. Conversely, no question of recognising statehood ever arose in the aftermath of the Unilateral Declaration of Independence by the Ian Smith regime in Southern Rhodesia in November 1965. This was of course owing to the very widespread condemnation of Ian Smith's racist regime as expressed even in a UN Security Council resolution at the time.[35] The assessment was wholly unaffected by whether the effectiveness of the Smith regime in the territory was comparable or even greater than that of most other African states at the moment of de-colonisation. Nor did anyone seriously suggest that Kuwait's statehood came to an end in August 1990 as the troops of Iraq's Saddam Hussein invaded the country and attached it as a 'province' to the occupying country. The matter turned on a political assessment of the situation that may – as in these cases – have to do with the respect of the leaders of the new entity of the relevant rules of international behaviour. Or in other words, it may be that while statehood is not something that is simply granted by recognition (that is, that recognition is not 'constitutive'), a consistent policy of non-recognition does seem seriously to impede the emergence and persistence of effective statehood.

There is no reason to believe, however, that we can simply entrust legal recognition with clarifying issues of blurred state identity in the long run by assuming that formally unrecognised entities would ultimately fail to uphold their claims. Such a 'neo-constitutive' position cynically neglects the political nature of conflicts underpinning disputes over statehood, thus endorsing the hegemony and vision of the international order of established

governmental and foreign policy experts. In reality the performance of statehood is not simply theirs to judge. This is nicely illustrated where so-called 'de facto', 'contested' or 'unrecognised' states speak for themselves in the language of statehood. To be sure, some emerging entities, such as the 'Republic of Ichkeria' (Chechnya) or the territory held by the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, did not last – also because non-recognition left them vulnerable to military recapture by their parent states. Yet a number of political entities have shown a remarkable resilience in their performance of statehood despite non-recognition – from Transnistria and Nagorno-Karabakh in the post-Soviet space to the Turkish Republic of Northern Cyprus and the Republic of Somaliland, not to mention Taiwan (the 'Republic of China').[36]

Somaliland illustrates the formally unrecognised performance of statehood rather well, also because it has not received any substantial external assistance to be dismissed as a 'puppet state' whose statehood would only disguise annexation of territory by a third party.[37] Like many other contested states, Somaliland emerged in war. Towards the late 1980s, the dictatorial regime of Siad Barre was fighting on different fronts against various clan-based 'liberation movements', one of them the Somali National Movement (SNM) which recruited its followers mainly from the northern-located *Isaaq* clan family. While in early 1991 the national army of the collapsing state retreated from the north and rival opposition groups began fighting over the spoils in Mogadishu, the SNM and northern clan leaders facilitated local peace talks, set up a rudimentary government, and on 18 May declared the independence of the 'Republic of Somaliland'. The claims by the nascent 'government' that it was revoking and dissolving the union between Somaliland and southern Somalia agreed in 1960 did not find any international echo, however. For one, the UN and important states such as the US were committed to re-establishing a viable government in Mogadishu and maintaining the unitary state. For another, Somaliland itself experienced several episodes of fratricidal violence in the 1990s until some measure of peace and control was consolidated at least in its western and central parts towards the end of the decade.

Finally, the African Union (Organisation) was disinclined to grant recognition to any secessionist entity, except with the consent by the parent state, for example, Eritrea and, much later, South Sudan. Notwithstanding these odds, the Somaliland government could renew internal peace and basic consent among most clans and over time established a rudimentary administrative structure, including a military and a police force collaborating with local groups in providing basic public security.[38] As a result, 'Somaliland has emerged as one of the most stable polities in the Horn' of Africa.[39]

