THE MEANING OF "STATES" IN THE MEMBERSHIP PROVISIONS OF THE UNITED NATIONS CHARTER

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"Statehood" is an element of membership in the United Nations. The two provisions of the Charter on membership are quite clear on this requirement:

> Article 3. The original Members of the United Nations shall be the *states* which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.[1]

> Article 4. (1.) Membership in the United Nations 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]

However, the Charter does not define the term "states" nor do the two advisory opinions of the International Court of Justice concerning membership of the United Nations.[3] In practice, the decision-makers seem to have followed a number of criteria and have given a wide variety of meanings to the term. First, they have applied a traditional definition of states in international law which regards an entity as a state if it possesses "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[4] The entities found to fit this definition, however, have

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1. U.N. CHARTER art. 3 (emphasis added).

2. *Id.* art. 4, para. 1 (emphasis added).

3. Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57 (May 28); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3).

4. Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881. The Restatement defines state in similar terms: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW

displayed great variances among them in the degree of conformity to the four qualifications. Secondly, the decision-makers have on occasion ignored the traditional definition and followed other criteria of decision. This practice has occurred mainly in two situations. In founding the United Nations, the participants at the San Francisco Conference rightfully exercised the prerogatives afforded founders of international organizations and decided to define states as entities that did not possess all of the commonly understood requirements of statehood and enshrined their decision in Article 3 of the Charter. The decision-makers also ignored the traditional definition when they acted on the applications for admission of entities newly independent from colonial or other forms of non-self-governing rule, some of whom were not really independent or self-governing.[5] Thirdly, in cases involving the so-called "divided-states," the decision-makers have restricted the operation of the traditional definition by attaching an extrinsic condition to further a policy of favoring the reunification of these states. The condition imposed was an agreement between the two entities on unification or separation. Until there was an agreement, each entity's statehood would be questioned regardless of its actual qualifications as a state under the traditional definition.

The result is that the term states in the above Charter provisions has not been given one uniform meaning but instead a number of plainly discordant meanings. An entity may appear to fall short of statehood in one or another important respect yet be held a state eligible for membership. Conversely, an entity may appear to be well-qualified as a state yet be refused the status of statehood remaining ineligible for membership. Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, an entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, an entity without a government, an entity with a disputed territory, and so on. The term seems to possess "metaphysical attributes."[6] Are all these meanings of state "lawful?" The answer seems to depend on the conception of law influencing the person giving it. If "law" is regarded as a body of absolute and autonomous rules that have fixed or plain and ordinary meanings, and if the process of application is no more than

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OF THE UNITED STATES §201 (1987). *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (1979).

5. Describing the entities that were admitted to membership in the 60's, Professor Reisman wrote: "Many had economic, customs, nationality and monetary ties which linked them closely if not inextricably to a larger state. Many had defense arrangements with larger states which were extremely one-sided. Many had virtually no foreign policy apparatus. *Almost none of these points was raised in debate.*" W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION, A REPORT FOR THE CONFERENCE ON PUERTO RICO AND THE FOREIGN POLICY PROCESS, 60 (1973).

6. "If Guyana, Barbados and Lesotho were states and the D.D.R. was not a state, the word 'state' plainly had some mystical metaphysical attributes requiring serious scholastic inquiry." *Id.* at 59-60.

logical derivation, then, with the traditional definition on the books, many of the meanings mentioned above would seem to be inconsistent with the law. But this conception places too much faith in language, over-emphasizes "authority" to the neglect of "control," and over-emphasizes "perspectives" to the neglect of "operations." A more balanced conception would regard law, not merely as rules, but as a process of authoritative decision, including a continuing process of ascription of meaning to legal concepts such as states, and would emphasize control as well as authority, operations as well as perspectives.[7] Under this understanding, a decision to give a particular meaning to states will be regarded as lawful if it is made by an established decision-maker and in accordance with established criteria. A decision-maker or criterion is "established" if such is maintained by those who hold effective control in the community and supported by community expectations of how decisions in that community ought to be made. The wide variety of meanings given to the word states in the practice of the United Nations would all appear lawful when reviewed under this perspective.

In the following pages, I first elaborate on the record of practice, which has yielded these facially inconsistent meanings, provide illustrations where appropriate, and then discuss the legality of these meanings. At the outset, I should stipulate the temporal reference of my discussions. The critical time used to test statehood in this paper is the time at which an entity became or failed to become a member. Thus, for original members, the relevant time was the time when each of them became an original member in accordance with Article 3, and for subsequent members, when a decision on recommendation or admission was rendered or refused by the appropriate organ. This paper is not concerned with changes in the attributes of statehood occurring after an entity has become a member, including the attainment of statehood.

I. PROLIFERATION OF THE MEANING OF "STATES"

A wide range of meanings for the term "states" has come about from the application of the traditional definition, the sidelining of this definition followed by the application of other criteria of decision, and the restriction of the operation of the definition with an extrinsic condition.

A. Application of the Traditional Definition

In the practice of the United Nations, the traditional definition has been followed. For example, the Security Council was reported to take the following factors into account when acting on membership applications:

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7. I subscribe to the teachings of the New Haven school of jurisprudence and am indebted to its founders, the late Professors Myres S. McDougal and Harold D. Lasswell. Their theory about law appears in HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

> In connexion with the statehood of the applicant, reference has been made to such matters as the following: The possession or lack of settled frontiers; the mode of the establishment of the State; the bearing of a General Assembly decision; . . . relations with a former sovereign; . . . the necessity of ratification of peace treaties with ex-enemy applicants; disabilities resulting from the Second World War; the legitimacy of statehood obtained through aggression and conquest; defence arrangements with other powers; the *de jure* or *de facto* status of the applicant and its Government; recognition of the applicant by Members of the United Nations; the maintenance of diplomatic relations with other States.[8]

However, if one were to believe that the traditional definition had given the term states in the Charter a set of uniform and consistent meanings, that belief would be belied by the facts. Such a belief rests on an unwarranted assumption that the technical concepts of law comprising the definition have a fixed and plain meaning. People may think that the United Kingdom is a state under the traditional definition. But do they think that the United Kingdom is a state because it meets the definition of state or that the United Kingdom meets the definition of state because they think it is a state? The record indicates, first, that the decision-makers within the United Nations have applied the definition differently from those outside the United Nations. Secondly, within the United Nations, applications of the definition have been flexible showing the exercise of substantial discretion. The result is that the term has acquired a set of flexible meanings displaying inconsistencies. As early as 1948, a respected authority on international law and then Deputy Representative of the United States to the Security Council, Philip Jessup, made the following observation on uniformity:

> It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world. . . . [But] the term 'State', as used and applied in Article 4 of

8. U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council, 1946-1951, 272-73 (1954) (hereinafter "RPSC").

> the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks of international law.[9]

The point of flexible applications and meanings within the United Nations has been admirably discussed.[10] Following are the more glaring illustrations found in connection with the application of the criteria of government and the capacity to enter into foreign relations.

