

Participation of States in the International Conference of the Red Cross and Red Crescent and assemblies of other international organizations

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Abstract

The International Conference of the Red Cross and Red Crescent ('International Conference') is one of the few international fora in which governments take part on an equal footing with other entities. The origins of the International Conference, and its capacity to adopt decisions that are binding on both National Red Cross and Red Crescent Societies and on governments in their dealings with National Societies as their auxiliary partners, give rise to special considerations concerning state participation. This article provides an overview of the models for participation in the assemblies of other international organizations, and how problematic cases have been dealt with in various fora. The authors then examine the participation of states and other political entities in the International

Conference, as well as the controversial cases that have put the Conference to the test.



In 2007, the 30th International Conference of the Red Cross and Red Crescent was held in Geneva. As with many of its predecessors, organizers had to cope with difficulties concerning participation entitlements for either states or National Societies. The reasons for their respective difficulties vary somewhat, owing to the character of National Societies within the International Red Cross and Red Crescent Movement ('the Movement') and their distinction from states as parties to the Geneva Conventions. This article will not address National Society issues, which are handled within the Movement itself. Instead, it will concentrate on problems of state participation, which have sometimes been of such political gravity that they have led to International Conferences being postponed or even cancelled.

Which entities are eligible to participate under the banner of statehood?¹ Who is entitled to represent an existing state where government authority (or its legitimacy) is in dispute? These questions have aroused controversy to an extent that few substantive issues have matched, and the Conference is certainly not alone in having to navigate them. Indeed, when disagreements regarding statehood or legitimacy arise, international fora frequently become a strategic platform for entities to assert a right to have their say in international relations, and for opponents to ensure that they do not receive recognition. Although the settings may vary, the storylines are essentially the same. In considering how these questions may be dealt with at the International Conference, it is therefore appropriate to examine the reaction of other comparable fora.

Participation in the assemblies of international organizations

In order to draw a comparison, the fora considered here are the plenary decision-making assemblies of international organizations (be they intergovernmental or mixed, as in the case of the International Conference of the Red Cross and Red Crescent).

The special characteristic of the International Conference that needs to be taken into account in this examination is that it is not a conference of members of a body: it brings together, on an equal basis, the members of the International Red Cross and Red Crescent Movement² and the states parties to the 1949

1 It should be noted that, with regard to the International Conference of the Red Cross and Red Crescent, this article discusses only the participation of states (or state-like entities) in this forum. It does not deal with the representation and participation of National Societies, as there are very specific rules that govern the recognition and admission of National Societies into the Conference.

2 The Movement's members, termed 'components' in its statutes, are the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross (ICRC), and the International

Geneva Conventions. Hence the issue of membership of an organization and accompanying rights and responsibilities does not arise – this article addresses instead the perhaps wider issue of representation at the Conference itself.

It should also be noted that the Movement's traditions and statutes require all participants in the International Conference to act in accordance with the Fundamental Principles of the Red Cross.³ The principles of independence and neutrality provide an assurance that the Movement and the bodies created by it can and will work in such a way as to carry out its mission, which is above all to prevent and alleviate human suffering wherever it may be found. While this should enable the Movement's conferences to stand apart from the political disputes that disrupt other organizations, the reality of the modern international community is that no organization can steer free of them entirely.

The world's first global international organizations of the type now common were formed to achieve specific state objectives in specialized fields.⁴ They were based on the responsibility of governments to take action to secure those objectives. The aim of the International Conference of the Red Cross, on the other hand, has from the very start been to support the ideals of the founders of the International Red Cross, which were enshrined in an agreement by states to respect the inviolability of the wounded on the battlefield. The origin of the International Conference is thus different from those of the assemblies of international organizations.

Many organizations now seek to unite states on the basis of certain regional, political, or technical characteristics and restrict membership accordingly. The participation of states in the International Conference of the Red Cross and Red Crescent, however, is universal, for it encompasses all states parties to the 1949 Geneva Conventions.⁵ For purposes of comparison with the International Conference, this article will therefore first focus on the policies and practices of organizations that also aspire to be universal in nature, namely those that have a purpose of universal interest, are open to all states or state-like entities,⁶ and seek to achieve universal membership.⁷ Such organizations are primarily to be found in the United Nations (UN) system (i.e. the UN itself and its specialized agencies),

Federation of Red Cross and Red Crescent Societies ('International Federation'). Statutes of the International Red Cross Red Crescent Movement (Movement Statutes), Art. 1(1).

3 I.e. humanity, impartiality, neutrality, independence, voluntary service, unity, universality.

4 Such as the International Labour Organization (ILO), founded in 1919 on the premise that universal, lasting peace can only be established if it is based on decent treatment of working people; and the Permanent Court of Arbitration, established in 1899 to record 'the principles of equity and right on which are based the security of States and the welfare of peoples'. First Hague Convention for the Pacific Settlement of International Disputes, 29 July 1899, Preamble, available at http://avalon.law.yale.edu/19th_century/hague01.asp (last visited 19 February 2010).

