No Justice Without Statehood: Resolving the Lack of Accountability Measures as Regards Newly-Formed States

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I. INTRODUCTION

A. Background of the Study

The early conceptions of statehood largely dealt with theoretical and academic theories. Hugo Grotius, in 1625, defined a state as "a complete

association of free men, joined together for the enjoyment of rights and for their common interest."[1]

Much of Grotius' thought was influenced by Francisco de Vitoria, who surmised that a "[s]tate or community [ ] is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates[.] ... Such a state, then ... has authority to declare war, and no one else."[2]

In 1758, Emer de Vattel said, "[n]ations or [s]tates are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security."[3] As an additional requirement, such nations should be "free and independent of one another."[4]

Even after the attempt of these legal luminaries to clarify the theoretical conception of a state, still, the problem persisted through time —

> In the [18th] [C]entury[, what would emerge as the declaratory theory posits that] the existence of a [s]tate was believed to be founded on its internal sovereignty and did not require recognition by other [s]tates or monarchs. Under the influence of the positivist theory, [however,] which bases the obligation to respect international law on the consent of individual [s]tates, effective statehood became more dependent on international recognition. A new [s]tate would create obligations for

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1. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 6 (2d ed. 2006) (citing HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 38-39 (Francis W. Kelsey trans., 1925)).
2. CRAWFORD, *supra* note 1, at 7 (citing FRANCIS DE VICTORIA, DE INDIS AC DE IURE BELLI RELECTIONES 169 (Herbert Francis Wright trans., 1917)).
3. CRAWFORD, *supra* note 1, at 7 (citing 1 EMMER DE VATTEL, LE DROIT DES GENS, Introduction, §§ 1 & 15 (George D. Gregory trans., 1916)).
4. *Id.* § 15.

> existing [s]tates and should[,] therefore[,] be accepted by those [s]tates. At the end of the [19th] and [at] the beginning of the [20th] [C]entury, this argument developed into the constitutive theory.[5]

The two prevailing theories — the declaratory and the constitutive — would present problems later on, especially when the time came to actually apply them to specific legal issues happening in the real world. Theoretically, the conflict already exists, as the two prevailing theories are diametrically opposed to each other. Looking at recent history would only lead to more confusion, as each theory is seemingly used without any legal reasoning, which can establish precedent.

Today, the definition has continued, and is continuing to evolve, in light of recent developments regarding customary international law, political realities, and the right to self-determination, such that now —

> Nation-states can be largely defined as autonomous geopolitical entities inhabited by citizen[s] sharing the same language, history[,] and ethnicity. In the age of globalization, it can be asked if nations are 'imagined communities' ... or 'communal images[.]' Nationalism has to be understood in term of sentiments, politics[,] and ideology.[6]

But the problem with this intellectual exercise on the idea of nationhood is that it does not take into consideration the legal implications of having a working definition of statehood. States are the proper subjects of international law,[7] and, as such, it is important to know which entities can and cannot be considered states. While the 1933 Montevideo Convention on the Rights and Duties of States[8] sought to establish the elements of a state by codifying customary international law as regards statehood, as will be discussed, the elements are oftentimes merely considered, and sometimes completely ignored, in determining whether an entity can be classified a state.

While certain problems have presented themselves through time because of the unsettled nature of certain statehood principles, such issues mostly

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5. JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD 110 (1996).

6. Alexandra Giroux, The Accountability of Nation-States on the International Stage, *available at* http://www.alexandragiroux.net/the-accountability-of-nation-states-on-the-international-stage/ (last accessed Feb. 17, 2015).

7. Fr. Joaquin G. Bernas, S.J. writes, "States enjoy the fullest personality in international law." JOAQUIN G. BERNAS, S.J., INTRODUCTION TO PUBLIC INTERNATIONAL LAW 71 (2009 ed.).

8. Montevideo Convention on the Rights and Duties of States, *signed* Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

concerned the question of whether a certain entity can be considered a state for purposes of academic classification.[9] No legal consequences, apart from admission to the United Nations (U.N.), have necessitated a thorough discussion on statehood for purposes of resolving the theoretical dilemma.[10]

However, recent events in Palestine have shed light to a problem, which requires a review of statehood principles. After a long history of violence and struggle for independence with Israel, Palestine finally, at least in terms of recognition, achieved statehood.[11] It wanted to file a case with the International Criminal Court[12] (ICC) against certain Israeli officials using the Rome Statute's retroactive jurisdiction clause for non-party states.[13] However, Israel opposed Palestine's complaint by asserting that the ICC did not have jurisdiction because Palestine was not a state and, therefore, had no standing to file a case.[14]

This issue brought to the fore the importance of having a categorical answer to the question, "*When can an entity be considered a State?*" Moreover, the Rome Statute of the ICC being a treaty meant to exact accountability for war crimes and crimes against humanity,[15] the current issue presented a legal problem wherein newly-formed states would be left without an avenue to prosecute such crimes, absent any domestic alternative. Such a gap in the law is critical, especially because secession as a means of exercising the right to self-determination usually comes about after a violent struggle.[16] Indeed,

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9. *See generally* CRAWFORD, *supra* note 1, ch. 4.

10. *Id.*

11. *See* United Nations, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, *available at* http://www.un.org/News/Press/docs/2012/ga11317.doc.htm (last accessed Feb. 17, 2015).

12. The International Criminal Court (ICC) was created by virtue of the Rome Statute. *See* Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

13. *See* Yonah Jeremy Bob, *Analysis: Round 2 of 'Israel, Palestine at the ICC,'* THE JERUSALEM POST, Nov. 15, 2012, *available at* http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=291919 (last accessed Feb. 17, 2015). *See also* Rome Statute, *supra* note 12, art. 12 (3).

14. Bob, *supra* note 13.

15. Rome Statute, *supra* note 12, art. 5 (1).

16. *See generally* Wolfgang Danspeckgruber & Anne-Marie Gardner, Self-Determination, *available at* http://pesd.princeton.edu/?q=node/266 (last accessed Feb. 17, 2015).

"the present [ ] legal situation *encourages the use of force* in order to make demands for secession successful."[17]

B. Thesis Statement

The various concepts and theories regarding statehood have failed to resolve certain issues, which have important legal consequences, one of which is the issue of accountability measures with regard to newly-formed states. This Note will discuss the developments and issues with regard to the concept of statehood, how these affect rights and obligations in international law, particularly with regard to accountability measures, and suggest measures for resolving such issues going forward.

C. Definition of Terms

1. State

A state is defined as "a type of legal person recognized by international law. Yet, since there are other types of legal persons so recognized, the possession of legal personality is not in itself a sufficient mark of statehood."[18] According to the Montevideo Convention, a "[s]tate 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."[19]

2. International Personality

International personality is "the capacity to assume rights and duties under international law."[20]

3. Self-Determination

Self-determination is "the right to decide on the political status of a people and its place in the international community in relation to other states, including the right to separate (secede) from the existing state of which the group concerned is a part, and to set up a new independent state."[21] It "is a

17. DUURSMA, *supra* note 5, at 426 (emphasis supplied).

18. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 127 (8th ed. 2012) [hereinafter CRAWFORD, BROWNLIE].

19. Montevideo Convention, *supra* note 8, art. 1.

20. NEYIRE AKPINARLI, THE FRAGILITY OF THE FAILED STATE PARADIGM 105 (2009).

21. Thomas Elliot A. Mondez, Recognition as a Necessary Condition to Statehood: Exposing the Myth of Self-Determination and Giving Order to an Anarchic Practice of Quaint Legal Standards, at 12 (2009) (unpublished J.D. thesis,

principle concerned with the *right* to be a state."[22] Indeed, it is said that "[t]he fundamental philosophical thought behind the concept of self-determination has historically been that every human being is entitled to control his own destiny."[23]

According to Article 1 of both the International Covenant on Economic, Social, and Cultural Rights (ICESCR) [24] as well as the International Covenant on Civil and Political Rights (ICCPR):[25]

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social[,] and cultural development.
>
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> (3) The state[-]parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the [U.N.].[26]

4. Recognition

This is "a formal acknowledgment or declaration by the government of an existing [s]tate intending to attach certain customary legal consequences to an existing set of facts, which in its view justifies its action."[27] Recognition,

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Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University) (citing International Conference of Experts, Barcelona, Spain, Nov. 21-27, 1998, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*).

22. CRAWFORD, BROWNLIE, *supra* note 18, at 141.

23. DUURSMA, *supra* note 5, at 7 (citing A.M. Connelly, *The Right of Self-Determination and International Boundaries*, *in* THESAURUS ACRASIUM 549 (D.S. Constantopolous ed., 1985)).

24. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

25. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

26. ICESCR, *supra* note 24, art. 1 & ICCPR, *supra* note 25, art. 1.

27. Keith D. Suter, *The Australian Government's Policy of Recognition and Diplomatic Relations*, 47 THE AUSTRALIAN QUARTERLY 67, 67 (1975) (citing MORTON A.

for purposes of this Note, will be limited to recognition of an entity as a state, regardless of the nature of the entity's government.

5. Constitutive Theory

The constitutive theory states that it is recognition which "constitutes" a state, "that is, it is what makes a state a state and confers legal personality on the entity."[28] This view came about as a result of the recent practice of states in recognizing or not recognizing certain entities which have seceded or gained independence from other nations. As such, recognition is not a mere formality but is essential before one can be considered a state.

6. Declaratory Theory

The declaratory theory relies on the Montevideo Convention, which provides that a state "should possess the following qualifications: [(a)] permanent population; [(b)] a defined territory; [(c)] government; and [(d)] capacity to enter into relations with other states."[29] According to this view, "recognition is merely 'declaratory' of the existence of the state and that its being a state depends upon its possession of the required elements and not upon recognition."[30]

7. Secession

Secession may be defined as "the creation of a [s]tate by the use or threat of force without the consent of the former sovereign[.]"[31] It can also mean "the separation of part of the territory of a [s]tate carried out by the resident population with the aim of creating a new independent [s]tate or acceding to another existing [s]tate."[32] Thus,

> [t]he issue of secession arises whenever a significant portion of the population of a given territory, being part of a [s]tate, expresses by word or deed the wish to withdraw from the [s]tate and become a [s]tate in itself or

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KAPLAN & NICHOLAS KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 109 (1961)).

28. JORGE R. COQUIA & MIRIAM DEFENSOR-SANTIAGO, INTERNATIONAL LAW 74-75 (3d ed. 1998).

29. Montevideo Convention, *supra* note 8, art. 1.

30. BERNAS, *supra* note 7, at 74.

31. CRAWFORD, *supra* note 1, at 375 (citing KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 62 (1955)).

32. John Dugard & David Raic, *The role of recognition in the law and practice of secession*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 102 (Marcelo G. Kohen ed., 2006) (citing C. Haverland, *Secession*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 384 (Rudolf Bernhardt ed., 1987)).

> become part of another [s]tate. ... International law recognizes the right to secession in the context of self-determination *only for peoples, not for 'a significant portion of a population of a given territory,'* otherwise even religious groups would be accorded this right[.][33]

8. Parent State

A parent state "refers to the state from which a secession is being contemplated or carried out."[34] The parent state is therefore the original state from which the newly-formed state seceded from.

D. Significance of the Study

1. The Unresolved Nature of Statehood in International Law

As stated by renowned international law author Ian Brownlie, although the topic of statehood is of utmost importance in international law, there is a dearth of literature on the matter.[35] He attributes this to three factors, thus —

> First, though the subject is important as a matter of principle, the issue of statehood does not often raise long-standing disputes. In practice, disputes concern the facts rather than the applicable legal criteria. Moreover, many disputes do not concern statehood *simpliciter*, but specialized claims, for example, to membership of the [U.N.]. Secondly, the literature is often devoted to the broad concepts of the sovereignty and equality of a state and so gives prominence to the incidents of statehood rather than its origins and continuity. Finally, the political and legal nature of many complete rifts in relations between particular states is represented by non-recognition of *governments* rather than of states.[36]

Given the relative lack of sources when it comes to statehood, there is a high probability that certain legal issues will not be addressed by the existing literature. As will be seen in this Note, certain issues in the real world require an extensive understanding of statehood for their resolution. The scarcity of material when it comes to statehood leaves conflicting statehood

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33. Stanislav V. Chernichenko & Vladimir S. Kotliar, *Ongoing Global Legal Debate on Self-Determination and Secession: Main Trends*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE — REGIONAL APPRAISALS 84 (Julie Dahlitz ed., 2003) (emphasis supplied).

34. Aleksandar Pavkovic, *Secession, Majority Rule and Equal Rights: A Few Questions*, 3 MACQUARIE L.J. 73, 73 n.1 (2003).

35. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70 (7th ed. 2008).

36. *Id.* (emphasis supplied).

principles on a theoretical level, and real world problems on a practical level, unresolved.