The government used the vocabulary of statehood where it could: a 'modern' constitution was adopted, passports issued, a currency introduced, and some duties and taxes imposed. By the 2000s, main roads and major cities enjoyed relative security, which attracted modest private investment. The government of Somaliland presented itself as the only legitimate authority with which other governments would have to engage. With Ethiopia it concluded treaties, exchanged diplomatic missions and initiated regular consultations, including on the level of foreign ministers and heads of state. Djibouti, too, came to accept Somaliland's performance of statehood and sought closer ties, notwithstanding its reluctance to accept formally its independence. Overall, and despite difficulties on the ground, many observers have argued that 'from a purely international legal standpoint, Somaliland could indeed pass the statehood test'.[40] The fact that recognition has as of yet not been forthcoming appears to be largely due to domestic and regional political concerns.[41] Even Ethiopia deems it too 'adventurous', in Prime Minister Meles Zenawi's words, to recognise Somaliland as a state.[42] However, this neglect has not prevented Somaliland from extending its performance of statehood in the past two decades both internally and externally. This is not to say that the exclusion from the formal international system comes without costs or risks; but recognition is not simply 'constitutive' and the language of statehood allows Somaliland to voice claims even against the most dominant international legal or political position.

This brings us to perhaps the most persistent, popular and intricate case of contested statehood: Palestine. Indeed, no other

case illustrates better the performative nature of statehood and the role legal expertise has assumed in circumventing questions of real/fictional, legal/empirical and good/bad. Legal doctrines about territory, occupation, the laws of war and statehood have long been at the heart of the material and symbolic aspects of the Israeli–Arab conflict. From before the British mandate, different political visions of 'Palestine' and 'Israel' had taken shape and they further hardened through the Arab rejection of the 1947 UN Partition Plan, the unilateral Israeli declaration of independence, the Arab–Israeli war of 1948, and the consequent mass expulsion of Palestinians. With the defeat of 1967 and the effective occupation of vast Arab (and potentially Palestinian) territories, the chances for a Palestinian state became dim. Although the confrontation on the ground continued, peaking in the *intifada* of 1987, the quest for a Palestinian state could not be decided by military means – in such case, the Israeli Defence Force would have eventually disposed of the matter. When the Palestine National Council in 1988 declared 'Palestine' a state, a number of countries in the G-77 recognised it and established diplomatic relations with it. While most Western states and international institutions refrained from attaching the declaration with legal effects, the UN General Assembly, somewhat ambiguously, 'acknowledged' the declaration, changing the designation of the 'Palestine Liberation Organization' into 'Palestine'.[43] Whether a state had been constituted remained obscure: was territorial control really *effective*? Could the General Assembly *constitute* a state per recognition? What was the significance of Israeli and US refusal to recognise?[44] Could Palestine exist as a state in relation to some but not to other actors? Although the presence of Israeli troops and the exercise of governmental functions by Israel impeded the establishment of statehood on the ground,[45] international pressure on Israel increased to agree to a peace process with the aim of creating an independent state of Palestine. While the limited authority granted to Palestinians in the Oslo peace process never amounted to full territorial control, the administrative infrastructure of the Palestinian Authority was established – by the EU, among others – with very much a state bureaucracy in mind. Also, it did allow for an unprecedented scope of legitimate Palestinian self-government.

Legal and effective dimensions of statehood were inextricably intertwined.

With the ultimate failure of the Oslo process, the quest for and contestation of a Palestinian state returned on the one hand to the streets, as vividly expressed in the second *intifada*, the Israeli withdrawal from the Gaza strip, the continuation of settlement expansion in the West Bank, and Hamas's election victory and seizure of the Gaza strip. On the other hand, the performance of Palestinian statehood has been expanded in the international arena and the 'virtual reality' of the UN. In 2012, the General Assembly 'Decide[d] to accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and the role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people . . .'.[46] The resolution was passed by 138 states in favour, 9 against (Canada, Czech Republic, Israel, Marshall Islands, Micronesia, Nauru, Panama, Palau, United States) and 41 abstentions. Interestingly, the EU group was split, with some (Finland, France, Sweden) voting in favour, and others (for example, Germany, Netherlands, UK) abstaining. As the resolution was being prepared, member states went through tortuous legal wrangling to understand what a vote in favour might mean. Would it (1) mean that 'Palestine' had become a 'state' for the purposes of the UN, and (2) did it mean that they would thereafter be expected to deal with it as such also outside the UN context? The anxiety was predominantly articulated in functional terms, that is not as a question about whether 'Palestine' had 'really' become a state but whether the others were henceforth obliged to deal with its representatives in state-to-state terms. Many of the EU members voted in favour of the resolution in order to signal their support to the Palestinian cause but not so as to prepare the establishment of diplomatic relations, or to support Palestine becoming party to treaties or other institutions where only states were admitted – the International Criminal Court, for example. So they adopted a 'functional' view of statehood instead. They denied that the very formulation itself would have created Palestine as a state, referring, for example, to the very authoritative statement by the Badinter Commission in the context of