5 A total of 194 states parties. See ICRC, 'State parties to the Geneva Conventions of 1949', available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 28 October 2009).

6 Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organisations*, Cambridge University Press, Cambridge, 2005, p. 105.

7 Henry G. Schermers, 'International organisations', in Mohammed Bedjaoui and Federico Mayor, *International Law: Achievements and Prospects*, Martinus Nijhoff, The Hague, 1991, p. 69.

although other intergovernmental or similar organizations – such as the World Trade Organization (WTO), the International Organization for Migration (IOM), INTERPOL, and the Inter-Parliamentary Union (IPU) – may also come into this category. Some universal international non-governmental associations in which members or delegations represent a country (but not a government) may also serve as points of reference.⁸

Who participates in the assemblies of international organizations?

Generally speaking, participation in international organizations is determined by their rules of membership (i.e. those governing accession to the organization's constitutive instrument).⁹ Even within the category of organizations that aim to be universal in nature, there are some general minimum participation requirements that can be inferred, namely statehood, acceptance by a majority of the organization's members, and subscription to membership obligations. In addition, there is the procedural requirement of presentation of credentials by the delegation, in order to ensure its representation at a particular assembly or conference.

Statehood

In intergovernmental organizations, formal statehood¹⁰ is a prerequisite for full membership, which in turn entitles a state to full participation in the organization's plenary decision-making body. As for the UN, only 'states' may be admitted as members¹¹ – this membership then opens the way to participation as a member with full voting and procedural rights in the General Assembly.¹² The UN's specialized agencies generally take their lead from the UN itself,¹³ but there can

8 For example, the International Olympic Committee (IOC), the International Association of Federation Football (FIFA), the International Organization for Standardization (ISO), and the International Union for Conservation of Nature (IUCN). Apart from the International Conference of the Red Cross and Red Crescent, the IUCN is a rare example of an organization that brings together governmental and non-governmental members on an equal basis – see IUCN Statutes, Art. 1, available at http://cmsdata.iucn.org/downloads/statutes_en.pdf (last visited 11 January 2010).

9 Daniel Dormoy, 'Recent developments regarding the law on participation in international organisations', in Karel Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy*, Martinus Nijhoff, The Hague, 1998, p. 323.

10 I.e. a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. See Montevideo Convention on the Rights and Duties of States, 1933, Art. 1, available at http://avalon.law.yale.edu/20th_century/intam03.asp (last visited 23 June 2009). See also Opinion No. 1 of the Badinter Arbitration Committee, which restates the requirement of 'government' as 'organised political authority', and adds that a state is characterized by sovereignty: Art. 1(b), reproduced in Alain Pellet, 'The opinions of the Badinter Arbitration Committee: a second breath for the self-determination of peoples', in *European Journal of International Law*, Vol. 3, No. 1, 1992, p. 182.

11 UN Charter, Art. 3(1) and 4(1).

12 *Ibid.*, Art. 9(1).

13 UN specialized agencies will automatically admit UN members that ratify the agency's founding statute and undertake the attendant obligations, without need for further approval by members of the agency. See e.g. Universal Postal Union (UPU) Constitution, Art. 11(1); International Atomic Energy Agency (IAEA) Statute, Art. 4(a); ILO Constitution, Art. 1(3); World Health Organization (WHO) Constitution,

be – and are – differences, especially when a state has chosen not to become a member of the UN but wishes to participate in specialized agency activities as a member.¹⁴ Even in cases where the specialized agencies allow non-members of the UN to join and participate in their assemblies, this permission is usually still only accorded to states¹⁵ or groups of states.¹⁶ The World Meteorological Organization (WMO), on the other hand, allows for full membership (and thus full participation in the World Meteorological Congress)¹⁷ by territories not responsible for the conduct of their international relations – but this does require the co-operation of the state responsible for the territory's foreign affairs.¹⁸ This provision has allowed for full participation in the World Meteorological Congress by the British Caribbean Territories, French Polynesia, Hong Kong, Macau, the Netherlands Antilles, Aruba, and New Caledonia.¹⁹ However, Niue is listed as a member state of WMO despite the fact that its foreign affairs concerns are managed by New Zealand.²⁰

The UN Convention on the Law of the Sea (UNCLOS) also lists several types of territories without full statehood that may ratify the Convention, albeit subject to very detailed qualifications, *inter alia* the competence to enter into treaties on subject matters regulated by UNCLOS.²¹ These territories may then participate fully in the Assembly of the International Seabed Authority.²² Similar distinctions apply to the UN Framework Convention on Climate Change (UNFCCC).²³ Both

Art. 4; UN Educational, Scientific and Cultural Organization (UNESCO) Constitution, Art. 2(1); International Telecommunication Union (ITU) Constitution, Art. 2(b); Convention on the International Maritime Organization (IMO), Art. 6; World Meteorological Organization (WMO) Convention, Art. 3(b); UN Industrial Development Organization (UNIDO) Constitution, Art. 3(a). The Statutes of the UN World Tourism Organization (UNWTO), however, require even a UN member's candidature to be approved by a two-thirds majority in the General Assembly (which must also amount to a majority of UNWTO's full members) – see Art. 5(1)–(2).