2. The Continuing Rise of Entities Claiming Statehood

While it is well-settled that, generally, the subjects of international law are states, the question of which entities can be considered states is not as extensively discussed as other topics in international law. Even if the principles of statehood are not well-established yet, the number of entities considered as states has grown dramatically in recent years —

> At the beginning of the [20th] [C]entury[,] there were some [50] acknowledged [s]tates. Immediately before World War II[,] there were about [75]. By 2005, there were almost 200 — to be precise, 192. The emergence of so many new [s]tates represents one of the major political developments of the [20th] [C]entury. It has changed the character of international law and the practice of international organizations. It has been one of the more important sources of international conflict.[37]

It is noted that "[u]ntil the end of the Cold War, the trend has been an increase in the number of nation-states. ... Alongside, one can observe a resurgence of nationalism showing evidence that self-determination, self-governance[,] and nation-states are still relevant."[38] At the same time, "the international system resists the recognition of new states [and] many who legitimately consider themselves distinct peoples do not receive the regional and/or international recognition they deserve[.]"[39]

Indeed, the advent of the information age has made people around the world more aware of their rights and the possible courses of action to take, which includes secession and the right to self-determination. One can readily see the problem here because "[i]f every ethnic, religious[,] or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security[,] and economic well-being for all would become even more difficult to achieve."[40] There is, thus, a need to balance the clamor of the various groups of people around the world for independence with the need

37. CRAWFORD, *supra* note 1, at 4.

38. Giroux, *supra* note 6 (citing JOHN BAYLIS, ET AL., THE GLOBALIZATION OF WORLD POLITICS 404 (4th ed. 2008)).

39. Giroux, *supra* note 6 (citing IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 254 (2000)).

40. DUURSMA, *supra* note 5, at 1 (citing U.N. Secretary General, *Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, ¶ 7, An Agenda for Peace, U.N. Doc. A/47/277 (June 17, 1992)).

to establish an organized world order. Given the state of international law as regards statehood, the topic is ripe for discussion.

There are a number of entities which have successfully used secession in order to form their own independent state. Since 1945, new states that have successfully seceded (not counting the ones which were freed from colonial control) include: Senegal (1960); Singapore (1965); Bangladesh (1971); the three Baltic States: Latvia, Lithuania, and Estonia (all 1991); the eleven successor States of the former Soviet Union: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan (all 1991); the five successor States of the former Yugoslavia: Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, and the Federal Republic of Yugoslavia (Serbia and Montenegro) (1991 and 1992); Czech Republic and Slovakia (1993); and Eritrea (1993).[41]

Even with the relatively large number of new states, there are still plenty of examples around the world of entities that want to form their own separate state independent of the one they are associated with today —

> The question is topical in different areas of the world, including in Canada, where a third referendum on Québec independence is plausible; in Spain, where the separatist movement in Catalonia is also seeking a referendum; in Sudan, where a referendum on the secession of South Sudan is scheduled for January 2011; in Papua New Guinea, in Scotland, in New Caledonia, in Bosnia Herzegovina, in Sahrawi, and elsewhere.[42]

Most recently, the leaders of the Sunni Islamist militant group Islamic State of Iraq and al-Sham (ISIS) announced itself as a new Islamist "caliphate" and, thus, "unilaterally declar[ed] statehood."[43] With the entity's reputation for brutality and human rights abuses,[44] accountability measures,

41. CRAWFORD, *supra* note 1, at 391.

42. Patrice Garant, Limitations on the right to secede: The advisory opinion of the International Court of Justice on Kosovo and the stability of federations (A Paper for the Quebec Think Tank on Federalism) 2, *available at* http://www.ideefederale.ca/wp/wp-content/uploads/2010/12/kosovo-eng-15nov.pdf (last accessed Feb. 17, 2015). Unsuccessful attempts at attaining statehood through secession include Tibet (China), Katanga (Congo), Biafra (Nigeria), Kashmir (India), East Punjab (India), The Karen and Shan States (Burma), Turkish Federated State of Cyprus (Cyprus), and Tamil Elam (Sri Lanka), to name a few. *See* CRAWFORD, *supra* note 1, at 403.

43. Matt Bradley, *ISIS Declares New Islamist Caliphate*, WALL ST. J., June 29, 2014, *available at* http://www.wsj.com/articles/isis-declares-new-islamist-caliphate-1404065263 (last accessed Feb. 17, 2015).

44. *See* Tessa Berenson, ISIS's Harrowing Sexual Violence Toward Yezidi Women Revealed, *available at* http://time.com/3644943/yezidi-iraq-isis-sexual-violence/ (last accessed Feb. 17, 2015) & Terrence McCoy, *ISIS, beheadings and*

specifically under international law, have to be prepared to address this unique situation.

One need only look at the Philippines' own situation to comprehend the importance of statehood as an international legal principle. The Bangsamoro issue threatens the territorial integrity of the Philippines,[45] or so it would seem. The Muslims in Mindanao seek independence, through secession or otherwise, while the national government wants to retain control of the territory.[46] If, or when, separation pushes through, can the separating entity be considered as a state? What, then, are the legal implications?

3. The Global Importance of Accountability

With the increase of entities claiming statehood, it is important to note that "[s]tates are, in principle, entitled to use police enforcement measures to impose the continuation of their territorial integrity and to prevent secessions. ... Yet, as soon as a seceding part is recognized as [ ] a [s]tate, the so-called police actions become acts of international aggression."[47] On the other side of the conflict, the people wishing to secede may also legitimately use force — "[I]t is not impossible to defend the legal use of force by peoples entitled to a *jus cogens* right of self-determination, for the purpose of attaining autonomy, if they can prove that they have been forcibly deprived of that right."[48] Of course, all of these situations where force is employed, whether legal or illegal, have to comply with fundamental human rights and international humanitarian law.[49]

Secession can thus be seen as a situation where two opposing sides with conflicting agenda are allowed to use force against each other to attain their goals. With the aforementioned trend in recent history of an increase in entities claiming statehood through secession, certain measures for justice and accountability are crucial for the maintenance of peace. Aside from making the perpetrators of heinous crimes accountable, it is important to have

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the success of horrifying violence, WASH. POST, June 13, 2014, *available at* http://www.washingtonpost.com/news/morning-mix/wp/2014/06/13/isis-beheadings-and-the-success-of-horrifying-violence/ (last accessed Feb. 17, 2015).

45. Amita Legaspi, Ex-SC Justice: Bangsamoro territory will reduce PHL govt sovereignty, *available at* http://www.gmanetwork.com/news/story/417025/news/nation/ex-sc-justice-bangsamoro-territory-will-reduce-phl-govt-sovereignty (last accessed Feb. 17, 2015).

46. *Id.*

47. DUURSMA, *supra* note 5, at 426-27.

48. *Id.* at 428.

49. *Id.* at 427.

measures for exacting accountability in place for preventive purposes as well. Indeed, the Prosecutor of the ICC stated that "the ICC was created on the premise that justice is an essential component of a stable peace[,]"[50] as it is recognized that "international criminal justice may actually have a preventive or deterrent effect."[51] Therefore, it is important to address any gaps that the law may have, especially ones that have a high likelihood of being exposed.

II. REVIEW OF RELATED LITERATURE

A. Recognition

Any discussion regarding statehood inevitably needs to talk about recognition. Recognition is the main source of contention when it comes to statehood.[52] As defined by one author, "[r]ecognition means a formal acknowledgment or declaration by the government of an existing [s]tate intending to attach certain customary legal consequences to an existing set of facts, which in its view justifies its action."[53] While it is defined as a "formal acknowledgment," recognition can take on various forms, to wit —

> Recognition may be express or explicit, as when a formal statement is issued. It may be implied or tacit, as when a [s]tate enters into official relations with the new [s]tate and sends diplomatic representatives to it, acknowledges its flag, communicates officially with its chief of [s]tate, concludes an agreement with it, or takes not[e] of its existence as a [s]tate.
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> Some other forms have been considered as amounting to recognition, such as: (1) a message of congratulations to a new [s]tate which gained

50. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 42 (2010 ed.) (citing Office of the Prosecutor, *Policy paper on the interests of justice*, at 8, ICC-OTP-2007 (Sep. 2007)).

51. *Id.* at 43 (citing Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH YEARBOOK INT'L L. 249 (2001); Daniel Sutter, *The Deterrent Effects of the International Criminal Court*, 23 (1) CONFERENCES ON NEW POLITICAL ECONOMY 9 (2006); Gustavo Gallon, *The International Criminal Court and the Challenge of Deterrence*, *in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 93-104 (Dinah Shelton ed., 2000); David J. Scheffer, *The International Criminal Tribunal, Foreword: Deterrence of War Crimes in the 21st Century*, 23 MD. J. INT'L & TRADE L. 1 (1999); & Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MILITARY L. REV. 156 (2001)).

52. *See generally* Mondez, *supra* note 21.

53. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 103 (citing KAPLAN & KATZENBACH, *supra* note 27, at 109 & MAX SORENSEN, MANUAL OF INTERNATIONAL LAW 267 (1968)).

> independence; (2) the formal establishment of diplomatic relations by exchange of diplomatic representatives; (3) the issuance of *exequatur*; [and] (4) formal declaration of neutrality in the issue of recognition of belligerency.[54]

Recognition is often associated with membership in the U.N.[55] While membership in the U.N. requires recognition from the Member-States of the General Assembly,[56] "[t]he admission of a community into the [U.N.] does not necessarily mean the extension of recognition on the part of all its members."[57] Notably —

> By admission into the [U.N.], the community in question becomes a subject of duties and rights stipulated by the Charter in relation to all other members, even to those who have voted against the admission of the new member; and the other members of the [U.N.], even those against its admission, obtain, according to the rules laid down in the Charter, certain rights and incur certain obligations in relation to the newly-admitted member. The resolution of the General Assembly by which the new member is admitted, does not imply an act of recognition for those members which have themselves not yet recognized the new members as a [s]tate.[58]

Also,

> [a]dmission to the [U.N.] implies that the international community agrees to treat the new member as a [s]tate, with all the rights, duties[,] and [the] responsibilities which this entails, inside as well as outside the [U.N.]. Thus, membership of the [U.N.] tends to facilitate entry of [s]tates into other international organizations. ... Although neither affecting nor modifying the criteria for statehood, the admission to the [U.N.] constitutes a case of collective recognition which may have either a declaratory or a constitutive effect.[59]

Moreover,

> [s]ince the recognition of a [s]tate is a legal act, the ascertainment of that fact cannot be conditional. The question [of] whether a given community is a [s]tate in the sense of international law can only be answered by a 'Yes'

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54. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 107 (citing SORENSEN, *supra* note 53, at 282).

55. Political Geography Now, How Many Countries Are There in the World in 2014?, *available at* http://www.polgeonow.com/2011/04/how-many-countries-are-there-in-world.html (last accessed Feb. 17, 2015).

56. U.N. Charter, art. 4.

57. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 107-108.

58. *Id.* at 108.

59. DUURSMA, *supra* note 5, at 112.

> or 'No.' The content of the declaration of recognition excludes any possibility of a condition.[60]

B. Declaratory Versus Constitutive Theory

In resolving the issue of when a state can be considered as such, two generally accepted theories have been advanced — the declaratory theory and the constitutive theory.

On the one hand, the declaratory theory relies on the 1933 Montevideo Convention on the Rights and Duties of States,[61] which provides that a state "should possess the following qualifications: [(a)] permanent population; [(b)] a defined territory; [(c)] government; and [(d)] capacity to enter into relations with other states."[62] According to this view, "recognition is merely 'declaratory' of the existence of the state and that its being a state depends upon its possession of the required elements and not upon recognition."[63] Additionally, recognition is deemed "merely a political act recognizing a pre-existing state of affairs."[64]

On the other hand, the constitutive theory states that it is recognition which "constitutes" a state, "that is, it is what makes a state a state and confers legal personality on the entity."[65] Recognition is deemed "a necessary act before the recognized entity can enjoy an international personality."[66] This view came about as a result of the recent practice of states in recognizing or not recognizing certain entities which have seceded or gained independence from other nations.[67] As such, recognition is not a mere formality but is essential before one can be considered a state.

Which view is correct? While this is far from a settled issue, "[t]he weight of authority favors the 'declaratory view.'"[68] Thus,

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60. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 107-108 (citing HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 396 (2d ed. 1966) & SORENSEN, *supra* note 53, at 282).

61. Montevideo Convention, *supra* note 8.

62. *Id.* art. 1.

63. BERNAS, *supra* note 7, at 74.

64. Jure Vidmar, *Explaining the legal effects of recognition*, 61 INT'L & COMP. L.Q. 361, 361 (2012) (citing MARTIN DIXON, ET AL., CASES AND MATERIALS IN INTERNATIONAL LAW 158 (5th ed. 2011)).