(1) A Permanent Population:

Applications for admission have rarely been challenged for lack of a permanent population. However, the "makeup" of an applicant's population has been raised to challenge its statehood, but the challenges did not seem to get anywhere. The question of makeup was probably raised on the thinking that foreigners residing in a claimant state, being there on sufferance, were not part of its permanent population. The decision implied that as long as an applicant had a permanent population, whether it constituted a minority or a majority of all those living in its territory, it satisfied the requirement of statehood. An illustration is the application of Kuwait. When Kuwait applied in 1961, the representative of Iraq discussed the issue of the constitution of the applicant's population in the Security Council as follows:

> The whole territory has a population of approximately 250,000 inhabitants, of whom more than 60 percent live in the town of Kuwait itself. The population outside the town is composed mainly of nomads who habitually roam the extensive deserts stretching from the southernmost reaches of Iraq to the heart of the Arabian peninsula. In the town of Kuwait itself, which is the only center of population in the territory controlled by the Sheikh, the majority of the inhabitants are considered by the Sheikh himself to be foreigners, and are therefore denied the rights and privileges normally accorded to citizens.[11]

The Soviet Union vetoed Kuwait's application on the ground of the latter's failure to meet the requirement of statehood. Kuwait reapplied two years later, and this time the Security Council voted unanimously to recommend admission. Since there was no indication in the record that the makeup of

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9. U.N. SCOR, 3rd Sess., 383rd mtg. at 10 (1948).

10. *See* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, Part I (1963); REISMAN, *supra* note 5, at 53-62.

11. U.N. SCOR, 16th Sess., 984th mtg. at 5, U.N. Doc. S/PV.984 (1961).

Kuwait's population had undergone any significant change since the first application, it must be the case that Kuwait could be held to have satisfied the requirement of a permanent population even though its nationals constituted only a minority of its residents. If Kuwait was a state in 1963, it must have been one in 1961.[12] In sum, "a permanent population" seems to mean a permanent population which may be no more than a minority of all those living in the territory of a claimant state.

(2) A Defined Territory

A notable case is the application of Israel. A resolution of the General Assembly proposed the establishment of an Arab state and a Jewish state in Palestine by partitioning this then-British mandate over the objection of Arab and other Islamic states on the ground of self-determination.[13] At the time, the population of the mandated territory was two-thirds Arab and one-third Jewish. The General Assembly's resolution had not been implemented. On May 14, 1948, one day before the announced termination of the mandate, a

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12. The irrelevancy of the makeup issue to statehood seemed obvious to many on the Security Council. Without any known significant changes in Kuwait's demography between 1961 and 1963, the representative of Ghana said, "Kuwait possesses all the attributes of an independent State." The representative of Venezuela said, "In the case of Kuwait all the conditions for admission to membership of the United Nations laid down in Article 4 have been met . . . . [Venezuela] [b]ases its support for the admission of Kuwait on the relevant legal principles." The representative of the Philippines said, "We are satisfied that Kuwait meets the exacting requirements for membership of the World Organization as set forth in Article 4 of the Charter." For these and other statements, *see* U.N. SCOR, 18th Sess., 1034th mtg., U.N. Doc. S/PV.1034 (1963).

The makeup of an applicant's population also has been raised as an ostensible issue when the opposition to the application was really based on a different reason. An illustration is the statement of the representative of Syria in 1948, which questioned the makeup of Israel's population but was obviously meant to impugn Israel's "legitimacy." The statement is as follows:

> We must also consider the people living on the land. The people in the area over which the Jews claim that they exercise *de facto* authority are not all Jews. The majority are not Jews. The majority of the population in that area is Arab. If the entire population of that area is taken into consideration, it can be seen that the majority of the people are against the formation of this State. If they were to be consulted, and if a plebiscite were held, we would find that the majority of the Arabs reject the idea of the formation of such a State. I do not speak now of all of Palestine, but of that area where the Jews claim to be exercising *de facto* authority. They have gained certain advantages over the Arabs simply by terrorism and armed force. Furthermore, they have expelled the Arab population, massacred the people, looted their property and oppressed them to such an extent that they have been compelled to leave their own country. Under such circumstances, we cannot consider that they have authority over people who are enjoying a democratic way of life, or who are living peacefully and in conditions of friendship and neighbourliness with others.

U.N. SCOR, 3rd Sess., 385th mtg. at 5 (1948).

13. G.A. Res. 181(II), U.N. GAOR adopted Nov. 29, 1947, 1947-48 U.N.Y.B. 247, U.N. Sales No. 1949.I.13.

State of Israel was proclaimed. Later in the same year Israel applied for admission. While the General Assembly's First Committee was discussing the future of Palestine, the Security Council acted on Israel's application. Questions were raised regarding Israel's territory. The representative of the United States characterized the issue as one of "undefined frontiers" only, which would not violate the requirement of a defined territory, and not one of "undefined territory", which would violate it, and explained:

> One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. . . . The formulae in the classic treaties somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.[14]

The representative of the Soviet Union argued that it was incorrect to question Israel's territory as undefined, since "[i]ts territory is clearly defined by an international decision of the United Nations, namely by the resolution adopted on 29 November 1947 by the General Assembly."[15]

On the other hand, the representative of the United Kingdom, the former mandatory of Palestine, clearly felt that Israel's situation raised an issue of undefined territory, stating: "The ultimate fate or at least the ultimate shape of the State of Israel remains yet to be determined and is not yet known."[16] The representative of Syria felt the same way, stating: "The State of Israel has no territory which is not contested. The Arab States and all the neighbouring States of the Near East contest the existence of that State; it is not only its frontiers that they contest, but the existence of the State itself."[17]

In any event, Israel was admitted into the United Nations the following year, 1949, after it had declared its readiness to comply with a General Assembly resolution on the internationalization of Jerusalem and on Arab refugees resulting from a war between Israel and five Arab states in 1948.[18]

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14. U.N. SCOR, 3rd Sess., 383rd Mtg. at 11 (1948).
15. *Id.* at 22.
16. *Id.* at 16.
17. U.N. SCOR, 3rd Sess., 385th mtg. at 3 (1948).
18. 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1461 (Rudolf Bernhart ed., 1995).

A remark that the criterion of defined territory "has never been interpreted very strictly"[19] certainly is apposite if the specter of "a defined territory" is no more than a spirit, even an embodied one, inhabiting some portion of the earth's surface.

In sum, a defined territory seems to mean an arguably undefined territory.

(3) Government

Similarly, the criterion of "government" has not been interpreted very strictly. An interesting illustration is the case of the application of the Principality of Monaco. The principality's territory totals 1.95 square kilometers. Of an estimated total population of 31,693, as of July, 2000, the ethnic composition was 40 percent French, 16 percent Monegasque, 16 percent Italian, and 21 percent other. Under a treaty with France in 1918,[20] Monaco, in exchange for France's protection, undertook to limit both the constitution and the operation of its government. Monaco's measures concerning the exercise of a regency or succession to the throne are always the subject of prior consultation with France, and the throne can only pass to a person of French or Monegasque nationality. While the Prince is the Head of State, the head of government is the Minister of State, who is appointed by the Prince from a list of three French nationals selected by the French government. Among the three Councilors of Government, the Councilor of the Interior is required to be a French national. Regarding the operation of the government, Monaco is required to exercise its sovereignty in complete conformity with the political, military, naval and economic interests of France. Monaco's measures concerning its international relations are always the subject of prior consultation with the French government. The French government may, on its own motion, send military or naval forces into the territory of Monaco for the maintenance of the security of the two countries.