the Yugoslavian crisis, that statehood is a matter of pure fact (Opinion 1, 16 July 1993). But they accepted that as far as the UN General Assembly and its subsidiary bodies were concerned, they were ready to treat Palestine as a 'state' and its representatives accordingly. As a result, the legal position today appears to be the following. Membership in an organisation may be evidence of but does not automatically entail statehood for other ('general') purposes. On the other hand, 'there is nothing in the Charter, or customary law, which requires a non-recognizing state to enter into optional bilateral relations with other members'.[47] A non-recognising state may thus continue to avoid treating a fellow member of an international organisation that accepts only states as its members as a state *outside the frame of that organisation*. Moreover, the question here was only of status as 'Observer State'. Because full membership would require the votes of all the permanent members, it would not have been forthcoming. This is a status that is not mentioned in the Charter. Therefore, and however illogical this may seem, being an 'Observer State' did not mean that the entity was a 'State'.

From a legal perspective, the question 'Is Palestine a state?' is not about unravelling the puzzle about the existence of some ontological identity. Instead, it seeks to answer pragmatic questions such as 'What should we do with this situation [entity, claim . . .]?' Taking the view of actors on the scene, the focus shifts from ontology and moral evaluation to the *consequences* of alternative decisions. As a way of diplomatic compromise, it may often be wise to distinguish the material consequences of statehood (that is, membership in international institutions, formation of diplomatic relations) from formal status and, for example, accept an entity's statehood only symbolically or only for some clearly defined purpose or – the case of Taiwan is typical – refrain from symbolic recognition while in de facto terms treating it as a state. For any state or international body, depending on its political position, a 'good' legal response to the question 'Is Palestine a state?' would be one that would for example accommodate political support to the 'Palestinian cause', meet legitimate Israeli concerns, and deal in some constructive way with the situation in the Middle East, the prospects of the Peace Process as well as the balance of power

in the UN and other international institutions. Statehood exists in the eyes of the beholder. But what the criteria are that influence an observer's assessment of a nature of a performance cannot be reduced to the 'application' of the conventional categories of state/non-state and legal/effective. Although fragmented, the various performances of statehood interact; the continued reaffirmation of Palestinian claims in the international arena has helped in pressuring Israel into concessions on the ground while PLO, Hamas and other Palestinian activity has time and again given rise to the awareness that there 'is' a politically active Palestinian people reaffirming its claim for statehood, which in turn has provoked international responses. What Palestinian statehood thus means for people in the territories, for refugees, Israel, other states and international organisations depends on the concrete contexts in which performances of statehood make a difference.

Conclusion

It may appear that the performance of Palestinian or Somaliland statehood and the contestation of Baltic continuity and Soviet succession are only borderline cases, strange outliers if compared to the stable statehood of, say, Switzerland or France. But Swiss and French statehood also rest on performances; they have only been so deeply inscribed in everyday routines as to appear entirely 'natural'. Yet the occasional or permanent contestations of Baltic, USSR, Somaliland and Palestinian statehood illustrate that there really is nothing but performance to which external observers are called upon to react in one way or another. The reactions may again be informed by many kinds of considerations, including the wish to deal with entities whose power seems to have consolidated – or perhaps to assist in the consolidation of an 'emerging' entity. Issues of legitimacy and legality affect such judgements and it is the varied preferences and perceptions of the observers that make the resulting picture often appear less than coherent. What appears as 'statehood' when viewed from one perspective may not at all appear so when examined from a contrasting angle. Neither legal validity nor empirical effectiveness has a final word on how

to tell the fictional from the real, the good from the evil. In the last instance, statehood is neither a fact nor a norm but a set of practices and performances, as adjudged from different perspectives. To see it this way allows appreciating the constitutive role international law plays in supporting and stabilising, rejecting and contesting particular descriptions of statehood. In order to proceed beyond the argumentative circles into which participants in any dispute over statehood are compelled, external analysts could do worse than adopt a performative view that not only puts down the dead weight of some of the most entrenched of our academic dogma, but also highlights the responsibility of observers as they decide to accept this or that performance as creative of statehood.