65. BERNAS, *supra* note 7, at 74-75.

66. Vidmar, *supra* note 64, at 361.

67. *Id.*

68. BERNAS, *supra* note 7, at 74.

> [t]he majority view holds that recognition is merely declaratory, that is, it merely acknowledges as a fact the existence of a [s]tate. A [s]tate exists if it has already possessed all the requisites of a [s]tate before recognition, which serves to declare the [s]tate's readiness to accept the normal consequences of that fact. The declaratory theory is more realistic. At most, recognition is a formal admission of already existing facts.[69]

As would be explained by supporters of the declaratory view, "[t]he criteria for statehood set forth in Article 1 of the [C]onvention did not purport to create international law. Rather, Article 1 restated and codified customary international law as existing in 1933."[70] However, as recent history will show, in a more practical sense, the constitutive theory can be argued as having more weight in the determination of statehood.[71]

C. Self-Determination

The right to self-determination is defined as

> the collective right of a people to determine its own future, free of any outside interference or coercion. It includes the right to determine this people's political status and to freely pursue its economic, social, spiritual[,] and cultural development.
>
> In the exercise of that right, people at one end can demand and pursue within the nation[-]state more political power, active participation in the decision-making and administration of government affairs, equitable redistribution of economic benefits, and appropriate ways of preserving and protecting their culture and way of life. On the other end, they have the right to organize their own sovereign and independent state with the right to international recognition.[72]

There exists "little doubt that the [sentence] 'all peoples have the right of self-determination' is an accepted customary rule of international law."[73] Verily, the right to self-determination has already been officially recognized in a number of international documents, to wit —

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69. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 110-11.

70. John V. Whitbeck, United Nations Latin American and Caribbean Meeting in Support of Israeli-Palestinian Peace (A Paper Presented at a Plenary on Support by Latin American and Caribbean Countries for a Comprehensive, Just, and Lasting Settlement of the Question of Palestine) 3, *available at* http://www.un.org/depts/dpa/qpal/docs/2011%20Uruguay/P2%20John%20Whitbeck%20E.pdf (last accessed Feb. 17, 2015).

71. *See generally* Mondez, *supra* note 21.

72. *See* Abhoud Syed M. Lingga, *Understanding Bangsamoro Independence as a Mode of Self-Determination*, 27 MINDANAO J. 3, 3-4 (2004).

73. DUURSMA, *supra* note 5, at 77.

> The right of peoples to self-determination is enshrined in many [U.N.] instruments, among which are:
>
> (a) Article 55 of the [U.N.] [C]harter, which provides that the world body shall create 'conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples[;]'
>
> (b) General Assembly [R]esolution 1514 (XV) of 14 December 1960, which states that, 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social[,] and cultural development[;]' [and]
>
> (c) Article 1 of the ... [ICESCR], and repeated in Article 1 of the ... [ICCPR], which makes this statement [—] 'All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social[,] and cultural development.'[74]

While the right to self-determination has indeed been established, it cannot be made applicable to every group of people desiring independence. The ICESCR and the ICCPR specifies that the right to self-determination is only available to "peoples."[75] It is therefore of supreme importance to know which groups of people can be considered as "peoples" within the ambit of international law.

James R. Crawford, a noted international law author, elaborates on the concept of "peoples," to wit —

> [T]he question of defining 'people' concerns identifying the categories of territory to which the principle of self-determination applies as a matter of right. Practice identifies such categories plainly enough. Specifically, the principle of self-determination applies in the following cases.
>
> First, it applies to entities whose right to self-determination is established under or pursuant to international agreements, and in particular to mandated, trust[,] and non-self-governing territories.
>
> Secondly, it applies to existing [s]tates, excluding for the purposes of self-determination those parts of the [s]tate that are themselves self-determination units as defined. In this case[,] the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a [s]tate, a central element of which is the right of the people of the [s]tate to choose for themselves their own

74. Abhoud Syed M. Lingga, Self-Determination and Peace in Mindanao (Part of the Occasional Paper Series for the Institute of Bangsamoro Studies), *available at* http://www.yonip.com/wp-content/uploads/2013/03/Self-determination-and-Peace-in-Mindanao.pdf (last accessed Feb. 17, 2015).

75. ICESCR, *supra* note 24, art. 1 & ICCPR, *supra* note 25, art. 1.

> form of government. In this sense, at least, self-determination is a continuing, and not a once-for-all right. Since self-determination units are coming increasingly to be [s]tates (subject to the second[,] rather than the first meaning of self-determination)[,] it is likely that self-determination in the future will be a more conservative principle than has oftentimes been feared.
>
> However, there is a further possible category of self-determination units, that is, entities part of a metropolitan [s]tate but that have been governed in such a way as to make them in effect non-self-governing territories — in other terms, territories subject to *carence de souverainete*.[76]

Other writers define "peoples" as "a group of persons who have a distinct character based on the basis of objective and subjective elements."[77] Objective criteria include race, ethnicity, culture, tradition, history, language, and religion,[78] with language being considered by some as being the most important, as it oftentimes captures all the other elements.[79] The subjective characteristic has to do with "psychological group thinking,"[80] that is, the community must have "the will to live together as a group, be conscious of its identity[,] and want to preserve its distinctive characteristics."[81] The objective characteristics "are not the condition[s] *sine qua non*, but the common feeling of a group[,] that it is a people[,] is the deciding factor."[82] Other writers suggest other criteria for determining who can be considered "peoples," such as the need for a geographically separate territory separated by the sea (called the "Salt Water Theory"),[83] or the need to be recognized by other states as "separate political units."[84] It has been noted that "[i]t is [ ] difficult to deduce a solid consensus"[85] as regards the proper way to define "peoples."

With regard to the propriety of secession, it is important to note that

> a right to secession only arises under the principle of self-determination of peoples at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation,

76. CRAWFORD, *supra* note 1, at 126.

77. DUURSMA, *supra* note 5, at 73.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 75.

83. DUURSMA, *supra* note 5, at 76.

84. *Id.* at 75.

85. *Id.* at 77.

> domination[,] or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.[86]

With regard to secession achieved through the proper means, "the principle of self-determination operates in [favor] of statehood of the seceding territory, provided that the seceding government can properly be regarded as representative of the people of the territory."[87]

However, it should be noted that the unilateral right to secede is not recognized in practice. "In principle, self-determination for people or groups within a [s]tate is to be achieved by participation in its constitutional system, and on the basis of respect for its territorial integrity."[88] In case of unilateral secession where the parent state does not agree, the U.N. has been reluctant to give the seceding entity recognition as a state.[89] This is because, under the U.N. Charter, "the exercise of the right of self-determination is limited by the principle of territorial integrity of States."[90] However, as already discussed, such recognition by the U.N. is not a requirement for statehood, at least under the Montevideo Convention.[91]

D. The Rome Statute

The Rome Statute entered into force on 1 July 2002.[92] The statute established a permanent ICC, which had the power to exercise jurisdiction over persons who committed the "most serious crimes of international concern."[93] Such heinous crimes for which the ICC had subject-matter

86. CRAWFORD, *supra* note 1, at 411-12.

87. *Id.* at 387.

88. *Id.* at 417.

89. *Id.*

90. Vidmar, *supra* note 64, at 363.

91. *See* DUURSMA, *supra* note 5, at 112.

92. International Criminal Court, About the Court, *available at* http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last accessed Feb. 17, 2015).

93. Rome Statute, *supra* note 12, art. 1.

jurisdiction include genocide, crimes against humanity, war crimes, and the crime of aggression.[94]

1. Jurisdiction

There are a number of provisions in the Rome Statute regarding the exercise of jurisdiction by the ICC. Under Article 11, the ICC can only exercise jurisdiction over crimes which occurred after the Statute's entry into force or after 1 July 2002.[95] As regards states which become state-parties after such date, the ICC can only exercise jurisdiction for crimes which occurred after the entry into force of the Rome Statute for such state, unless it makes a declaration that it accepts the jurisdiction of the ICC even before its ratification.[96]

Article 12 of the Rome Statute enumerates the preconditions to the exercise of the ICC of jurisdiction, thus —

> Article 12
>
> Preconditions to the exercise of jurisdiction
>
> (a) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in [A]rticle 5.
>
> (b) In the case of [A]rticle 13, [P]aragraph[s] (a) or (c), the [ICC] may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the [ICC] in accordance with [P]aragraph 3:
>
> (i) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (ii) The State of which the person accused of the crime is a national.
>
> (c) If the acceptance of a State which is not a Party to this Statute is required under [P]aragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the [ICC] with respect to the crime in question. The accepting State shall cooperate with the [ICC] without any delay or exception in accordance with Part 9.[97]

94. *Id.* art. 5.

95. *Id.* art. 11 (1).

96. *Id.* art. 11 (2).

97. *Id.* art. 12.

Evidently, "[a] general rule is established in [A]rticle 12 by which the [ICC] may exercise jurisdiction over crimes committed on the territory of a state[-]party and, furthermore, over crimes committed by its nationals anywhere."[98] Moreover, the ICC "may also exercise jurisdiction if a non-party [s]tate has made a declaration pursuant to [A]rticle 12 (3)."[99]

The general rule regarding the place where the crime is committed and the nationality of the perpetrator does not apply in the event a situation is referred by the U.N. Security Council. Because Article 12 (2) specifies its application to the case of Article 13 (a) and (c), Article 13 (b), the provision relating to the referral of a situation to the ICC by the U.N. Security Council, is made an explicit exception to the territory and nationality rule. It has been observed that

> [a] [s]tate[-][p]arty can only refer a 'situation' over which the [ICC] already has jurisdiction, in accordance with [A]rticle 12 (2). However, [A]rticle 12 (2) does not address conferral of jurisdiction by the [U.N.] Security Council. It seems to be presumed that the [ICC] *may exercise jurisdiction anywhere to the extent that the 'exercise of jurisdiction' is authorized by the* [U.N.] *Security Council*.[100]

However, only the territory and nationality rules regarding the exercise of jurisdiction by the ICC are made inapplicable in cases of referral by the U.N. Security Council. Thus, "[t]he Security Council cannot provide by resolution that the [ICC] exercise jurisdiction prior to 1 July 2002[.] Nor can it expand or otherwise alter the subject-matter jurisdiction of the [ICC] defined in [A]rticle 5."[101]

Thus, taking Article 12 together with Article 13, it can be concluded that the ICC can exercise jurisdiction in cases where (1) a situation is referred by a state-party, where the crime was committed in the territory or by a national of a state-party; (2) a situation is investigated by the Prosecutor of the ICC *motu proprio*, where the crime was committed in the territory or by a national of a state-party; (3) a situation is referred by the U.N. Security Council, regardless of the place where the crime was committed and the nationality of the perpetrator; or (4) a non-party state makes a declaration invoking the retroactive jurisdiction of the ICC, where the crime was committed in the territory or by a national of such non-party state.

It is worthy to point out that "[j]urisdiction over the crimes listed in [A]rticle 5 (1) and over the time period identified in [A]rticle 11 is

98. SCHABAS, *supra* note 50, at 277.

99. *Id.*

100. *Id.* at 300 (emphasis supplied).

101. *Id.* at 301.

automatic, to the extent that a [s]tate has ratified or otherwise indicated its consent to be bound by the [Rome] Statute[.]"[102] However, while jurisdiction is automatically conferred, the ICC may only exercise such jurisdiction upon compliance with the preconditions listed in the Rome Statute.[103]

2. Complementarity

The "complementarity" principle "is central to the philosophy of the [ICC]."[104] Article 17 of the Rome Statute embodies this, thus —

> Article 17
>
> Issues of admissibility
>
> (a) Having regard to [P]aragraph 10 of the Preamble and [A]rticle 1, the [ICC] shall determine that a case is inadmissible where:
>
> (i) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (ii) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (iii) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the [ICC] is not permitted under [A]rticle 20, [P]aragraph 3;
>
> (iv) The case is not of sufficient gravity to justify further action by the [ICC].
>
> (b) In order to determine unwillingness in a particular case, the [ICC] shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (i) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the [ICC] referred to in [A]rticle 5;

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102. *Id.* at 284.

103. *See* Rome Statute, *supra* note 12, arts. 5, 121, & 123.

104. *Id.* at 336.

(ii) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(iii) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

(c) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[105]

Article 17 imposed three tests for admissibility — "'complementarity,' double jeopardy (*ne bis in idem*)[,] and gravity. The [ICC] may not proceed with a case when the concerned [s]tates are investigating or prosecuting in good faith."[106] Thus, the Rome Statute recognizes the right, as well as the duty, of states-parties to exercise national criminal jurisdiction. [107] Investigations will only be undertaken where there is a "clear case of failure to act by the [s]tate or [s]tates concerned."[108] This provision "was carefully negotiated to ensure that [s]tate[-[p]arties would enjoy a level of confidence that their sovereign right to try crimes committed on their territory would not be encroached upon by the [ICC]."[109]

Notably, in order for the ICC to exercise jurisdiction, the state in question need not be "unwilling or unable" to prosecute; it is enough that there is no pending investigation or prosecution — "in the absence of any acting [s]tate, the [ICC] need not make any analysis of unwillingness or inability."[110]

It should likewise be pointed out that while the issue of complementarity was "intentionally left unresolved" as regards its applicability to referrals made by the U.N. Security Council,[111] it is

105. Rome Statute, *supra* note 12, art. 17.

106. SCHABAS, *supra* note 50, at 336.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 341 (citing Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ¶ 40 (Feb. 10, 2006)).