Under the treaty regime, Monaco's government and governance are clearly subject to substantial control by France. Thus, the principality seems to enjoy a dubious degree of statehood.[21] Yet, in 1993, while the 1918 treaty

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19. HIGGINS, *supra* note 10, at 20. The learned author discussed other cases in *id.* at 18-20.

20. Treaty Establishing the Relations of France with the Principality of Monaco, July 17, 1918, France-Monaco, 981 U.N.T.S. 359 (1975).

21. Professor Crawford remarked: "The inclusion of Monaco in the category of protected States is probably a result *not of any indisputable qualifications for statehood* but of its widespread recognition and acceptance as a State." CRAWFORD, *supra* note 4, at 194 (emphasis added). 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 8th ed. 1955) obfuscated on the statehood of Monaco: "The present status of Monaco is not easy to classify. . . . [But meanwhile] it seems preferable to regard Monaco as an independent State in close alliance with France." *Id.* at 193, n. 5.

regime remained basically intact,[22] Monaco's application for admission was recommended by the Security Council without a vote[23] and approved by the General Assembly by acclamation.[24] The official records indicate no discussions of the issue of statehood.[25]

In sum, government seems to mean government constituted with or without foreign influence and more or less self-governing.

(4) Capacity to Enter into Relations with Other States

In 1948, the representative of the United States remarked:

> In so far as the question of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.[26]

In light of the time at which this remark was made, the phrase "some political entities" was probably in reference to some of the original members who were not sovereign states. Many subsequent members also show a lack of complete freedom in determining and implementing their foreign policies. Professor Reisman described the situation as follows:

> Most of the states admitted in the '60s had a number of common features. Virtually all were small. . . . Many were poor, in resource and technological senses. . . . Many had economic, customs, nationality and monetary ties which

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22. In 1963, France and Monaco concluded a *Convention Fiscale*, an agreement on taxation, which did not alter the 1918 treaty regime. *See* Convention Fiscale, May 18, 1963, France-Monaco, 658 U.N.T.S. 393 (1969).

23. S.C. Res. 829, U.N. SCOR, 48th Sess., 3219th mtg., U.N. Doc. S/PV.3219 (1993).

24. G.A. Res. 47/231, U.N. GAOR, 48th Sess., 104th mtg., U.N. Doc. A/47/PV.104 (1993).

25. Equally if not more intriguing is the admission in 1993 of Andorra, a feudal remnant whose co-princes are the French president acting in his non-governmental personal capacity and the Bishop of Urgel, Spain. S.C. Res. 848, U.N. SCOR, 48th Sess., 3251st mtg., U.N. Doc. S/PV.3251 (1993); G.A. Res. 47/232, U.N. GAOR, 47th Sess., 108th mtg., U.N. Doc. A/47/PV.108 (1993).

26. U.N. SCOR, 3rd Sess., 383rd mtg. at 10 (1948).

> linked them closely if not inextricably to a larger state. Many had defense arrangements with larger states which were extremely one-sided. Many had virtually no foreign policy apparatus. *Almost none of these points was raised in debate.*[27]

The states Professor Reisman referred to were basically newly independent states admitted during the period of acceleration of the decolonization movement. Both the original members the representative of the United States had in mind in 1948 and the subsequent members Professor Reisman talked about come more appropriately in the category of admission decisions that were made without regard to, rather than in the flexible application of, the traditional definition. Nevertheless, these cases reveal the meager role the criterion "capacity to enter into relations with other states" has played in the membership practice of the United Nations.

For an illustration of the flexible application of this criterion to an applicant that is neither an original member nor a newly independent state, we may conveniently revert to the above-discussed case of Monaco. Under the same treaty regime established in 1918, it is plain that Monaco does not enjoy sovereign rights in both the making and the implementation of its foreign policies. This prompted an observation that if Monaco were to have applied for admission in 1961 its application would have failed on the ground of lack of statehood.[28] However, Monaco was admitted without debate in 1993, although little had changed by way of Monaco's capacity to conduct its foreign affairs between 1961 and 1993.

In sum, capacity to enter into relations with other states seems to mean capacity, more or less limited, to enter into such relations.

II. TRADITIONAL DEFINITION SIDELINED: STATEHOOD OF ORIGINAL MEMBERS

Article 3 of the Charter provides:

> The original Members of the United Nations shall be the states which, having participated in the United Nations

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27. REISMAN, *supra* note 5, at 60.

28. The observation was made by Dr. Rosalyn Cohen, now Judge Rosalyn Higgins of the International Court of Justice. She wrote that:

> an examination of practice before the General Assembly and Security Council reveals that the lack of ability of a state to conduct its own foreign relations has been regarded as significant, and in no case of virtually total limitation upon sovereign rights in this regard has an entity been admitted to membership in the United Nations.

In an accompanying footnote, she cited Monaco as one of the examples of virtual total limitation upon sovereign rights to conduct foreign relations. Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1150 (1961).

> Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

But not all participants in the San Francisco Conference or signatories to the Declaration by United Nations were states under the traditional definition. Some of them were not states even at the time the Charter came into force.

The Declaration by United Nations[29] was a document signed by the U.S.A., the U.K., the U.S.S.R., and China as well as a number of other nations that were at war with the Axis powers, among them India. By its own terms the Declaration was open for adherence by "other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism."[30] It was adhered to by, among others, the Philippines, Syria and Lebanon. The Declaration formed a "wartime coalition" by these United Nations.[31] On October 30, 1943, the governments of the United States, the United Kingdom, the Soviet Union, and China issued a Declaration of Four Nations on General Security in Moscow.[32] In this document, the four nations recognized "the necessity of establishing at the earliest practicable date a general international organization based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security."[33] After they laid down the major contours of the international organization they had in mind in the Dumbarton Oaks Proposals,[34] the four governments, acting as "sponsoring powers," invited the entire wartime coalition[35] to the United Nations Conference on International Organization at San Francisco, as referred to in Article 3, for the purpose of completing the drafting of the Charter of the United Nations. During the conference, four additional participants, including the Byelorussian S.S.R. and the Ukrainian S.S.R., were invited on account of their contribution to the war effort.[36] The sponsoring powers had always

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29. Declaration by United Nations, January 1, 1942, E.A.S. 236 (1942).

30. *Id.*

31. *See* RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 50-56 (1958).

32. *See* Declaration of Four Nations on General Security, October 30, 1943, DEP'T ST. BULL. IX, 1943, at 308.

33. *Id.* at 309

34. Proposals for the Establishment of a General International Organization, October 8, 1944, DEP'T ST. BULL. XI, 1944, at 368.

35. Except Poland, whose provisional government of national unity was not yet formed at the time and which therefore could not participate. To make sure that Poland would be eligible for original membership upon formation of the provisional government, the otherwise redundant precondition, "having previously signed the Declaration by United Nations," was added to Article 3. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 156 (Bruno Simma ed., 1995).