Notes

1. A good account of this is Christian Lazzeri, 'Introduction', to Henri de Rohan, *L'intérêt des princes et des Etats de la chrétienté* (Paris: PUF, 1995), pp. 115–28.
2. The distinction between universal law and a law between political communities is made with great clarity in 1617 in Francisco Suárez, 'De legibus ac deo legislatore', in *Selections from Three Works*, vol. II, translation (Oxford: Clarendon, 1944), Book II Chapter XIX, § 8, p. 347.
3. For a programmatic statement, see Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933, reprinted with Introduction by Martti Koskenniemi, 2011).
4. PCIJ, *Lotus* case (1927), see A 10, p. 28.
5. The best recent account is Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).
6. Frantz Fanon, *Les Damnés de la Terre* (Éditions François Maspero, 1961).
7. ICJ, 'Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)', Judgement of 22 December 1986.
8. C. A. W. Manning, *The Nature of International Society* (London: Wiley & Sons, 1962), p. 7.
9. Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley

and Los Angeles: California University Press, 1967), pp. 286–319.

10. Cf. James Crawford, *The Creation of States in International Law*, 2nd edn (Oxford: Oxford University Press, 2006), pp. 45–89. See also Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (reissued with a new epilogue, Cambridge: Cambridge University Press, 2005), pp. 272–81.
11. See Mikhail Bakunin, *Statism and Anarchy* (Cambridge: Cambridge University Press, 1990); China Miéville, *Between Equal Rights. A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005); Hans Kelsen, *The Pure Theory of Law*; Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002); see more generally Jens Bartelson, *The Critique of the State* (Oxford: Oxford University Press, 2001) on the intimate relationship between modern political critique and statehood and the difficulty of going beyond the latter by means of the former.
12. See Bartelson, *Critique of the State*, p. 171.
13. Ibid., pp. 34 and 181.
14. Friedrich Nietzsche, *Jenseits von Gut und Böse* [1886] (Stuttgart: Kröner, 1991), p. 10.
15. On the persistence of statehood, see for example the essays in Hent Kalmo and Quentin Skinner, *Fragments of Sovereignty. The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010).
16. Albrecht Koschorke, Thomas Frank, Ethel Matala de Mazza and Susanne Lüdemann, *Der fiktive Staat: Konstruktion des politischen Körpers in der Geschichte Europas* (Frankfurt am Main: Fischer Verlag, 2007), p. 35.
17. Tarja Långström, *Transformation of Russia and International Law* (Leiden: Nijhoff, 2003), pp. 191–6; Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR* (Leiden: Nijhoff, 2003).
18. Jonathan L'hommedieu, 'Roosevelt and the Dictators: The Origin of the US Non-recognition Policy of the Soviet Annexation of the Baltic States', in John Hiden, Vahur Made and David J. Smith (eds), *The Baltic Question during the Cold War* (London: Routledge, 2008), pp. 39–40.
19. The Final Act of the Conference on Security and Cooperation in Europe, August 1, 1975, *International Legal Materials*, 14, 1992, pp. 1292–1325.