111. SCHABAS, *supra* note 50, at 301.

submitted that such referral must still comply with the admissibility requirements under Article 17.[112]

III. THE PROBLEM WITH STATEHOOD

A. A Clash of Theories

Some states are considered as such because of the application of one theory while disregarding the other. This conflict, some have said, can lead to no other conclusion than that "both schools of thought are flawed."[113] Indeed, if one were to peruse the recent events which called for the determination of whether a state can be considered as such, one would find numerous conflicting cases in favor of either view while being diametrically opposed to the other.[114] On its face, there seems to be no way to reconcile these views.

In fact, the conflicting status of these two views leads to some absurd situations, as noted by Thomas Elliot A. Mondez —

> [I]t is hard to reconcile why a people who settled a Middle Eastern territory by immigrating from Europe (the Jews) could be recognized as a state comprising [ ] most of Palestine, while a country that used to enjoy recognition (Taiwan), which unquestionably possess[es] all the qualifications of statehood, could suddenly cease to exist as an independent state by simply losing the recognition of other states.[115]

Indeed, legal precepts sometimes take a back seat to political agenda and realities. Verily, "[t]he constitutive theory creates difficulties, for a [s]tate would exist for some and would not exist as a [s]tate for others, especially if the new government has an ideology not agreeable to some [s]tates."[116] It has even been put forward that "[n]either theory of recognition satisfactorily explains modern practice."[117]

B. Different Types of Recognition

It is important to note that "[r]ecognition (both [s]tate and government) forms a fundamental legal process in that it determines the structure of the

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112. On the issue of referrals by the Security Council, "the Prosecutor has made it abundantly clear ... that he believes he is required to determine whether a case is admissible pursuant to the provisions of [A]rticle 17." *Id.*

113. Mondez, *supra* note 21, at 115 (citing JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 123-24 (1987)).

114. Mondez, *supra* note 21, at 119.

115. *Id.*

116. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 110.

117. CRAWFORD, *supra* note 1, at 5.

international legal system. Yet[,] no explicit rules, other than that each [s]tate has the right to identify those whom it sees as legitimate actors, exist."[118] This lack of rules as regards recognition only exacerbates the problems with regard to statehood.

This is not to say that there have been no attempts by legal luminaries to clarify the subject. Hans Kelsen, a noted author of international law, "distinguished between two totally different acts or two different functions of one and the same act, both called 'recognition.'"[119] According to him, there are two types of recognition, to wit —

> The first is the legal sense, that is, that the recognizing [s]tate ascertains that the recognized community is a [s]tate in the sense of international law. The second is the political sense, when the recognizing [s]tate is willing to enter into political and other relations with the recognized [s]tate, relations of the kind which normally exist between members of the family of nations.
>
> Entirely different from the political is the legal recognition of a community as a [s]tate, that is, the act by which a [s]tate ascertains that a community is a [s]tate in the sense of international law. The act may be performed in any form whatever, [and] its meaning may be expressed directly or indirectly, expressly or tacitly. Legal recognition is necessary, as international law determines under what conditions a community has to be considered a [s]tate. International law authorizes governments of [s]tates to decide the question of whether or not a given community is a [s]tate in the sense of international law. If the community in question meets the criteria of a [s]tate, and is recognized as a [s]tate, recognizing [s]tates have, with respect to the newly-recognized [s]tate, all the duties and rights laid down by [ ] international law.[120]

While this may appear to solve certain problems with recognition, as it tries to distinguish between political recognition and legal recognition to try and avoid the conflict between the constitutive theory and the declaratory theory, this distinction is more theoretical than practical —

> In practice, the recognition of a [s]tate in its declaratory character is usually influenced by political considerations. Recognition is employed as an instrument of national policy. While the task of ascertaining the conditions of statehood is essentially one of administration of international law, it is[,] at the same time, a political act fraught with political consequences involving the interests of the [s]tate called upon to grant recognition.[121]

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118. James Larry Taulbee, *International Law and Politics*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 584 (Sanford R. Silverburg ed., 2011).

119. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 105.

120. *Id.* at 105-106 (citing KELSEN, *supra* note 60, at 390-91).

121. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 106.

Jorge R. Coquia and Senator Miriam P. Defensor-Santiago also suggest that recognition is not purely political and must succumb to legal principles, thus —

> While the grant of recognition is within the discretion of [s]tates, this is not a matter of arbitrary will, but must be given or refused in accordance with a legal principle. That principle, which applies alike to recognition of [s]tates, of governments, and of belligerency, is that certain conditions of fact, not in themselves inconsistent with international law, impose a duty of, and confer the right to, recognition.[122]

The Coquia-Santiago view may not receive much traction in reality. The problem lies with the fact that "[r]ecognition or non-recognition is a political act, in that no new [s]tate has a right as against other [s]tates to be recognized by them, and no [s]tate has a duty to recognize a new [s]tate."[123] Indeed, "[t]he constitutive theory [ ] suffers because the recognizing states quite often decide to grant or withhold recognition with scant legal basis."[124] Very clearly, the difficulty here is in trying to create a sturdy legal foundation on the basis of the political considerations of [s]tates. Notably —

> The main conclusion to be drawn is that the question of recognition of states has become less predictable and more a matter of political discretion as a result of recent practice.
>
> ...
>
> It now seems that the 'political realities' have gained primacy over the inclinations to maintain consistency by applying accepted criteria to test the fact of statehood.
>
> ...
>
> When considering a question of recognition, states will have to ask themselves questions about whether such an action will contribute to a peaceful resolution of a conflict, and if the answer is in the affirmative, the traditional criteria for statehood will have to be finessed.[125]

States cannot be expected to distinguish the recognition or non-recognition they are making between legal and political so as to guide legal practitioners in determining statehood. Moreover, even if such distinctions are made, it is hard to envision a situation wherein the state in question would make differing types of recognition anyway. Finally, it is wishful

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122. *Id.* at 105 (citing LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW, A TREATISE 127 (8th ed. 1955)).

123. COQUIA & DEFENSOR-SANTIAGO, *supra* note 28, at 105.

124. Mondez, *supra* note 21, at 120.

125. Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 EUR. J. INT'L L. 36, 64-66 (1993).

thinking to suggest that states would prioritize adherence to legal principles in granting recognition over national policy.

Recognition, it must be reiterated, serves an important purpose in any analysis involving statehood. It "is an institution of [s]tate practice that can resolve uncertainties as to status and allow for new situations to be regularized."[126] Verily,

> [t]he non-recognition by other nations of a government claiming to be a national personality[ ] is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classified as such. But when recognition *vel non* of a government is by such nation determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned.[127]

C. The Need for Contextual Analysis

The main problem with just determining whether a state can be considered a state based on a certain theory is that it removes the specific context of why the question can arise in the first place. One cannot just select an entity whose statehood is doubtful and try to determine whether it can be considered a state using one of the two previously discussed theories. This simplistic method of analysis would lead to seemingly bizarre situations of having entities which are "obviously" states but not considered as such, and states considered as states when logic would dictate otherwise.

There is a reason behind every conclusion of statehood, but the conclusions themselves should not be made the sole basis for supporting either of the two views. The process behind the conclusion should be taken into consideration. In this regard, context is of supreme importance in any analysis of an entity's statehood.

1. Taiwan

The case of Taiwan might serve to better illustrate the importance of contextual analysis. The People's Republic of China and Taiwan both subscribe to the One-China Policy.[128] The One-China Policy "holds that

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126. CRAWFORD, *supra* note 1, at 27.

127. BROWNLIE, *supra* note 35, at 87 (citing Tinoco Claims Arbitration (Great Britain v. Costa Rica), 1 R.I.A.A. 369 (1923)).

128. *See* Slate, What Is the One-China Policy?, *available at* http://www.slate.com/articles/news_and_politics/explainer/2000/05/what_is_the_onechina_policy.html (last accessed Feb. 17, 2015).

there is but one China and that Taiwan is part of China."[129] This issue goes all the way back to the conflict between the Communists and the Nationalists in 1949.[130] The Communists emerged victorious and established the People's Republic of China on the mainland, while "the defeated Nationalists fled to Taiwan [but] ... continued to claim sovereignty over all of China."[131]

Because of the One-China Policy, there can only be one state recognized between the People's Republic of China and Taiwan as regards the other states around the world.[132] Because the People's Republic of China has gained international prominence as of late, it has mostly enjoyed recognition from other states.[133] This leaves Taiwan in a difficult position, as it does not enjoy the recognition of being a state from other nations. Applying the constitutive theory, Taiwan would seemingly not be considered as a state.

However, if the declaratory theory were instead to be applied, Taiwan would clearly meet the requirements of statehood. It has a population of more than 23 million people,[134] has a clearly defined territory, which is no longer under any dispute,[135] has a robust democratic government,[136] and has entered into relations with many other countries, [137] including the Philippines.[138]

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *See generally* Shelley Rigger, Why giving up Taiwan will not help us with China, *available at* http://www.aei.org/outlook/foreign-and-defense-policy/regional/asia/why-giving-up-taiwan-will-not-help-us-with-china/ (last accessed Feb. 17, 2015).

134. *See* Trading Economics, Taiwan Population, *available at* http://www.tradingeconomics.com/taiwan/population (last accessed Feb. 17, 2015).

135. *See generally* Kallie Szczepanski, Taiwan, Facts and History, *available at* http://asianhistory.about.com/od/Taiwan_History_and_Culture/p/Taiwan-Facts-And-History.htm (last accessed Feb. 17, 2015).

136. *Id.*

137. As of 2011, "Taiwan is left with 23 diplomatic allies, most of them small developing countries on [the] Pacific [I]slands, in Africa, or in Latin America. ... Taiwan has also established informal relations with a large number of other countries." Sigrid Winkler, Biding Time: The Challenge of Taiwan's International Status, *available at* http://www.brookings.edu/research/papers/2011/11/17-taiwan-international-status-winkler (last accessed Feb. 17, 2015). *See also* Taipei Economic and Cultural Representative Office in the U.S.,

Thus, it would seem there is yet another conflict with regard to the status of Taiwan. However, the conflict could be avoided by determining the context of the question of statehood. It is not enough to ask whether Taiwan is a state or not; there must be a reason why such status is being established.

In Taiwan's case, its status as a state was deemed important in deciding whether to accept its application to the U.N. General Assembly,[139] as only states are allowed membership.[140] Membership in the U.N. is generally left up to the Member-States to decide.[141] In this context, recognition from other states is essential in order to be considered a state. While membership in the U.N. is not necessary for statehood, as states are free to not join if they so choose, statehood, as determined by the General Assembly, is necessary for membership.[142]

It is, therefore, more appropriate in this situation to apply the constitutive theory. There is no occasion to apply the declaratory theory, as membership in the U.N. is more of a political exercise rather than a legal determination of status. As most of the Member-States adhere to the One-China Policy, the rejection of Taiwan's application was inevitable.[143]

This is not to say that Taiwan can never be considered a state separate and distinct from the People's Republic of China. Indeed, "to refer merely to statehood 'for purposes of international law' assumes that a [s]tate for one

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Taiwan-U.S. Relations, *available at* http://www.taiwanembassy.org/US/ct.asp?xItem=266456&CtNode=2297&mp=12&xp1=12 (last accessed Feb. 17, 2015).

138. *See generally* Taipei Economic and Cultural Office in the Philippines, *available at* http://www.roc-taiwan.org/PH/mp.asp?mp=272 (last accessed Feb. 17, 2015).

139. *See* BBC News, Taiwan applies for UN membership, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/6909053.stm (last accessed Feb. 17, 2015).

140. Article 4 of the U.N. Chapter provides —

> (1) Membership in the United Nations [(U.N.)] is open to *all other peace-loving states* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> (2) The admission of any such state to membership in the [U.N.] will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

U.N. Charter, art. 4. (emphasis supplied).

141. *Id.*

142. *Id.*

143. *See generally* Megan Darby, Taiwan defies China to seek recognition at UN climate talks, *available at* http://www.rtcc.org/2014/11/17/taiwan-defies-china-to-seek-observer-status-at-un-climate-talks/ (last accessed Feb. 17, 2015).

purpose is necessarily also a state for another. This may be true in most cases *but not necessarily all.*"[144] Instead, this is an example of a case where "[e]ven if recognition is virtually universally withheld, sometimes there will be no doubt that the non-recognized entity is a [s]tate[,]"[145] at least if the declaratory theory is used. Taiwan may later on do something along the lines of Kosovo's unilateral declaration of independence,[146] which the International Court of Justice (ICJ) may have occasion to rule upon the matter and decide in favor of Taiwan's statehood, disregarding non-recognition by other states and instead employing the declaratory theory. However, until such a situation occurs, there is no use speculating on Taiwan's current status without a context to decide upon. For now, the only conclusive statement that can be made is that Taiwan cannot be considered a state for purposes of membership in the U.N.