36. *See* Doc. 42, P/10, 1 U.N.C.I.O. Docs. 344-359 (1945).

contemplated that the United Nations was to be established "with our allies."[37] Thus, when the invitation to the San Francisco Conference was presented to these allies, the Secretary of State of the United States issued a statement saying, "The responsibility for the establishment and maintenance of a peaceful world order is the common responsibility of all the United Nations."[38] There was a shared expectation among the wartime allies that not only victory in the war but also the securing of future peace and security was their joint responsibility and undertaking. Accordingly, the participants at the San Francisco Conference assumed this responsibility by making themselves the original members of the United Nations.

However, at the time of this conference, all the named entities in the above paragraph were not states within the traditional definition. This was known to all the participants.[39] In fact, it was suggested, though not acted upon, that the looser word "nations" be used in place of "states" in the Charter to refer to the original members.[40] A conference report mentioned that the membership of the original members was "considered as acquired by right," and explained that "the definition adopted [in Article 3] would serve to calm

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37. The Report of the Crimea Conference of February 12, 1945 stated:

> We are resolved upon the earliest possible establishment *with our allies* of a general international organization to maintain peace and security. We believe that this is essential, both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples.

Report of the Crimea Conference, February 12, 1945, 12 DEP'T ST. BULL., 1945, at 213, 214 (emphasis added).

38. Statement by the Secretary of State, March 5, 1945, 12 DEP'T ST. BULL., 1945, at 395, 396.

39. At the 5th plenary session of the San Francisco Conference, Mr. Molotov, the chief delegate of the U.S.S.R., stated:

> We have at this Conference an Indian Delegation. But India is not an independent state. We all know that the time will come when the voice of an independent India will be heard, too. Nevertheless we share the view held by the British Government which suggested that representatives of India should be granted a seat at this Conference, imperfect though her status is. We have at this Conference a Philippine Delegation. But the Philippines are not an independent country. We know full well that the time will come when we shall be able to hear the voice of independent Filipinos, too. But we have agreed with the United States Government, which suggested that the Philippines have a voice even with their present status.

Doc. 42, P/10, 1 U.N.C.I.O. Docs. 4-5 (1945).

The Soviet attitude on the status of Byelorussia and Ukraine was interesting. Before Yalta, Ambassador Gromyko suggested that most of the sixteen Soviet republics were much more important than Liberia or Guatemala, but when asked if they were independent, he gave an emphatically positive answer with a caveat that they also were "very intimately connected as members of a federation." RUSSELL, *supra* note 31, at 509. At Yalta, Mr. Molotov explained that on the independence status of the Soviet republics, "his Government was prepared to follow the example of the British dominions, which had approached independent international status *gradually*." *Id.* at 533 (emphasis added).

40. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 157. Actions taken at San Francisco on this issue were summarized in RUSSELL, *supra* note 31, at 927-29.

the fears of certain nations participating in our deliberations which, properly speaking, are not *States* and which for this reason might be denied the right of membership in the Organization."[41] The record is, therefore, clear that the traditional definition was deliberately sidelined at San Francisco. When the Charter came into effect on October 24, 1945, India was still a non-self-governing entity under the rule of the United Kingdom,[42] the Philippines was an overseas possession of the United States,[43] Lebanon and Syria were mandated territories under the administering authority of France,[44] and Byelorussia and Ukraine were constituent republics of the Soviet Union.[45]

In sum, under Article 3, "states" seems to mean not only states under the traditional definition but also territorial bodies politic that failed to comply with this definition.

III. TRADITIONAL DEFINITION SIDELINED: STATEHOOD AND DECOLONIZATION

The impact of decolonization on membership practice has been succinctly summarized:

> The 'radicalization' of the principle of self-determination of peoples . . . in favor of a speeding up of decolonization . . . led to a broadening of the spectrum of statehood and to new types of states, inducing a new practice and adaptation of the application of Art. 4. Leaving aside exceptional cases . . . the admission of states which had gained their independence in the course of decolonization as a rule took place without even mentioning the criteria referred to in Art. 4(1). The admission of new member states thus became a mere procedural formality, permitting the automatic admission of even micro-states . . . . The UN having thus reached its status

41. *Report of the Rapporteur of Committee* I/2., 7 U.N.C.I.O. Docs. 325 (1945).

42. India became a self-governing dominion on August 15, 1947.

43. The Philippines became independent on July 4, 1946.

44. Although independence for Lebanon was proclaimed by France on November 26, 1941, it was subject to a treaty to be concluded, and France continued to exercise authority in Lebanon. It was not until December 31, 1946 that the treaty was signed and France withdrew its troops from Lebanon.

As to Syria, the French *Troupes Speciales du Levant*, stationed in Syria to maintain security, did not completely leave until April 15, 1946 when France voluntarily complied with a proposed resolution which failed adoption on account of a veto. On the Security Council's actions on the Syria and Lebenon question, see 1946-7 U.N.Y.B. 341-45, U.N. Sales No. 1947.I.18.

45. *See supra* note 40.

> of quasi-universality, the practical relevance of Art. 4 of the Charter has become more or less reduced to solving special cases and problems.[46]

Thus, in the admissions of newly independent states, the traditional definition was not merely subjected to flexible applications but given short shrift or sidelined.

Indeed, when an application was from an entity newly emerged independent from colonial or other forms of non-self-governing rule, the "deliberations" in the Security Council were uniformly ceremonial. The members would take turns to speak, and the former metropolitan power, if not a member, would be invited to speak first. The speeches fell into a pattern and would typically include: orations of satisfaction on the successful worldwide movement of self-determination and at the peaceful achievement of independence by the applicant; expressions of warm welcome to an applicant willing and well-qualified to shoulder the heavy responsibilities of membership in light of its history, human and natural resources; expressions of best wishes for a prosperous and successful future; tributes, usually by Western representatives and their friends, to the former metropolitan power for a job well done in guiding the applicant to independence; and sympathies, usually from the representatives of Soviet Union and Eastern-bloc states, for the lengthy subjugation and the difficult road to independence endured by the applicant. The question of the statehood of the applicant, when mentioned occasionally, was usually subsumed in a cursory and perfunctory statement that the speaker's government considered the applicant qualified under Article 4(1) of the Charter. No representative seemed to seriously care about the traditional definition at all. The Committee on Admissions became virtually irrelevant. The General Assembly was no less, if not more, welcoming. Hence, it did not matter if the applicant relied heavily on the former metropolitan power for finance, defense and security, continued to have troops from the latter stationed on its territory, was politically and structurally integrated with it, or, in a glaring case summarized below, did not even have a government.[47]

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46. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 161.

47. The General Assembly seemed to be well aware of the fact that some newly independent states would be less endowed and developed in resources and institutions. Since colonialism was taken to be "contrary to the Charter of the United Nations and . . . an impediment to the promotion of world peace and co-operation," the General Assembly not only declared that "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence," but also adopted resolutions to express the opinion that these newly independent states should be admitted forthwith upon attaining independence. The quoted passages appear in Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A.Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4686 (1960). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028

The Congo (Leopoldville) attained independence from Belgium on June 30, 1960. Within one week, its national *force publique* mutinied against its officers who were Belgians. On July 7, the Security Council voted to recommend its admission to membership at the United Nations.[48] The dispatch by Belgium of paratroopers to protect Europeans and to restore order rekindled strong local anti-colonial feelings. A violent civil war was also raging, involving several political factions respectively led by Joseph Kasavubu, Joseph Mobutu, the followers of Patrice Lumumba, Antoine Gizenga, and Cyrille Adoula, all of whom attempted to seize political control of this newly independent country. The United Nations became deeply involved in peace-keeping in the Congo. In spite of the actual conditions then prevailing in the Congo,[49] the General Assembly adopted by acclamation a draft resolution sponsored by Tunisia to admit it on September 20.[50] It was the practice of the General Assembly that, following the declaration of the admission of a new member by the President of the General Assembly, the delegation of the new member would be escorted to its place in the Assembly hall. In the case of the Congo, because of the state of "civil war"[51] or "political anarchy,"[52] no

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(1971) (hereinafter Declaration on Friendly Relations).