20. James T. McHugh and James S. Pacy, *Diplomats without a Country: Baltic Diplomacy, International Law, and the Cold War* (Westport: Greenwood, 2001), pp. 100-1.
21. URL: http://www.mfa.gov.lv/en/ministry/exhibitions/recognition/ (accessed 31 October 2013).
22. Wayne Thompson, 'Citizenship and Borders: Legacies of Soviet Empire in Estonia', *Journal of Baltic Studies*, 29, 1998, pp. 124–5.
23. See Thompson, 'Citizenship and Borders', pp. 109–34.
24. See Martti Koskenniemi and Marja Lehto, 'La succession d'états dans l'ex-URSS en ce qui concerne particulièrement les relations avec la Finlande', *Annuaire français de droit international*, 38, 1992, pp. 190–8.
25. ECtHR, Zdanoka v. Latvia 2006, judgement (16 March 2006) application n. 58278/00.
26. Ibid., §132–6.
27. In his words, 'when the Latvian constitutional order was still in *statu nascendi*, one could not have simply said [. . .] that Mrs Zdanoka's and others' concurrent political activities opposing Latvian independence, the disintegration of the Soviet Union and so on were *per se* politically illegitimate or even illegal' (ibid.).
28. *International Legal Materials*, 31, 1992, p. 149.
29. Martti Koskenniemi, 'The Present State of Research', in Pierre-Michel Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested against the Facts* (Hague Academy of International Law. Centre for Studies and Research in International Law and International Relations, The Hague: Nijhoff, 1997), p. 147.
30. Ibid., p. 147.
31. See Konrad Bühler, *State Succession and Membership in International Organizations. Legal Theories versus Political Pragmatism* (The Hague: Kluwer, 2001), pp. 164–6.
32. Helmut Tichy, 'Two Recent Cases of State Succession – the Austrian Perspective', *Austrian Journal of Public and International Law*, 44, 1992, p. 120.
33. James Ker-Lindsay, 'From autonomy to independence: the evolution of international thinking on Kosovo, 1998–2005', *Journal of Balkan and Near Eastern Studies*, 11, 2009, pp. 141–56.
34. ICJ, 2010, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (22 July 2010).
35. See SCR 216 (12 November 1965).

36. Scott Pegg, *International Society and the De Facto State* (Farnham: Ashgate Publishing, 1998); Deon Geldenhuys, *Contested States in World Politics* (Basingstoke: Palgrave Macmillan, 2009); and Nina Caspersen, *Unrecognized States. The Struggle for Sovereignty in the Modern International System* (Cambridge: Polity Press, 2011).
37. On the notion of 'puppet states', see Crawford, *The Creation of States*, pp. 78–83 and 156.
38. Mark Bradbury, *Becoming Somaliland* (Bloomington: Indiana University Press, 2008); Marleen Renders and Ulf Terlinden, 'Negotiating Statehood in a Hybrid Political Order: the Case of Somaliland', *Development and Change*, 41, 2010, pp. 723–46, and Dominik Balthasar and Janis Grzybowski, 'Between State and Non-State: Somaliland's Emerging Security Order', in *Small Arms Survey Yearbook 2012: Moving Targets* (Cambridge: Cambridge University Press, 2012), pp. 147–73.
39. Bradbury, *Becoming Somaliland*, p. 1.
40. Peggy Hoyle, 'Somaliland: Passing the Statehood Test?', *IBRU Boundary and Security Bulletin*, Autumn 2000, p. 88.
41. Iqbal D. Jhazbhay, *Somaliland: Post-War Nation-Building and International Relations, 1991–2006* (Dissertation, University of Witwatersrand, Johannesburg, South Africa, 2007), pp. 242–324; Bradbury, *Somaliland*.
42. Jhazbhay, *Somaliland*, p. 265.
43. UNGA Res 43/177 (20 December 1988).
44. Cf. Francis A. Boyle, 'The Creation of the State of Palestine', *European Journal of International Law*, 1, 1990, pp. 301–6; James Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', *European Journal of International Law*, 1, 1990, pp. 307–13; James L. Prince, 'The Legal Implications of the November 1988 Palestinian Declaration of Statehood', *Stanford Journal of International Law*, 25, 1988, pp. 681–708.
45. Crawford, 'Creation of the State of Palestine', pp. 307–13; Prince, 'Legal Implications', pp. 681–708; John Quigley, 'Palestine's Declaration of Independence: Self-determination and the Right of the Palestinians to Statehood', *Boston University International Law Journal*, 7, 1989, pp. 1–33.
46. UNGA Res 67/19 (26 November 2012).
47. James Crawford, *Brownlie's Principles of International Law* (Oxford: Oxford University Press, 2012), p. 150.