2. Kosovo

The case of Kosovo can serve as a good counterpoint to the case of Taiwan, although with more legally ambiguous circumstances. It may well be important to first note the factual antecedents before delving into the issues of statehood, thus —

> Kosovo has been an autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia (SFRY), until the abolition of its autonomous status in 1989. After the dissolution of the SFRY in 1991-1992, Kosovo continued as part of Serbia within the Federal Republic of Yugoslavia (FRY). In 2003, the FRY was transformed into the Federation of Serbia and Montenegro. After Montenegro declared its independence in 2006 on the basis of a referendum and with the consent of the central government, Serbia continued as the successor of the FRY.
>
> Already from the [1980s] onwards, the separatist and pro-independence movement among the Albanian majority population in Kosovo has been receiving international attention. ... [T]he treatment of Albanians in Kosovo by the FRY security forces has caused great human suffering with international implications, culminating with the 1999 attack and the air campaign by NATO against the FRY[.] ... [I]n 2007[,] the issue of the final status of Kosovo has been brought before the [U.N.] Security Council[.] ... [T]he idea of the independence of Kosovo was endorsed by the United States and a number of [European Union (EU)] Member[-]States, and

144. CRAWFORD, *supra* note 1, at 31 (emphasis supplied).

145. Vidmar, *supra* note 64, at 361.

146. *See* Peter Beaumont, *Kosovo's independence is legal, UN court rules*, THE GUARDIAN, July 22, 2010, *available at* http://www.theguardian.com/world/2010/jul/22/kosovo-independence-un-ruling (last accessed Feb. 17, 2015).

> opposed by Russia, China, India, but also by several EU Member[-]States.[147]

It is also reported that —

> On 17 February 2008, the elected representatives of Kosovo declared it to be a sovereign [s]tate independent from Serbia, to mixed responses from the international community. On 8 October 2008, the General Assembly of the [U.N.] adopted [R]esolution 63/3 (drafted and sponsored by Serbia), requesting an advisory opinion from the [ICJ] on the following question [—] 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'[148]

The ICJ's advisory opinion then became the subject of much scrutiny from numerous legal scholars.[149] While the ICJ did not expressly address the issue of Kosovo's statehood, its pronouncements nevertheless showed that it "implicitly recognized Kosovo as a state."[150] In coming to this conclusion (or non-conclusion), the Court may have impliedly used the declaratory theory when it declined to rule upon Kosovo's statehood because it was a "factual" issue.[151] The determination of the existence of the elements stated under the Montevideo Convention is deemed factual,[152] and their existence must likewise be shown in order to be considered a state under the declaratory theory.

In this regard, it can be seen that the ICJ impliedly admitted Kosovo's statehood using the declaratory theory, even though at the time, only 42 out of 192 U.N. Member-States recognized Kosovo as a state.[153] Although it was

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147. Alexander Orakhelashvili, Statehood, Recognition, and the United Nations System: A Unilateral Declaration of Independence in Kosovo (An Article for the Max Planck Yearbook of United Nations Law) 2-3, *available at* http://www.mpil.de/files/pdf2/mpunyb_01_orakhel_12.pdf (last accessed Feb. 17, 2015).

148. Alex Mills, *The Kosovo advisory opinion: if you don't have anything constructive to say…?*, 70 CAMBRIDGE L.J. 1, 1 (2011).

149. *See, e.g.*, Mills, *supra* note 148.

150. Dov Jacobs & Yannick Radi, *Waiting for Godot: an Analysis of the Advisory Opinion on Kosovo*, 24 LEIDEN J. INT'L L. 331, 350 (2011).

151. *Id.* at 338.

152. William A. Schabas, The Prosecutor and Palestine: Deference to the Security Council, *available at* http://humanrightsdoctorate.blogspot.com.au/2012/04/prosecutor-and-palestine-deference-to.html (last accessed Feb. 17, 2015).

153. Mondez, *supra* note 21, at 77. However, as of this Note's writing, 108 U.N. Member-States have recognized Kosovo. *See* Ministry of Foreign Affairs, Solomon Islands recognise Kosovo's Independence, *available at*

the U.N. which asked for the advisory opinion, the ICJ did not resort to the use of the constitutive theory. As it was asked to rule upon the legality of Kosovo's unilateral declaration of independence and nothing more, it had no reason to employ a political approach in resolving the issue presented before it. Moreover, as an adjudicatory body, it relied more on legal arguments rather than political persuasions.

From the two cases mentioned, it can be seen that the declaratory theory and the constitutive theory can both be used depending on the circumstances under which the question of statehood is being asked. Similar to the Philippine Supreme Court's case or controversy requirement before issuing a ruling,[154] the issue of statehood should not be determined in a vacuum but must have an issue requiring the determination of its statehood. Each entity has its own historical background which must be taken into consideration when determining its status in international law. Determining the status of an entity whose statehood is doubtful, without any legitimate issue with which to contextualize the analysis, could lead to inconsistent findings of statehood.[155]

IV. PALESTINE AND THE ROME STATUTE: STATEHOOD AND RETROACTIVE JURISDICTION

A. The Palestinian Predicament

1. History of the Israel-Palestine Conflict

The dispute in Palestine can be traced all the way back to the years prior to the First World War after the Ottoman Empire ceased to have control of Palestine as a result of Turkey losing the War, the territory came under the control of Great Britain.[156] The British government then issued the Balfour Statement in 1917 favoring the establishment of a Jewish State in Palestine, covering 25% of Palestine to the west of the Jordan River.[157] The rest of the territory would belong to the Palestinian-Arabs.[158] The U.N. would later on

http://www.mfa-ks.net/?page=2,4,2415 (last accessed Feb. 17, 2015) & Vladimira Yaneva, Kosovo Marks Independence Day Amid Doom and Gloom, *available at* http://www.novinite.com/articles/166604/Kosovo+Marks+Independence+Day+Amid+Doom+and+Gloom (last accessed Feb. 17, 2015).

154. *See, e.g.*, Phil. Assn. of Colleges & Univ. v. Sec. of Edu., 97 Phil. 806, 808-20 (1955).

155. *See* Mondez, *supra* note 21, at 119.

156. Ben Rast, A Brief History of Israel and "Palestine," *available at* http://www.contenderministries.org/articles/israelhistory.php (last accessed Feb. 17, 2015).

157. *Id.*

158. *Id.*

issue Resolution No. 181, which sought to effectuate the plan to have two independent states, one for Palestinian-Jews and the other for Palestinian-Arabs.[159] However, the Palestinian-Arabs wanted the entire territory for themselves.[160] Thus, the attacks commenced.[161]

On 14 May 1948, the Palestinian-Jews finally declared their own State of Israel, and held off seven different Arab armies from its territories the next day.[162] Israel was admitted to the U.N. on 11 May 1949,[163] thus, its recognition as a state. However, the territory held by the Palestinian-Arabs was not accorded the same status. It was only recently, on 29 November 2012, that Palestine was accorded "non-Member Observer State" status in the U.N.[164] It was thus a momentous occasion for Palestine, as it was the first time that it was recognized as a state by the U.N.

2. Operation Cast Lead

War devastated the territories in the periods between those two occasions. Notably, on 27 December 2008, the Israeli military launched an assault on the Palestinian Gaza Strip, later to be known as Operation Cast Lead.[165] It was described by the U.N. Office for the Coordination of Human Affairs as "one of the most violent episodes in the recent history of the Palestinian territory[.]"[166] It was reported that "[m]issiles, bombs, shells, and illegal weapons were used against defenseless people. Mass slaughter and destruction followed."[167] One thousand three hundred eighty three Palestinians were killed — mostly civilians — including 333 children.[168] There was likewise extensive destruction of civilian infrastructure and private property, including homes, schools, hospitals, mosques, and businesses.[169] There are

159. *Id.*

160. *Id.*

161. *Id.*

162. Rast, *supra* note 156.

163. *Id. See also* United Nations, Member States, *available at* http://www.un.org/en/members/ (last accessed Feb. 17, 2015).

164. *See* United Nations, *supra* note 11.

165. *See* Pierre Tristam, Operation Cast Lead, *available at* http://middleeast.about.com/od/c/g/Operation-Cast-Lead.htm (last accessed Feb. 17, 2015).

166. *Id.*

167. Stephen Lendman, Gaza: Remembering Operation "Cast Lead," *available at* http://www.globalresearch.ca/gaza-remembering-operation-cast-lead/28382 (last accessed Feb. 17, 2015).

168. Tristam, *supra* note 165.

169. Lendman, *supra* note 167.

allegations that Israeli forces "directly targeted and attacked private homes and civilian institutions,"[170] in violation of international humanitarian law.

3. The Legal Issue

Because of the numerous acts of violence committed by Israel against it, Palestine now wants to file international criminal cases against certain Israeli officials, specifically for acts committed during Operation Cast Lead.[171] Because of its relatively recent recognition as a state, and since it is not a state-party to the Rome Statute, certain issues have arisen regarding the applicability of the treaty to Palestine. Specifically, the pertinent provisions of the Rome Statute are as follows —

> Article 11
> Jurisdiction *ratione temporis*
>
> ...
>
> (2) If a State becomes a Party to this Statute after its entry into force, the [ICC] may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under [A]rticle 12, [P]aragraph 3.
>
> Article 12
> Preconditions to the exercise of jurisdiction
>
> ...
>
> (3) If the acceptance of a State which is not a Party to this Statute is required under [P]aragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the [ICC] with respect to the crime in question. The accepting State shall cooperate with the [ICC] without any delay or exception in accordance with Part 9.[172]

These provisions make it clear that the ICC has jurisdiction only over crimes committed after a state ratifies the Rome Statute, but the state may file a declaration to accept the ICC's retroactive jurisdiction.[173] However, in Palestine's case, there is no need to ratify the Rome Statute, as it could accept the ICC's jurisdiction on an ad hoc basis, pursuant to Article 12 (3).[174] In such case, "[t]he Rome Statute gives jurisdiction to hear cases from states who join the ICC, even ad hoc and retroactively, as long as the cases

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170. *Id.*

171. *See* Bob, *supra* note 13.

172. Rome Statute, *supra* note 12, arts. 11 (2) & 12 (3) (emphasis supplied).

173. Kevin John Heller, Yes, Palestine Could Accept the ICC's Jurisdiction Retroactively, *available at* http://opiniojuris.org/2012/11/29/yes-palestine-could-accept-the-iccs-jurisdiction-retroactively/ (last accessed Feb. 17, 2015).

174. *Id.*

arose after [1 July 2002], when the statute took effect."[175] There is legal precedent for this issue, as the case of Cote d'Ivoire shows.[176] The Pre-Trial Chamber allowed retroactive jurisdiction over crimes allegedly committed in Cote d'Ivoire since 19 September 2002, on the basis of Cote d'Ivoire's declarations to accept such jurisdiction.[177]

As is readily apparent, the issue stems from the fact that only states can call for the application of the Rome Statute. As noted by William A. Schabas, an authority in international law —

> The Palestinian declaration was formulated by the Minister of Justice of the Palestinian Authority on 21 January 2009, in the aftermath of the Israeli campaign directed against Hamas militants in Gaza. It reads as follows [—]
>
> Declaration [R]ecogni[z]ing the Jurisdiction of the [ICC]
>
> In conformity with Article 12, [P]aragraph 3 of the Statute of the [ICC], the Government of Palestine hereby recogni[z]es the jurisdiction of the [ICC] for the purpose of identifying, prosecuting[,] and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.
>
> As a consequence, the Government of Palestine will cooperate with the [ICC] without delay or exception, in conformity with Chapter IX of the Statute.
>
> This declaration, made for an indeterminate duration, will enter into force upon its signature.
>
> Material supplementary to and supporting this declaration will be provided shortly in a separate communication.
>
> The Palestinian declaration raises a number of difficult legal issues. *Palestine is not a Membe*r[-]*State of the* [*U.N.*]*, and its claim to be a* [*s*]*tate within the meaning of* [*A*]*rticle 12 (3) is debatable. Even if it is recognized as a* [*s*]*tate at some point in time, there is a question as to whether it can retroactively give jurisdiction to the* [*ICC*] *over its territory for periods of time when it was not a* [*s*]*tate*.[178]

Can Palestine be considered a state for the purposes of the application of Article 12 (3)? This issue was precisely submitted to the Office of the

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175. Bob, *supra* note 13.

176. Situation in the Republic of Cote d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d'Ivoire, No. ICC-02/11, Pre-Trial Chamber III, ¶ 15 (Oct. 3, 2011).

177. *Id.*

178. SCHABAS, *supra* note 50, at 290 (citing Palestinian National Authority, Ministry of Justice, Office of the Minister, Declaration Recognising the Jurisdiction of the International Criminal Court (Jan. 21, 2009)) (emphasis supplied).