48. U.N. SCOR, 15th Sess., 872nd mtg. at 1-18, U.N. Doc. S/PV.872 (1960).

49. In addition to the phenomenon of competing governments, the Congo was faced with the attempted secession of the provinces of Katanga and South Kasai. On July 22, 1960, the Security Council adopted a resolution calling for the speedy withdrawal of Belgian paratroopers, which contained this language in the preamble: "the Security Council recommended the admission of the Republic of the Congo to membership in the United Nations as a unit." The phrase "as a unit" was explained by a co-sponsor of the resolution as follows:

> In the situation that exists in the Congo at the present time, it is well for us to bear in mind the fact that the Security Council agreed to recommend the Republic of the Congo for admission to the United Nations as the Congo that existed on 7 July 1960, as the Congo composed of the several provinces of which it is constituted, and the Congo for which was established a central government . . . when we speak of the Congo, we mean the Congo as the Republic of the Congo – the whole unit, including all its provinces . . . when we recommended the Republic of the Congo for admission, we had no idea of any separate parts of the Congo, . . . and therefore, this Council can take no cognizance of any position that the Congo is divided or that it is now no longer the same Congo which we, on 7 July 1960, recommended for membership in the United Nations.

1 Repertory of Practice of United Nations Organs, Report by the U.N. Secretary-General, Supp. No. 3, at 185-86 (1972).

50. U.N. GAOR, 15th Sess., 864th plen. mtg. at 6 (1960).

51. Donald McNemar, *The Postindependence War in the Congo, in* THE INTERNATIONAL LAW OF CIVIL WAR 244 (Richard Falk ed., 1971). The author wrote: "A civil war is defined here as a violent struggle over political control of a state occurring entirely within the geographic boundaries of that state. The Postindependence War in the Congo fulfills these requirements and is here analyzed as an example of a civil war." *Id.* at n. 1.

52. In his address delivered upon the opening of the General Assembly's meeting of September 20, 1960, Temporary President Belaundo, referring to the Congo, said: "The Congo crisis has also been dealt with as a regional matter. An appeal had to be made to the solidarity of the African peoples, who were concerned to save the young Republic from *political anarchy* and economic chaos." U.N. GAOR, 15th Sess., 864th plen. mtg. at 2 (1960) (emphasis added).

delegation took its place in the Assembly hall. The remarks of the President of the General Assembly, which turned the case from one of "lack of government" into one of mere "proper credentials," were most revealing:

> As Members of the Assembly are aware, the situation in the Congo has been the subject of much discussion in the United Nations within recent weeks and even within the past few days, and the constitutional and political position in that country still remains, unhappily, far from clear. In these circumstances, we are faced with a difficulty as regards the implementation of the resolution we have just adopted. The difficulty is one for the Assembly itself, and I would suggest to the Assembly that the best solution of this would be to refer it to the Credentials Committee. As I hear no objection to this proposal, it will be considered as adopted.[53]

Even though the Security Council had recommended admission just before the government in the Congo collapsed, the General Assembly was entitled and obligated to exercise its own judgment.[54] The General Assembly plainly ignored the criterion of "government" in the traditional definition.

In sum, "states" seems to mean a territorial body politic newly freed from colonial or other non-self-governing rule and more or less independent.

IV. STATEHOOD AND THE "DIVIDED STATES"

In the context of the United Nations, the term "divided states" has been used to describe the division of Germany, Korea and Vietnam after World War II as a part of the larger East-West conflict.[55] It has not been used to refer to the situation that has been prevailing in China since 1949, which has been rightly or wrongly but at any rate officially treated as a case involving the question of representation only.[56] With respect to the divided states, it would seem that each in every pair was clearly qualified as a state under the traditional definition, at least in comparison with some of the members of the

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53. *Id.* at 6.

54. There certainly was no lack of precedent for the General Assembly to take into consideration post-recommendation events and make an independent judgment accordingly. Thus, the General Assembly decided, on September 20, 1960, to postpone action on the application of the Federation of Mali, which became separated into Mali and Senegal after Security Council's recommendation of June 28, 1960. Repertoire of the Practice of the Security Council Supp. 1959-1963, at 141.

55. *See* THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166-67.

56. In 1963, Dr. Higgins wrote that the situation in China did not present a "problem of statehood *stricto sensu*, but rather a problem of the representation of an undeniably existent state, that of China. It is, of course, quite possible to approach the problem with the view that by now two separate states of China may exist." HIGGINS, *supra* note 10, at 42.

United Nations. But, for each, compliance with the traditional definition of statehood was not enough for it to qualify as a state for the purpose of membership, and the status of statehood of each, to be acceptable, was made conditional upon an agreement with the other entity of the same pair. The two might agree either to separate or to reunify, and their agreement would be respected. But, until agreement, an application for admission by either was certain to be blocked by the cold-war allies or friends of the other by a control over the number of votes or by a veto. The blocking was usually justified in part by the assertion that the applicant was not a state but a mere "zone of occupation," "puppet regime," and the like. A unilateral move to apply without the needed agreement, even accompanied by a proposal that the other in the pair be simultaneously admitted, would still be doomed to failure. Thus, as aptly summarized, "Divided states were in fact admitted to the UN only after the conflicting claims of the two sides had been formally adjusted, either in favour of division . . . or in favour of reunification."[57]

This extrinsic requirement of agreement led to a stalemate, which could not be broken until an agreement was reached. For a long time, none of the parts of divided states was able to secure admission. An agreement was first reached between the two Germanys in favor of division. This was made possible during a period of detente by the success of Chancellor Brandt's *Ostpolitik* which brought about a Basic Treaty between the "two German states in one German nation" in 1972.[58] The treaty paved the way for admission of both Germanys in 1973.[59] In 1991, the two Koreas were admitted after a "South-North Basic Agreement" had defined the two sides as forming a "temporary special relationship" toward eventual reunification. In the case of Vietnam, the unification of the whole nation by the Socialist Republic of Viet Nam rendered the divided-state issue moot, and the Socialist Republic was admitted in 1977.

In sum, "states" did not mean an entity in a divided state, no matter how qualified it might be as a state in comparison with some members, until the other entity in the pair consented to its statehood.

V. LEGALITY OF ALL MEANINGS

The proliferation of meanings, reviewed above, may have given the impression that decisions on statehood are an unprincipled and promiscuous affair, and that it is all a matter of power politics. Professor Reisman once observed:

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57. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166.

58. *See* MARY FULBROOK, THE DIVIDED NATION: A HISTORY OF GERMANY 1918-1990, at 207-210 (1992).

59. Information on the year in which a member state is admitted to the United Nations is available on line at http://www.un.org/Overview/growth.htm.

> In practical application, Article 4(1) really says little more than that those applicants will be admitted which the Security Council and the General Assembly (or in more political terms, the effective elites of the world) think ought to be admitted, a conclusion which the International Court appears to have obliquely and perhaps reluctantly reached. . . .[60]

But the key is the language, "think ought to be admitted." Neither the Security Council nor the General Assembly enjoys absolute unfettered freedom to "think" what it "ought" to do. Both organs are made up of and act through their respective members, who are naturally expected to act so as to maximize their own positions in power and other values. The bearings of the members' perceived interests, including their common interests in law and order, upon the decision processes of the two organs disciplines the thinking and actions of these organs.

I submit that the decisions on statehood in the practice of the United Nations are generally lawful. A decision is lawful if it is made by an established decision-maker and in accordance with established criteria. A lawful decision is always supported by enough "effective control" in order to be put into effect, and a decision without the support of effective control is little more than mere illusion or pretended authority. All of the decisions I discussed were made by the holders of effective power in the world power process: the victorious wartime coalition which at the time formed the majority of the states of the world and the members of the Security Council and of the General Assembly who alone could vote on applications for admission in their respective organs. Power politics not only did not render the decisions unlawful but also was an indispensable component of their legality. It is control enjoyed by the power elites that guarantee the effective implementation of decisions. But effective decision-makers cannot claim legality for their decisions if they act capriciously or whimsically. Lawful decisions need to be supported also by "formal authority" if they are not to be displays of naked power. The effective decision-makers were expected by the community to be the decision-makers with regard to the membership decisions they made. Furthermore, they made their decisions in accordance with community expectations as to how decisions on membership should (and should not) be made and as embodied in a number of rules and principles of international law, which display perspectives of authority. Since both control and authority were present in all the decisions reviewed above, they are lawful. It is convenient to elaborate separately with reference to original members and subsequent members.

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60. REISMAN, *supra* note 5, at 54.

1. Original Members As States

Decision-Makers

The founders of the United Nations were the decision-makers on who should constitute the original members of the organization, and they made themselves the original members. Each of them became an original member upon its ratification of the Charter. Under Article 3, the ratification must be in accordance with Article 110, which requires a deposit of ratification, but this latter provision is ministerial and does not prescribe substantive qualifications for original membership.[61] Of course, a ratification made before the Charter comes into force cannot operate to make the ratifying state an original member until the Charter comes into force and the organization comes into existence. A ratification made after the Charter is in force operates to make the ratifying state an original member upon deposit of the ratification.[62] The Charter entered into force on October 24, 1945, upon the deposit of ratifications by, among others, Byelorussia and Ukraine. Before that date arrived, the Philippines, Lebanon, and Syria had already deposited their ratifications. Thus, for these five entities, original membership status commenced on October 24, 1945. As already mentioned, on that date, Byelorussia and Ukraine were constituent units of the U.S.S.R., the Philippines were still an overseas possession of the U.S.A., and Lebanon and Syria were under the mandate of France. India deposited its ratification and became an original member on October 30, 1945, when it was under the British raj. Therefore, none of these six original members on the relevant date fit the traditional definition of statehood known to international law, and yet the founders, including the six themselves, decided to call themselves officially "states."

Criteria of Decision

International law defers to the judgment of founders of international organizations on who should be their members. It is the founders that set the purpose of an organization and are uniquely interested in ensuring its effective functioning. Therefore, where the founders have explicitly specified the conditions for membership in the constitutive document, their specifications are respected and unalterable.[63] Where a question pertaining to eligibility for

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61. See THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 1191-95. The suggestion that Article 110(4) is a substantive provision on the criteria of original membership is a doubtful one. *See id.* at 1194. Article 3 deals with "membership," and Article 110(4), only with "signing and ratification." *Id.*

62. *See* U.N. CHARTER arts. 110, paras. 3 & 4.

63. *See* Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57 (May 28).

membership is not explicitly covered in the constitutive document, it is likely to be resolved in the interest of the effective functioning of the organization, by considering the ability of a candidate to comply with the obligation of membership or to participate in the normal activities of the organization.[64] The founders of the United Nations, including the above-mentioned six in question, either formed a part of the wartime coalition or contributed significantly to the war effort and the final, complete victory. They were united in common purposes and enterprises. It was their shared conviction that the maintenance of public order in the world community after the war would require an international organization as they envisioned. At the time of the founding of the United Nations, they held the effective power in the world community. In undertaking the responsibility of founding the United Nations, they echoed the general expectations then prevailing in the world community relative to the securing of international peace, security and abundance after the war.[65] Their actions indicated support of effective control and formal authority. In Article 3, they concluded that the original members of the United Nations should include all of the founders, including the six in question. To borrow from the International Court of Justice, "[F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law,"[66] to decide who should be its original members.

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64. Thus, under the regime of the Treaty of Versailles, Poland was in charge of the conduct of foreign relations of the Free City of Danzig, and in connection with its foreign relations the Free City was not entitled to call upon Poland to take any step opposed to the latter's interest. The Permanent Court of International Justice was requested to render an advisory opinion as to whether the Free City, under this special legal status, could become a member of the International Labor Organization. Since membership in the ILO would unavoidably obligate the Free City to take steps that would fall within the sphere of its foreign relations, which could be objected to by Poland on the basis of Polish policy, the Court was of the opinion that this special legal status rendered the Free City unqualified for membership. Free City of Danzig and International Labor Organization, 1930 P.C.I.J. (ser. B) No. 18, at 1 (Aug. 26). The Court explained:

> The Free City as a Member of the Labor Organization could not take any such steps itself. It would be obligated to use the Polish Government as its intermediary . . . [and] the Polish Government would be entitled to refuse to take these steps on behalf of the Free City if they were prejudiced to important interests of the Polish State.
>
> The Court has not found any provision in Part XIII [of the Treaty of Versailles] which absolves a Member of the Labor Organization from complying with the obligations of membership or excuses it from participating in the normal activities of the Organization if it cannot first obtain the consent of some other Member of the Organization. . . . [T]he Court considers that the Free City of Danzig could not participate in the work of the Labor Organization.

Id. at 15-16. Obviously, the compliance with the obligations of membership and the participation in the normal activities by its members are indispensable to the effective functioning of an international organization.

65. These expectations are articulated in the Preamble to the Charter and were asserted by the governments of the original members when they ratified the Charter.

66. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, at 185 (Apr. 11).

The document that was adopted in San Francisco is a treaty. The participation by the six in the conclusion of a general treaty of overriding importance conceivably could raise an issue of competence.[67] It should be pointed out, however, that the participation of the six was on the motion of the U.S.A., U.K., U.S.S.R., and France,[68] the very states that enjoyed sovereignty or administering powers over them. Furthermore, in San Francisco, the founders, including these four sovereign or administering powers, were fully aware of the meaning of "states" under the traditional definition and the nonconformity of the six with that definition. Nevertheless, they chose to ignore the traditional definition and to refer to the six, as well as all other founders, as "states." That they acted knowingly and deliberately is beyond doubt. For in so acting, they actually forsook a suggested alternative of masking this nonconformity with a more ambiguous word, "nations." Under international law, parties to a treaty are entitled to adopt special meanings and conclude a treaty accordingly.[69] Where a special meaning has been adopted, it will override the ordinary meanings that may be obtained under general rules of interpretation.[70] In San Francisco, the founders explicitly agreed that "states" included the six in question and confirmed this by their ratifications of the Charter. Consequently, the term "states" in Article 3 lawfully means mandated territories, overseas possessions, constituent units as well as states within the traditional definition of international law.