Prosecutor of the ICC for resolution, but it declined to issue a ruling, essentially saying it was "not the competent body to make such a determination."[179] Verily, the Prosecutor explained —

> (5) The issue that arises, therefore, is who defines what is a '[s]tate' for the purpose of [A]rticle 12 of the Statute? In accordance with [A]rticle 125, the Rome Statute is open to accession by 'all [s]tates[,'] and any [s]tate seeking to become a [p]arty to the Statute must deposit an instrument of accession with the Secretary-General of the [U.N.]. *In instances where it is controversial or unclear whether an applicant constitutes a '*[s]*tate*[*,'*] *it is the practice of the Secretary-General to follow or seek the General Assembly's directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an applicant is a '*[s]*tate*[*,'*] *Thus, competence for determining the term '*[*s*]*tate*' *within the meaning of* [*A*]*rticle 12 rests, in the first instance, with the* [*U.N. Secretary-General*] who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of [s]tate[-][p]arties of the Rome Statute could also in due course decide to address the matter in accordance with [A]rticle 112 (2) (g) of the Statute.
>
> (6) In interpreting and applying [A]rticle 12 of the Rome Statute, the Office has assessed that *it is for the relevant bodies at the* [*U.N.*] *or the Assembly of* [*s*]*tate*[-][*p*]*arties to make the legal determination whether Palestine qualifies as a* [*s*]*tate for the purpose of acceding to the Rome Statute* and thereby enabling the exercise of jurisdiction by the Court under [A]rticle 12 (1). *The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term 'State'* under [A]rticle 12 (3) which would be at variance with that established for the purpose of [A]rticle 12 (1).[180]

Complicating things further is the fact that assuming the ICC can exercise jurisdiction, it can only investigate and rule upon crimes committed when Palestine was already considered a state. Although the ICC can exercise retroactive jurisdiction, such jurisdiction cannot extend beyond the time when the state in question was not yet considered a state. This means that the precise date of statehood needs to be determined, aside from merely determining the current existence of statehood.

B. The Rome Statute Complication

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179. Schabas, *supra* note 152.

180. Office of the Prosecutor, International Criminal Court, Situation in Palestine, *available at* http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf (last accessed Feb. 17, 2015) (emphasis supplied).

The Rome Statute provides an avenue for states to prosecute war crimes and crimes against humanity committed against them.[181] Particularly, Palestine wants to invoke the provisions of the Rome Statute to prosecute the alleged war crimes committed by certain Israeli officials during Operation Cast Lead.[182] However, the statute specifically limits its application to states, which poses a problem given the unsettled topic of statehood in international law.[183] In this case, Israel opposed Palestine's complaint by saying the ICC cannot exercise jurisdiction over the issue because Palestine was not a state at the time the alleged crimes were committed.[184]

Palestine, it must be noted, has recently taken steps to become a "state-party" to the Rome Statute by delivering signed documents of ratification with the U.N. for the purpose of joining the ICC.[185] However, the U.N. Security Council has also recently denied Palestine's bid for statehood.[186] Specifically, the United States exercised its veto powers to deny Palestine's bid, being a stringent ally of Israel.[187] Since the ICC is an independent entity, it remains to be seen whether the U.N. Security Council's decision would negatively affect Palestine's bid to join the ICC.

The lack of a strict legal mechanism to determine statehood, as well as the sensitivity of the issues with which it is associated, seems to at least create a certain reluctance to issue any definitive ruling on the matter. Even the ICJ, in the case of Kosovo, did not answer the question directly (although the question was never directly asked).[188] It can be argued that, in Palestine's case, it is the ICC Prosecutor's duty to determine this factual consideration

181. Rome Statute, *supra* note 12, art. 5.

182. *See* Noah Gordon, Why the Palestinians Joined the International Criminal Court, *available at* http://www.theatlantic.com/international/archive/2014/12/Abbas-Palestine-International-Criminal-Court-Rome-Statute/384159/ (last accessed Feb. 17, 2015) & Raji Sourani, Operation Cast Lead five years on: 'We are still demanding justice,' *available at* http://www.aljazeera.com/indepth/opinion/2014/01/operation-cast-lead-five-years-are-still-demanding-justice-20141881165663 80.html (last accessed Feb. 17, 2015).

183. Rome Statute, *supra* note 12, art. 4.

184. Bob, *supra* note 13.

185. RT, Palestinian Authority submits documents to UN to join International Criminal Court, *available at* http://rt.com/news/219439-palestine-icc-un-join/ (last accessed Feb. 17, 2015).

186. RT, Palestinian statehood bid fails at UN Security Council as US, Australia vote against, *available at* http://rt.com/news/217975-unsc-palestine-statehood-vote/ (last accessed Feb. 17, 2015).

187. *Id.*

188. *See generally* Mills, *supra* note 148.

before requesting the permission of the Pre-Trial Chamber to begin an investigation. This would be more for practical considerations, to wit —

> Article 12 gives the Court jurisdiction over the territory and over the nationals of a [s]tate[-][p]arty (or a [s]tate making a declaration under [A]rticle 12 (3)). Who is to decide what constitutes such territory? Who is to determine whether or not an individual really is a national of a given [s]tate? This is not something to be delegated elsewhere. Rather, *these are factual issues to be assessed by the Prosecutor in determining whether to initiate an investigation, and subsequently by the judges at various stages of the proceedings.* For example, the Prosecutor might choose to proceed in a specific case, obtain an arrest warrant, bring the accused into custody, and begin a trial, only to have the accused person argue that he or she is not in fact a national of a [s]tate[-][p]arty, or that the act was not perpetrated on the territory of a [s]tate[-][p]arty. Would the trial stop, while inquiries were made with other bodies outside the Court to determine issues of nationality and territory? Of course not. It would be an issue of fact to be decided by the Court. And the same is true as to whether an entity constitutes 'a [s]tate which is not a [p]arty to this Statute.[']'[189]

The issue of Palestine's statehood is, therefore, of supreme importance in determining the applicability of the Rome Statute, yet, there is a reluctance to issue any definitive ruling because of the lack of any stringent standards to be applied. More importantly, assuming that Palestine can properly invoke the jurisdiction of the ICC retroactively, the next issue then becomes its precise date of statehood, as its statehood is generally accepted to have happened after the Rome Statute's entry into force.

C. Statehood and Retroactive Jurisdiction

It is worth noting that Palestine formally proclaimed its statehood, through its declaration of independence, in November 1988.[190] Such declaration, however, did not support Palestine's statehood, neither under the declaratory view nor under the constitutive view. At the time, it did not enjoy the recognition of other states. Additionally, it failed to possess all of the elements of a state necessary under the Montevideo Convention. Parenthetically, "[t]he [C]onvention's requirement for 'a defined territory' is now commonly tightened to 'a defined territory over which sovereignty is not seriously contested by any other state,' while the [C]onvention's requirement for 'government' is now commonly stated as 'effective control over the state's territory and population[.']"[191] It is with this stricter interpretation of the elements with which Palestine had difficulties. It was

189. Schabas, *supra* note 152 (emphasis supplied).

190. Whitbeck, *supra* note 70, at 4.

191. *Id.* at 3.

"legally challenging to make the argument that Palestine met the customary international law criterion for 'effective control over the state's territory and population'"[192] and it was "difficult to see how Palestine could constitute a state."[193]

However, such is not the case now. The recent vote by the U.N. Member-States to upgrade Palestine's status to a non-Member Observer State effectively gives Palestine statehood if one were to employ the constitutive theory. Similarly, even employing the declaratory theory would lead to the conclusion that Palestine can already be considered as possessing all of the elements of statehood. Thus, "[u]nder both the criteria of the Montevideo Convention and the more restrictive criteria of recent customary international law, the State of Palestine exists — now."[194]

Therefore, for purposes of determining Palestine's statehood as of the moment, the dilemma of choosing which theory to use has been rendered moot. Either way, Palestine should already be considered a state. It enjoys recognition by more than a majority of the U.N. Member-States, and can realistically claim to be in possession of all of the elements necessary for statehood under the Montevideo Convention, even with the application of the stricter norms developed in recent years. Indeed, Palestinian statehood "is a reality [that] must no longer be ignored."[195] This is true even with the U.N. Security Council's denial of Palestinian statehood, which can only be interpreted as a denial of statehood for purposes of adopting the resolution submitted to the U.N. Security Council, not an application of the Montevideo Convention principles as it relates to Palestine.

The real issue becomes the precise moment when Palestine was able to obtain its status of statehood. This is important in order to determine which war crimes or crimes against humanity can be made cognizable by the ICC, assuming that Palestine allows the ICC to exercise retroactive jurisdiction.[196] All of the atrocities committed against and by Palestine prior to its

192. *Id.* at 4.

193. James Crawford, *The Creation of the State of Palestine: Too Much Too Soon?*, 1 EUR. J. INT'L L. 307, 308 (1990).

194. Whitbeck, *supra* note 70, at 6.

195. *Id.*

196. There are some who think that it would be folly for Palestine to accept such retroactive jurisdiction, as it is itself guilty of committing war crimes. If it does accept the retroactive jurisdiction of the ICC, its own acts would be open for investigation and prosecution. However, it would seem that Palestine is willing to take this risk. *See generally* Heller, *supra* note 173; Schabas, *supra* note 152; & Bob, *supra* note 13.

attainment of statehood, as per the express terms of the Rome Statute,[197] would not be cognizable by the ICC.

Looking at the history between Israel and Palestine in recent years would show the number of assassinations, armed attacks, and acts of violence committed by one against the other.[198] The factual circumstance which needs to be established, as far as the declaratory theory is concerned, would be the precise moment when Palestine had effective control over its territory and population. It is the Author's view that it did not possess such qualities at the beginning of the 21st Century. The numerous attacks and the presence of Israeli forces exerting control over Palestine's population and territory support this conclusion.[199] Thus, Palestine cannot claim statehood on the basis of possession of the Montevideo Convention elements, at least at the start of the new millennium.

However, looking at Palestine's recognition history from other states would show that there is too big a gap in the timeline to be able to effectively use the constitutive theory. The Palestinian Liberation Order (PLO) won observer status in the U.N. in 1974,[200] a position not formally provided for in the U.N. Charter and, as such, cannot be made a basis for statehood. The PLO participated in General Assembly sessions and conferences of other U.N. bodies.[201] In 1988, the designation of PLO was replaced by "Palestine," albeit with no significant change in status.[202] In 1998, the General Assembly extended certain privileges to Palestine which were previously exclusive to Member-States, such as the right to participate in the general debate.[203] This effectively "upgraded Palestine's representation

197. Rome Statute, *supra* note 12, art. 11.

198. MidEastWeb, Timeline of Palestinian Israeli History and the Israel-Arab Conflict, *available at* http://www.mideastweb.org/timeline.htm (last accessed Feb. 17, 2015).

199. *See* Nafeez Ahmed, *IDF's Gaza assault is to control Palestinian gas, avert Israeli energy crisis*, THE GUARDIAN, July 10, 2014, *available at* http://www.theguardian.com/environment/earth-insight/2014/jul/09/israel-war-gaza-palestine-natural-gas-energy-crisis (last accessed Feb. 17, 2015); Raji Sourani, *supra* note 182; & American Friends Service Committee, Gaza under Siege, *available at* https://afsc.org/resource/gaza-under-siege (last accessed Feb. 17, 2015).

200. Robert McMahon & Jonathan Masters, Palestinian Statehood at the UN, *available at* http://www.cfr.org/palestinian-authority/palestinian-statehood-un/p25954 (last accessed Feb. 17, 2015).

201. BBC News Middle East, Q&A: Palestinians' upgraded UN status, *available at* http://www.bbc.com/news/world-middle-east-13701636 (last accessed Feb. 17, 2015).

202. *Id.*

203. *Id.*

at the U.N. to a unique and unprecedented level, somewhere between the other observers, on the one hand, and Member[-]State[,] on the other."[204] Still, it could not have been recognized as a state at this point.

The case of Palestine has illuminated a legal issue when it comes to the application of the Rome Statute's retroactive jurisdiction clause. It would appear that there is a scenario which the Rome Statute fails to account for. Whenever an entity wishes to secede through violent means from its parent state, and war crimes are committed during the ensuing hostilities, there is no recourse available to the ICC due to the statehood requirement under the Rome Statute. Firstly, there is no entity expressly clothed with jurisdiction to rule upon the statehood of the entity under the treaty and under international law. Moreover, the application of existing legal principles regarding statehood, specifically the four-element test for statehood under the Montevideo Convention, would always lead to a finding of non-statehood for the seceding entity at the time when the supposed war crimes occurred because of the lack of effective control over the disputed territory. If this is strictly applied by the entity deciding the issue of statehood, then, the seceding entity, even if successful in establishing its own separate state, can never make use of the retroactive jurisdiction provision of the Rome Statute. Thus, if war crimes are committed during this period of time, it is possible that these can be left unpunished.

This is the scenario sought to be addressed by this Note.

V. LETTING JUSTICE PREVAIL: ALLOWING NEWLY-FORMED STATES AN AVENUE TO EXACT ACCOUNTABILITY

A. Palestine's Quest for Justice

Palestine, although it may want to prosecute any and all crimes committed by Israel from the time it attained statehood, originally intended merely "to file war crimes cases against Israeli soldiers and leaders *relating to Operation Cast Lead, on* [*22 January*] *2009*."[205] Taking this into account, the question then transforms from "Since when can Palestine be considered a [s]tate?" to "Can Palestine be considered a [s]tate prior to the activities in Operation Cast Lead?"

While this may be seen as skirting around the issue, there is no need to determine the precise date when Palestine was able to attain statehood in resolving the particular issue to be presented to the ICC. Even then, there still has to be a determination of when certain elements were present,

204. McMahon & Masters, *supra* note 200.

205. Bob, *supra* note 13 (emphasis supplied).

although the precision required as regards temporal requirements are lessened.