2. *Subsequent Members*

Decision-Makers

Article 4(2) provides: "The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly

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67. 1 L. OPPENHEIM, INTERNATIONAL LAW, supra note 21, states:

> A State possesses the treaty-making power only so far as it is sovereign. States which are not fully sovereign can become parties only to such treaties as they are competent to conclude. It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States. . . . Thus, again, it depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States.

Id. at 882.

68. Although not a sponsoring power, France did "request" that invitations to the San Francisco Conference be sent to Lebanon and Syria upon being informally consulted after the four sponsoring powers had already agreed to invite the two entities. RUSSELL, *supra* note 31, at 627-28.

69. For a contemporary formulation, *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 8 I.L.M. 679.

70. 1 L. OPPENHEIM, INTERNATIONAL LAW, *supra* note 21, at 951:

> "In regard to interpretation given by the parties themselves, and which overrides general rules of interpretation, there are different ways open to them. They may either agree informally upon the interpretation, and execute the treaty accordingly . . . ."

upon the recommendation of the Security Council." Accordingly, the decision-makers, regarding the applications for subsequent membership, are the Security Council, whose recommendation is indispensable,[71] and the General Assembly, whose decision effects an admission. Without the recommendation of the Security Council, because of either a negative vote or inaction, an application cannot go forward to the General Assembly and is "dead" for all practical purposes until the Council again takes it up. Since a negative decision of the Security Council is not subject to review, it is in that sense "final." Thus, every time the Security Council declines recommendation to an applicant on the ground of lack of statehood, that decision officially gives final meaning to the term "states" in Article 4. But a positive decision of the Security Council to recommend, which necessarily includes a favorable finding on statehood, does not control the General Assembly, which is entitled to make its own "decision" on the statehood of the applicant. Between the two organs, the General Assembly has shown itself to be more willing to admit an applicant for membership than the Security Council. The General Assembly has many times requested the Security Council to reconsider applications that the latter had refused to recommend and passed resolutions to express a favorable opinion on individual applicants prior to their consideration by the Security Council. It was the General Assembly's frustration over a deadlocked Security Council, which as a consequence made no recommendations for admission, that precipitated an attempt to bypass the latter and eventually an advisory opinion of the International Court of Justice.[72] The Court, in its opinion, stated that

> the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend.[73]

Criteria of Decision

In passing on the statehood of applicants, the two organs of the United Nations appear to have honored a number of authoritative criteria of decision. Of course, the traditional definition of international law is one. Even when it was subjected to flexible applications, it was still followed. This is because

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71. Efforts to bypass the Security Council ended in failure. *See* Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3).

72. For the history of this long deadlock, see CASES ON UNITED NATIONS LAW 55-91 (Louis B. Sohn ed., 2nd rev. ed. 1967). The advisory opinion is at 84.

73. *See id.* at 88.

the traditional definition, like all other rules of law, is not absolute and autonomous. The technical concepts that comprise that definition, including that of "state," are but words, and words do not have fixed meanings. They point to no absolute and constant referents and can take on variant meanings.[74] The specific meaning a decision-maker may give on a particular occasion is a function of many predispositional and environmental variables. The great hodgepodge of meanings of "states" thus ascribed by decision-makers over a period of half a century through flexible applications of the traditional definition is clearly inevitable.

One principle that has lent legitimacy to the practice of loose interpretations of legal concepts and of liberal admission decisions is that of universality. Although the Charter does not provide for automatic universal membership, but only for conditional admission, the principle of universality has never ceased to surface in deliberations on membership matters and has received widespread support. However, actual practice indicates that this support has been limited. Thus, while the principle has appeared in the preamble of resolutions, it has never been included in the operative part of any resolution. Draft resolutions that have included the principle in their operative parts either had to be withdrawn upon a perception of a failure to pass because of the inclusion or were passed only after the reference to the principle had been deleted by amendment.[75] The steadfast adherence to placing the principle only in the preamble and not in the operative part is significant. Preambles state reasons for and the purposes of resolutions, including supporting perspectives of authority; only operative parts prescribe policies and make dispositions, including decisions of admission. The principle of universality is comprised of a "demand" for universal membership and the "expectation" that it is not a binding rule but a standing expression of authority with considerable support in the community. Such a principle, when invoked by those in effective control without objection, would seem to lend legitimacy to

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74. The following remarks in a contracts case under municipal law, are apposite generally:

> A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, and it may take on values from the words and ideas with which it is associated. Words are the product of history and their meaning may change with time, place and social group. As expressed by Mr. Justice Holmes . . . "A 'word' is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Pearson v. State Soc. Welfare Bd., 353 P.2d 33, 39 (Cal. 1960)(quoting Towne v. Eisner, 245 U.S. 418, 425).

75. I RP 173-74. Verbal support for the principle likewise has not been all out. For example, when the Secretary-General indorsed the idea that the United Nations should be "as universal as possible," an idea on which, according to him, "there has never been a serious difference of opinion," he nevertheless confined his support to the pending applicants only. He stated, "in my capacity as Secretary-General of the United Nations, I wish to support the admission to membership of all the States *which are applying today*." *Id.* at 173 (emphasis added).

decisions that would otherwise have been mere exercises of naked power. Thus, a decision of admission based on the principle of universality is both controlling and authoritative.

The principle of universality can reinforce legality in two types of cases. First, sometimes a flexible application of the traditional definition may appear to exceed the proper limits of flexibility, and the principle of universality could provide a needed reinforcement. A case in point is the admission of Monaco, whose statehood had for long been doubted by scholars and who once filed but then withdrew an application for admission to the League of Nations. As the United Nations was becoming almost universal, membership for Monaco, an entity that was already a member of a number of international organizations and generally recognized by other states, became more understandable in the light of the principle of universality.[76] Secondly, the principle gave added, though not really needed, credence to all the admissions decisions rendered without regard to the traditional definition but in accordance with the principle of self-determination.[77] In fact, the principle was frequently mentioned in the speeches in support of those decisions. The case of the admission of the Congo by the General Assembly illustrates both types of cases.

The principle of self-determination has supported the admission of about two-thirds of all subsequent members. It is included in Article 1(2) of the Charter as one of the purposes of the United Nations.[78] It is not necessary to get involved in the argument on whether self-determination, as stated in the Charter, is a binding legal prescription or a mere political prescription specifying a program of action for the organization. "Over the years," as one respected publicist observed, "Member States of the UN gradually turned that standard into a precept that was also directly binding on States."[79] This process depicts member states exercising their effective power to lend support to the broad concept of self-determination to the extent of one or another specific subject of concern, thus transforming, to that extent, a vague standard, even if still largely political, into a binding legal prescription. The subject that first became thus conjoined by control and authority was that of decolonization.[80] Self-determination in the sense of decolonization has been

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76. *See* CRAWFORD, *supra* note 4, at 193-94.

77. For some random examples of actual invocation of the principle for support of decisions in favor of admission, see statement of the representative of Yugoslavia on the application of Morocco, U.N. SCOR, 11th Sess., 731st mtg. at 6 (1956); statement of the representative of Cuba on the application of Sudan, U.N. SCOR, 11th Sess., 716th mtg. at 8 (1956); respective statements of the representatives of Argentina and Ecuador on the application of Malagasy, U.N. SCOR, 15th Sess., 870th mtg. at 11 (1960).

78. U.N. CHARTER art. 1, para. 2 : "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

79. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL 43 (1995).

80. The gradual development of self-determination as a political postulate into binding

regarded as not merely a legal norm but perhaps even a peremptory one as well.[81] When admissions decisions in favor of entities newly independent from colonial or other non-self-governing rule were judged in the light of this principle, their legality was scarcely open to question. Flexible application of the traditional definition and the principle of universality could provide useful justifications for these admissions decisions, but they are hardly necessary, since self-determination could provide a direct and independent justification for them. Also unnecessary are such doctrines as "sovereignty in abeyance"[82] and "inherent sovereignty,"[83] which are highly ambiguous.[84] They make one wonder whether newly independent entities should be held to be states because they enjoyed sovereignty in abeyance or whether they enjoyed sovereignty in abeyance because they should be held to be states. On the other hand, the proposition that, under the Charter, the territory of a colony or other non-self-governing territory has a status separate from that of the administering state forms a part of the binding norm of self-determination.[85]

A policy in favor of reunification of the divided states prevailed in the United Nations to govern the status of statehood of the two divided parts. This policy was implicitly indicated in 1947 in a resolution of the General Assembly concerning the independence of Korea.[86] It was expressly stated in 1948 in a follow-up resolution on Korea in which the General Assembly referred to the unrealized objective of "unification of Korea" and "call[ed] upon Member States to refrain from any acts derogatory to the results achieved and to be achieved by the United Nations in bringing about the completed

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treaty and customary norms is surveyed in *id.* Pts. I & II.

81. "[T]he principle of equality and that of non-discrimination on racial ground which follows therefrom, both of which principles, like the right of self-determination, are imperative rules of law." Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun). *Cf.* CASSESE, *supra* note 79, at 133-40.

82. "Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State." International Status of South West Africa, 1950 I.C.J. 128, 150 (July 11) (separate opinion of Judge McNair).

83. "Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 68 (June 21) (separate opinion of Vice-President Ammoun).

84. For a brief elaboration of these doctrinal formulations, see REBECCA WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 57-60 (1986).

85.

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter [of the United Nations], a status separate and distinct from the territory of the State administering it; and such separate and Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Declaration on Friendly Relations, *supra* note 47.

86. G.A. Res. 112, U.N. Doc. A/519, at 16-18 (1947).

independence and *unity* of Korea."[87] In 1955, in the famous "package deal" resolution, the General Assembly explicitly reiterated this preference.[88] A policy in favor of reunification of divided states can also draw support from the important General Assembly Declaration on Friendly Relations,[89] which has been held as representing customary international law by the International Court of Justice.[90] The Declaration, even as it proclaimed and elaborated on the principle of equal rights and self-determination of peoples, took care to add: "Every State shall refrain from any action aimed at the partial or total disruption of the *national unity* and *territorial integrity* of any other State or country."[91] It should occasion no surprise that such a policy would exist in an organization made up of states, all of which are naturally interested in national unity and territorial integrity. Under that policy, statehood of each in a pair was deferred until an agreement on the issue was reached between the pair. If the pair agreed that they should each be a state or that they should reunify into one state, their agreement would be respected. If one were to go by the traditional definition, each divided entity in every pair would seem to easily qualify as a state.[92] Cold-war politics, however, made sure that an application from an entity in a divided state, acting unilaterally and without the requisite agreement, would be met with either a failure to receive a sufficient number of affirmative votes or a veto in the Security Council. Thus, a unilateral application was abhorrent to those in effective control. But a unilateral application also contravened community expectations as expressed in the policy of favoring reunification. The record of practice has been succinctly summarized as follows:

> With regard to states divided as a consequence of the East-West conflict, the issue of the admission of one or both states

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87. G.A. Res. 195, U.N. Doc. A/810, at 25-27 (1948) (emphasis added).

88. G.A. Res. 918 (X), U.N. GAOR, 10th Sess., Supp. No. 19 (1955), U.N. Doc. A/3079, 1955 U.N.Y.B. 30, U.N. Sales No. 1956.I.20.

89. Declaration on Friendly Relations, *supra* note 47.

90. In Military and Paramilitary Activities in and Against Nacaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), the International Court of Justice said: "The effect of consent to the text of such resolutions [as the Declaration on Friendly Relations] . . . may be understood as an acceptance [as customary international law] of the validity of the rule or set of rules declared by the resolution by themselves." *Id.* at 100. The Declaration was adopted without a vote, i.e., by consensus.

91. Declaration on Friendly Relations, *supra* note 47 (emphases added).

92. On the opposition of the D.D.R.'s (East Germany's) application by the U.S.A., the U.K. and France in 1966 on the ground of, inter alia, statehood, Professor Reisman remarked: "If Guyana, Barbados and Lesotho were states and the D.D.R. was not a state, the word 'state' plainly had some mystical metaphysical attributes requiring serious scholastic inquiry. The opposing states themselves apparently changed their minds in 1973, withdrawing their objections to the D.D.R.'s admission to the United Nations. The case is instructive. Where state elites wish to bar an applicant for reasons of *realpolitik* they draw on complementary attributes of 'statehood' not otherwise used. Effective power must be considered when attempting to predict admission decisions." Reisman, *supra* note 5, at 59-60.

> to the UN presented itself for one side as a means of reinforcing a claim to independent statehood which was otherwise questioned. For the other side, it meant the loss or, at any rate, limitation on the option of reunification. In Res. 918 (X), December 8, 1955, the GA expressed an explicit preference for the reunification of divided states, which led to the exclusion of the two Koreas and Vietnams from the 'package deal' (applications by the two German States were not pending at the time). In fact, it was only this express preference which made the 'package deal' possible at all.

Divided states were in fact admitted to the UN only after the conflicting claims of the two sides had been formally adjusted, either in favour of division (in the view of one side possibly only on a provisional basis) or in favor of reunification.[93]

IV. CONCLUSION

The two provisions on membership of the Charter used the term "states." Over a period of half a century, that term has been interpreted and given meaning in connection with applications for admission to the United Nations. If it ever had a certain meaning in the belief of any person, it was his "own linguistic education and experience"[94] that gave him that belief. "This belief," however, in the words of Justice Traynor, "is a remnant of a primitive faith in the inherent potency and inherent meaning of words."[95] The decision-makers, with their divergent linguistic and other predispositions and acting in different contexts, have given the term a splendid array of apparently incongruous meanings. These meanings reflect varying combinations of authority and control and hence law.

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93. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166 .

94. 3 CORBIN ON CONTRACTS §579 (1960 ed.& Supp. 1964).

95. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643-44 (Cal. 1968).