In this case, a simplistic review of the factual circumstances existing in Palestine and Israel at the time of Operation Cast Lead would reveal that Palestine could not be considered a state. Although there were numerous cease fire agreements entered into prior to Operation Cast Lead, it was not enough to definitively establish effective control over the Gaza Strip and the West Bank.[206] The government itself was divided between the Hamas and Fatah factions, with Hamas exercising control over Gaza.[207] Moreover, the Prime Minister of the Palestinian Authority issued a detailed plan to establish a Palestinian State within two years, impliedly admitting its status as a non-state entity after Operation Cast Lead.[208]

Neither will resort to the constitutive theory yield different results. Proof showing sufficient recognition by other states would be hard to find or establish. While recognition and statehood do not require U.N. approval, such is the easiest method of showing the attainment of statehood through recognition. In Palestine's case, such recognition was only formalized on 19 November 2012,[209] although such recognition most likely existed before then. Nevertheless, it would be difficult to show that such recognition existed before Operation Cast Lead as to be able to claim statehood for the purposes of invoking the ICC's jurisdiction.

There is more to Palestine's issue of statehood than what appears from the previous analysis. It would seem that by denying Palestine's statehood because it has no effective control over its territory, it is precluded from initiating remedial measures for the very same reasons it cannot effectively exercise control. Putting things simply, Palestine cannot exercise control over its people and territory because of the continuing conflict. Because it cannot exercise control, it cannot be recognized as a state. Not being a state, it is not afforded any redress for the violations resulting from the conflict in its territory. In effect, Palestine cannot be considered a state because of the very cause it wishes to bring before the ICC. The existence of conflict is both the reason why Palestine cannot be considered a state and why it wishes

206. *See* Mitchell Plitnick, Did Israel Provoke Increase in Rockets to Justify Operation Cast Lead?, *available at* http://mitchellplitnick.com/2011/02/08/did-israel-provoke-increase-in-rockets-to-justify-operation-cast-lead/ (last accessed Feb. 17, 2015).

207. *See* Ami Isseroff, Palestine: Ending the Occupation, Establishing the State, *available at* http://mideastweb.org/palestine_state_program.htm (last accessed Feb. 17, 2015) & MidEastWeb, *supra* note 198.

208. *Id.*

209. *See* United Nations, *supra* note 11.

to bring an action in the first place, which it is not permitted to do because of the nature of the conflict.

Of course, there are many caveats to this analysis. A conflict can exist contemporaneously with a state. But the conflict preventing statehood can only apply under the declaratory theory, as recognition is not precluded because of an existing unresolved conflict. Nevertheless, in Palestine's case, it would seem unjust to deny jurisdiction on the same bases as the causes of action, especially from an accountability standpoint.

B. Options for Exacting Accountability

While the ICC is there in order to afford an avenue for states to prosecute war crimes, it is not the only means of exacting accountability. In fact, the ICC is merely complementary to domestic measures which are supposed to be instituted by state-parties,[210] otherwise known as the complementarity principle of the Rome Statute.[211] The Philippines, as an example, has complied with its obligation through the enactment of Republic Act (R.A.) No. 9851.[212] Indeed, "to comply with their obligations under the Rome Statute, it is argued that [s]tates must not only prosecute suspects for crimes committed on their territory, they must implement the definitions of crimes in their internal law so as to be in a position to prosecute the same offen[s]es as the Court."[213]

Notably, the General Assembly recently had reason to reinforce the importance of having municipal as well as international avenues for holding perpetrators of war crimes and crimes against humanity accountable, to wit —

> (22) We *commit* to ensuring that impunity is not tolerated for genocide, war crimes[,] and crimes against humanity, as well as for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through domestic mechanisms or, where appropriate, regional or international mechanisms, in accordance with international

210. *See* SCHABAS, *supra* note 50, at 44. *See also* Rome Statute, *supra* note 12, art. 17.

211. *See* SCHABAS, *supra* note 50, at 336.

212. An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009).

213. SCHABAS, *supra* note 50, at 46.

> law, and for this purpose we *encourage* [s]tates to strengthen national judicial systems and institutions[.]
>
> (23) We recognize the role of the [ICC] in a multilateral system that aims to end impunity and establish the rule of law, and in this respect, we *welcome* the [s]tates that have become parties to the Rome Statute of the [ICC], and *call* upon all [s]tates that are not yet parties to the Statute to consider ratifying or acceding to it, and *emphasize* the importance of cooperation with the Court[.][214]

However, in Palestine's case, or for newly-formed states in general, one can readily see the difficulty. Problems arise with regard to treaties concerning international humanitarian law — "[s]ince secessionist regimes are *ex hypothesi* not signatories to the [Geneva] [C]onvention[s], the application of Article 3 has met with difficulties in practice[.] The status of combatants in a civil war is [ ] left to the limited mercy of the customary law and *the discretion of the metropolitan government.*"[215] Moreover, since the new entities are newly-formed states, they are not yet state-parties to the Rome Statute and have yet to enact measures for proper prosecution of war crimes.

The parent state, in case it is the perpetrator of the acts sought to be prosecuted, cannot be expected to prosecute against itself, especially if such acts were officially sanctioned by the government or its military. If such parent state is, however, a state-party to the Rome Statute, the newly-formed state can institute an action with the ICC if the purported criminal is a citizen of such state-party.[216] However, in Palestine's case, such a recourse is not possible because Israel is not a state-party to the Rome Statute.[217]

Jurisdiction can also become a problem as regards pursuing domestic measures for exacting accountability, taking into consideration the generality and territoriality characteristics of criminal laws. The generality characteristic states that penal laws are binding on all persons who reside or sojourn in the

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214. Draft Declaration of the High-Level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels (Sep. 12, 2012), *available at* https://www.un.org/en/ga/president/67/letters/pdf/rol_letter_21_sept_2012.pdf (last accessed Feb. 17, 2015).

215. CRAWFORD, *supra* note 1, at 420 (emphasis supplied).

216. Article 12 (2) of the Rome Statute provides that "the Court may exercise jurisdiction if one or more of the following States are parties to this Statute ... (b) The State of which the person accused of the crime is a national." Rome Statute, *supra* note 12, art. 12 (2).

217. The U.N. Secretary-General received a communication from Israel's government stating that "Israel does not intend to become a party to the treaty." *See* American Non-Governmental Organizations Coalition for the International Criminal Court, Which countries have joined the ICC?, *available at* http://www.amicc.org/icc/ratifications (last accessed Feb. 17, 2015).

territory of the state, including transients, regardless of nationality, color, sex, age, social position, or other personal circumstances.[218] The territoriality characteristic states that the penal laws of the state are applicable only to crimes committed within its territory.[219] Generality refers to the persons covered by penal laws, while territoriality refers to the *situs* of the act or the place where the penal law is applicable.[220] Essentially, the penal laws of a state are only applicable to acts and persons within its territory. These characteristics can be used by the newly-formed state or the parent state to deprive the other of jurisdiction whenever prosecution is sought. Either state can claim that since it is independent of the other, then the other state's laws have no application within its territory.

These problems show that although complementarity is a cornerstone principle of the Rome Statute,[221] "to decline to exercise jurisdiction [by local courts] in [favor] of prosecution before the ICC is a step taken to *enhance* the delivery of effective justice, and is thus consistent with both the letter and the spirit of the Rome Statute and other international obligations with respect to core crimes."[222] Therefore, recourse to the ICC can be deemed as a more effective means of attaining justice, especially if the judiciary of the parent state is widely known to be unreliable.

Not only is the ICC a more effective means of prosecuting war crimes, in the case of newly-formed states, it can be deemed as the *only* means of attaining justice. It is therefore imperative that the issue of the ICC's jurisdiction in the case of newly-formed states be resolved. In this regard, it is important to note an alternative mode for the ICC to acquire jurisdiction — referral by the U.N. Security Council.[223] This mode "is of particular usefulness when crimes are committed on the territory of a non-party [s]tate."[224] However, the problems associated with reliance upon this method are also readily apparent. Such initiative on the part of the U.N. Security Council makes the exercise of jurisdiction by the ICC dependent

218. RUPERTO KAPUNAN, JR. & DONATO T. FAYLONA, CRIMINAL LAW 3 (1993). *See also* LEONOR D. BOADO, NOTES AND CASES ON THE REVISED PENAL CODE 6 (2012) & 1 LUIS B. REYES, THE REVISED PENAL CODE 6 (17th ed. 2008).

219. KAPUNAN, JR. & FAYLONA, *supra* note 218, at 3. *See also* BOADO, *supra* note 218, at 7 & REYES, *supra* note 218, at 13.

220. BOADO, *supra* note 218, at 7.

221. *See* SCHABAS, *supra* note 50, at 50.

222. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 164 (4th ed. 2011).

223. *See* Rome Statute, *supra* note 12, art. 13 (b).

224. SCHABAS, *supra* note 222, at 284.

on the foreign policy of the U.N. Security Council States. Moreover, such decision of the U.N. Security Council is subject to the veto powers of the Permanent Members,[225] making it difficult in case one of those states has a conflicting foreign relations policy. It should likewise be noted that there is only one instance wherein the U.N. Security Council exercised their referral powers, in the case of Darfur.[226] Indeed, given the U.N. Security Council's vote on Palestine's bid for statehood,[227] this would not be a feasible option.

C. Recourse to the Rome Statute and the ICC

It is worth noting Palestine's incentives in instituting its case. It wants justice for the supposedly inhumane way Israel went about its attack in Gaza, which resulted in the death of more than 1,000 Palestinians, including women and children.[228] Considering the point-of-view averted to above, Israel may be able to get away from facing accountability measures based on technicalities in the determination of Palestine's statehood, depending on the strictness and manner of analysis to be employed in resolving this issue. From a non-legal perspective, it would seem that Israel, or any other state or entity for that matter, could get away with committing war crimes or crimes against humanity if committed against a non-state entity. The straightforward provisions of the Rome Statute are arguably being used to subvert its purpose.

In the analysis of the Rome Statute's purpose, it is to be noted that "[t]he preamble to a treaty is deemed to be part of its context, for the purposes of interpretation of the treaty[.] ... [T]he purposes of the Rome Statute may be identified with reference to 'the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.'"[229]

225. *See* U.N. Charter art. 27 (3).

226. *See* SCHABAS, *supra* note 222, at 285. *See also* Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, *available at* http://www.un.org/press/en/2005/sc8351.doc.htm (last accessed Feb. 17, 2015).

227. RT, Palestinian statehood bid fails at UN Security Council as US, Australia vote against, *available at* http://rt.com/news/217975-unsc-palestine-statehood-vote/ (last accessed Feb. 17, 2015).

228. Ami Isseroff & Zionism and Israel Information Center, Gaza War: Operation Cast Lead, *available at* http://www.zionism-israel.com/dic/Cast_Lead.htm (last accessed Feb. 17, 2015).

229. SCHABAS, *supra* note 50, at 32. *See* Vienna Convention on the Law of Treaties art. 31 (2), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

Because the interpretation of the Rome Statute's provisions on retroactive jurisdiction is, at the very least, debatable,[230] turning to the preamble for clarification would be a good first step in resolving the issue. It can be argued that the "genuine meaning" of the Rome Statute is to provide an avenue for victims of war crimes and crimes against humanity to prosecute their claims. As enunciated in its preamble —

> The State[-]Parties to this Statute
>
> ...
>
> Mindful that during this century[,] millions of children, women[,] and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
>
> ...
>
> Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished and that their effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation,
>
> ...
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
>
> ...
>
> Determined to these ends and for the sake of present and future generations, to establish an independent permanent [ICC] in relationship with the [U.N.] system, with jurisdiction over the most serious crimes of concern to the international community as a whole,
>
> Emphasizing that the [ICC] established under this Statute shall be complementary to national criminal jurisdictions,
>
> Resolved to guarantee lasting respect for and the enforcement of international justice[.][231]

Additionally, in determining whether the ICC can exercise jurisdiction, it is well to keep in mind that

> [i]nternational obligations relating to judicial settlement of international disputes are fully fledged obligations like any other obligation in which States can place confidence. Therefore, jurisdictional clauses must be

230. *See* SCHABAS, *supra* note 50, at 290.

231. Rome Statute, *supra* note 12, pmbl. (emphasis supplied).

> interpreted just like any other conventional obligation, *in accordance with their genuine meaning*.[232]

It would better serve justice and attain the Rome Statute's genuine meaning, therefore, if a more lenient standard in terms of determining statehood were to be adopted in resolving a conflict based on the Rome Statute. This again takes into consideration the context of the issue, as the consequences of such a determination could mean the difference between proper accountability measures and grave injustice. This is not to say that all doubts should be resolved in favor of statehood. However, as the determination of statehood is itself far from an ironclad process, included in such determination should be the considerations based on equity and lack of adequate avenues for exacting accountability. In Palestine's case, since it is already definitively considered a state now,[233] it would be even more unjust for the ICC to decline to exercise jurisdiction over the case just because Palestine may not have been a state at the time of Operation Cast Lead.

The determination of statehood for purposes of the ICC's exercise of jurisdiction is an issue properly resolved by the Prosecutor and the Pre-Trial Chamber of the ICC.[234] According to Article 15 of the Rome Statute —

> Article 15
>
> Prosecutor
>
> (1) The Prosecutor may initiate investigations [*motu proprio*] on the basis of information on crimes *within the jurisdiction of the Court*.
>
> ...
>
> (3) If the Prosecutor *concludes that there is a reasonable basis to proceed with an investigation*, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
>
> (4) If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that *the case appears to fall within the jurisdiction of the Court*, it shall authorize the commencement of the investigation, *without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case*[.][235]

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232. ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 441 (2008 ed.) (emphasis supplied).

233. *See generally* Whitbeck, *supra* note 70.

234. *See* Rome Statute, *supra* note 12, art. 15.

235. *Id.* (emphasis supplied).

Therefore, it should have been the Prosecutor of the ICC who initially determined Palestine's statehood to know whether the ICC can exercise jurisdiction.[236] Since statehood is "a factual issue,"[237] the Prosecutor should have admitted evidence for the proper determination of jurisdiction, subject to the ICC's final determination on trial. The Prosecutor's claim that the entity with jurisdiction to rule on the matter is the U.N. Secretary General[238] finds no basis in law. As noted by international law expert William A. Schabas —

> The Prosecutor ducks the issue and misinterprets the Rome Statute. The absence of a mechanism in the Statute to identify 'a [s]tate which is not a [p]arty to this Statute' does not mean that the matter is to be resolved elsewhere. The question is different from that of whether an entity can join the [ICC], which is clearly delegated to the Secretary-General by [A]rticle 125 of the Statute. Rather, the question posed by [A]rticle 12 (3) is simply a question of fact, like so many other questions of fact that must be determined, in the first place, by the Prosecutor and, in the second place, by the judges.
>
> Article 12 gives the [ICC] jurisdiction over the territory and over the nationals of a [s]tate[-][p]arty (or a [s]tate making a declaration under [A]rticle 12 (3)). Who is to decide what constitutes such territory? Who is to determine whether or not an individual really is a national of a given [s]tate? This is not something to be delegated elsewhere. Rather, these are factual issues to be assessed by the Prosecutor in determining whether to initiate an investigation, and subsequently by the judges at various stages of the proceedings.
>
> ...
>
> Neither the Secretary-General nor the General Assembly (nor for that matter the Assembly of [s]tate[-][p]arties), has ever prepared a list of '[s]tates which are not [ ] [p]art[ies] to the Statute[.'] Under their legislative frameworks, they have no authority to do this. Why would they? They have never been asked. If the question were posed directly of the Secretary-General, the response would be that this is not within his remit, and that it certainly does not fall within the functions of a treaty depository.[239]

It is likewise to be noted that the Pre-Trial Chamber, after the initial investigation of the Prosecutor, has jurisdiction to decide whether "the case appears to fall within the jurisdiction of the Court[.]"[240] Included in such

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236. Schabas, *supra* note 152.

237. *Id.*

238. Office of the Prosecutor, *supra* note 180.

239. Schabas, *supra* note 152.

240. Rome Statute, *supra* note 12, art. 15 (4).

determination is whether the entity invoking jurisdiction can be considered a State, because such question goes into the jurisdiction of the ICC. Of course, this is still "without prejudice to subsequent determinations by the [ICC] with regard to the jurisdiction and admissibility of a case."[241]

The Rome Statute was enacted to make sure that heinous acts do not go unpunished, and the conflicting theories and unresolved issues regarding statehood should not serve as a hindrance to that objective.

VI. CONCLUSION AND RECOMMENDATION

A. Statehood

In the realm of international law, when a [s]tate becomes a [s]tate has been a problem since people realized the importance of having such a distinction.[242] As the world became much smaller with the advancements in communication and transportation technologies, becoming a [s]tate and being recognized as such attained even more significance. It was no longer a mere title, but a source of rights and obligations.

This problem was seemingly answered in 1933, with the enactment of the Montevideo Convention. Objective standards were put in place to supposedly settle the long-standing question of whether a given entity could be considered a [s]tate. While these standards were not considered new, as they merely "restated and codified customary international law as existing in 1933,"[243] having something written was supposed to remove some of the doubts as regards the status of an entity claiming to be a [s]tate.

Unfortunately, such a resolution failed to take into consideration the element of recognition. This eventually divided theorists into those who thought "being a state depends upon its possession of the required elements and not upon recognition,"[244] on one hand, and those who thought recognition was "what makes a state a state and confers legal personality on the entity,"[245] on the other.

The application of these conflicting theories has resulted in inconsistent determinations regarding statehood.[246] Indeed, the use of one theory over the other can be used to support a more favorable conclusion, and such an

241. *Id.*

242. *See generally* Mondez, *supra* note 21.

243. Whitbeck, *supra* note 70, at 3.

244. BERNAS, *supra* note 7, at 74.

245. *Id.* at 74-75.

246. *See* Mondez, *supra* note 21, at 119.

argument would make legal sense. There is, therefore, a need to first clarify when such theories should be applied.

Looking at the recent examples of when the issue of statehood was raised and determined, certain trends emerge as regards the application of the two theories. Generally speaking, recognition as a basis for determining statehood is more often used when the issue is political in nature, while the elements enumerated in the Montevideo Convention are applied when the issue requires a more legalistic approach.[247]

Any issue would inevitably have political and legal ramifications. In order to avoid oversimplification, the entire context of the issue must be considered, and each consideration weighed. Relevant factors to be considered include jurisdiction over the issue, the parties involved, the applicable law, and the consequences of the decision on non-party states.

All of the foregoing necessarily means that before an analysis can be done, there must exist a specific issue, which requires the determination of statehood for its proper resolution. Absent such an issue, either of the two theories can be used to justify the statehood or non-statehood of an entity.

B. Palestine and the Rome Statute

After the review of the literature on the matter and the establishment of the framework to be used in a statehood analysis, Palestine's issues regarding the applicability of the Rome Statute to its situation can be better discussed and analyzed.

Palestine wants to file international criminal cases against certain Israeli officials for allegedly criminal acts committed during Operation Cast Lead.[248] While Palestine is currently recognized as having attained the status of a state by virtue of it being voted as a "non-Member Observer State" by the U.N.,[249] the problem arises when the provisions of the Rome Statute are invoked for purposes of granting the ICC retroactive jurisdiction. The Rome Statute provides that the ICC can exercise retroactive jurisdiction when certain requirements are met, but such can only be granted to states and can retroact only up to the time when the party was a state.[250]

247. *See generally* Mondez, *supra* note 21, at 119; BBC News, *supra* note 139; & Jacobs & Radi, *supra* note 150. Taiwan's U.N. Membership application, essentially political in nature, is contrasted with the ICJ's determination on Kosovo's statehood, a more legalistic determination. BBC News, *supra* note 139.

248. *See* Bob, *supra* note 13.

249. *See* United Nations, *supra* note 11.

250. *See* Bob, *supra* note 13 & Heller, *supra* note 173.

Therefore, not only must Palestine's statehood be determined, but the exact date of the attainment of statehood must be shown to precede the events of Operation Cast Lead if the ICC is to exercise jurisdiction.

In such an analysis, the first consideration would be the party tasked to determine jurisdiction. Preliminarily, it should have been the Prosecutor of the ICC who determined Palestine's statehood so that the ICC can exercise jurisdiction.[251] As statehood is "a factual issue,"[252] the Prosecutor should have admitted evidence for the proper determination of jurisdiction, subject to the ICC's final determination on trial. Alas, because of the sensitivity of the issues involved, and because he supposedly believed that it was the U.N. Secretary General which had jurisdiction, the Prosecutor declined to issue a ruling.[253]

Considering that the interpretation of the provisions of the Rome Statute is more of a legal exercise rather than a political one, the Prosecutor or the ICC's determination of statehood should more properly employ the declaratory theory. While the issue of Palestine's status is politically charged,[254] such political undertones have little bearing on the provisions of the Rome Statute.

Departing from the theories to be applied and focusing on the ICC's exercise of jurisdiction, another factor worth considering in this analysis would be the nature of the dispute. The conflict in this case is the supposed commission of war crimes by Israeli officials on Palestinian citizens. Thus, the ICC should likewise consider the possible injustice to be committed if the Palestinians are not given any other recourse with which to prosecute the supposed illegal acts. Palestine cannot rely on domestic measures because of problems with jurisdiction, taking into consideration the generality and territoriality characteristics of criminal law.

Moreover, Israel would be able to use the ICC's assumption of jurisdiction to its advantage by prosecuting the supposed crimes committed by Palestine against Israel. While it is Palestine which initially wanted to prosecute a case against Israel, accepting the ICC's jurisdiction would also mean that Palestine could be investigated and made liable for its own acts, if there be any. It would thus be more in line with the genuine meaning of the Rome Statute as well as the greater interests of justice for the ICC to exercise jurisdiction over this issue.

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251. Schabas, *supra* note 152.

252. *Id.*

253. *Id.*

254. *See* United Nations, *supra* note 11.

It should be noted that a strict adherence to the four-element test provided by the Montevideo Convention would be ineffective. At the time of Operation Cast Lead, Palestine had no effective control over its entire territory, thereby making it not a state under the declaratory theory. It is proposed, therefore, that for purposes of the Rome Statute, if the only element missing is that of a defined territory due to the existence of hostilities brought about by secessionist movements, the Prosecutor, in making his determination, should instead use as basis the presence or absence of alternative accountability measures. This would effectively address the gap in the Rome Statute wherein newly-formed states would always be denied recourse to the ICC due to the fact that the war crimes sought to be prosecuted were committed during a time when the statehood of the warring entities could not be definitively determined. The legal basis for using such an approach would be the promotion and furtherance of the genuine meaning of the Rome Statute, as expressed in its preamble.

C. Moving Forward

The determination of statehood cannot exist in a vacuum. An issue requiring such determination is needed for a proper legal analysis, so that the legal theories can be applied without conflict or inconsistency. Without such issue, there would be no context with which to apply the legal theories and precedents regarding statehood.

The nature of international disputes ensures the continued importance of determining the statehood of an entity, even though international law is moving towards the recognition of the legal personality of non-state actors.[255] As such, because of the inherent difficulties in determining statehood, such issues should be avoided.

For treaties in general, the issues on statehood can be avoided by either modifying the scope or applicability of the treaties to parties which comply with certain requirements — as opposed to simply providing for states — or by at least specifying the legal theories applicable in determining statehood. Moreover, in case such issues arise, the proper party or entity with jurisdiction to decide on the matter should be so specified.

Particularly, in interpreting the Rome Statute's grant of retroactive jurisdiction to the ICC, its goal of ensuring accountability should be considered in resolving statehood issues. In the event that a case reaches the Prosecutor and the Pre-Trial Chamber, these bodies are clothed with jurisdiction to rule upon the issue of statehood for purposes of the application of the Rome Statute.

255. BERNAS, *supra* note 7, at 69.

However, in recognition that such issues cannot totally be avoided, the framework thus presented can serve as a basis for establishing a more robust mechanism for determining statehood. The goal is for such mechanism to enable legal practitioners to effectively determine the status of an entity through the use of legal precedents. Such a mechanism can include a categorization of the issues which require the determination of statehood that goes beyond the political-legal dichotomy. The context of any determination is important, and the entity with jurisdiction to rule upon the status of a given entity should be made clear.

Based on the issues presented in this Note and the corresponding discussions, the following recommendations are forwarded:

(1) Whenever statehood is sought to be determined, the issue requiring such determination should be clarified and established. The context of the issue should be involved in the analysis, and the entity with jurisdiction to rule upon the matter should be specified.

(2) Applying this approach to the Rome Statute, it is submitted that the Prosecutor and the Pre-Trial Chamber have jurisdiction to rule upon the matter of statehood, albeit preliminarily, for purposes of determining whether the ICC can exercise jurisdiction over the issue.

(3) In ruling on this matter, the recognition by other states should be less of a consideration for the Prosecutor. As the prevailing theory under international law, the declaratory theory should be used in the preliminary determination of statehood. However, in case the four-element test fails only because of the existence of the conflict between the seceding state and the parent state, the options available, or lack thereof, for holding the perpetrators accountable should be the determining factor in whether the ICC should exercise jurisdiction.

(4) Applying the foregoing to the case of Palestine, the ICC should accept jurisdiction over the events of Operation Cast Lead. Apart from Palestine already being considered a state presently, the ICC should note the absence of mechanisms to enforce accountability, taking into consideration the genuine meaning of the Rome Statute as well as the greater interests of justice. Likewise, acts committed by Palestinians against Israelis during the course of the conflict should be investigated and prosecuted.

Statehood will always be a contentious issue. It involves rights and obligations on an international scale and is of extreme significance in international law. The determination of statehood needs a legal backbone to lean on; it cannot rely merely on the discordant application of two

conflicting theories. Harmonizing the theories and laws on the matter and establishing a framework for their application is a step closer towards achieving a more effective legal system.