14 Switzerland, for instance, was a member of all the UN's specialized agencies long before it became a member of the UN itself in 2002.

15 See e.g. Food and Agricultural Organization (FAO) Constitution, Art. 2(2); ITU Constitution, Art. 2(c) and 8(1); UNESCO Constitution, Art. 2(2) and 4(A)(1); World Intellectual Property Organization (WIPO) Convention, Art. 5 and 6; Chicago Convention on Civil Aviation, Art. 48(b) (in respect of the International Civil Aviation Authority – ICAO); Convention on the IMO, Art. 4; UNIDO Constitution, Art. 3(b); UPU Constitution, Art. 11(2) and 14(2).

16 Regional organizations made up of states that have delegated some decision-making authority (i.e. a part of the state's sovereignty in a particular domain) to the organization. See e.g. International Fund for Agricultural Development (IFAD) Constitution, Art. 3(1)(b); FAO Constitution, Art. 2(4).

17 WMO Convention, Art. 7(a).

18 Either by applying the WMO Convention in respect of that territory, or by lodging a membership application on the territory's behalf: see WMO Convention, Art. 3(d)–(e). UN Trust Territories were placed in a similar position, with the UN fulfilling the role of the responsible state (Art. 3(f)).

19 WMO, 'Members of the World Meteorological Organization with date of ratification or accession', 4 December 2009, available at http://www.wmo.int/pages/members/membership/index_en.html (last visited 11 January 2010).

20 *Ibid.*

21 UNCLOS, Art. 305 (b)–(e).

22 *Ibid.*, Art. 156(2), read with Art. 1.2(2) and 159(1).

23 See the list of Non-Annex I parties to this Convention at http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php (last visited 8 February 2010).

those global conventions include Niue as a party although New Zealand retains some responsibility for its foreign affairs.

Until 1947, the Universal Postal Union (UPU) also allowed quasi-sovereign entities to become members.²⁴ This was changed as a result of its transformation into a UN specialized agency, since at the time the UN did not consider the UPU's standards of admission to be clear enough;²⁵ the wording 'sovereign country' was consequently introduced into the UPU Constitution.²⁶ Quasi-sovereign entities that were granted membership before 1947 were allowed to retain their equal rights and duties – today, only the UK Overseas Territories, Netherlands Antilles, and Aruba still benefit from this arrangement.²⁷

The practice that has developed over the years has seen different organizations frame different membership criteria according to their specific characteristics, as well as the impact of those characteristics on the universality necessary for the achievement of their objectives. This helps explain, for example, the membership of Niue in WMO, and of the Holy See's membership of a wide range of UN specialized agencies but not of the UN itself.

Notwithstanding the requirement of statehood, there have been exceptional cases in which entities that were not strictly states under customary international law were admitted to the UN and its specialized agencies. First, it should be noted that at least four founding states of the UN were not yet independent in 1945.²⁸ Second, there is Namibia's admission to the International Labour Organization (ILO) before it gained full independence.²⁹ According to Kirgis,³⁰ the latter decision was legally questionable because it ran counter to the ILO Legal Adviser's opinion, which was supported by earlier jurisprudence in the *Danzig* case.³¹ However, Kirgis considers that Namibia was a distinguishable case, owing to its status, because in effect the UN Council for Namibia³² was thus to be granted membership.³³ Osieke confirms that this exceptional move was a countermeasure to South Africa's occupation of Namibia, rather than a modification of the ILO's

24 International Bureau of the UPU, *UPU Constitution and General Regulations with Commentary*, Berne, 2005, p. A7.

25 Yirka Omeorogbe, 'Functionalism in the UPU and the ITU', in *Indian Journal of International Law*, Vol. 27, No. 1, 1987, p. 54.

26 International Bureau of the UPU, above note 24, p. A14.

27 *Ibid.*, p. A7.

28 India, the Philippines, Lebanon, and Syria. Questions also arose at the time concerning the Byelorussian and Ukrainian Soviet Socialist Republics: see John Dugard, *Recognition and the United Nations*, Cambridge University Press, Cambridge, 1987, p. 53. Kirgis notes that, at the time, the latter two were not even putative states, as they were part of the Soviet Union: see Frederic Kirgis, 'Admission of "Palestine" as a member of a specialized agency and withholding assessments in response', in *American Journal of International Law*, Vol. 84, 1990, p. 228.

29 ILO, 64th Session, Geneva, June 1978, Prov. Record No. 24, pp. 19–20.

30 F. Kirgis, above note 28, pp. 221–222.

31 Permanent Court of International Justice, *The Free City of Danzig and the ILO*, Advisory Opinion, PCIJ Series B, No. 18, 26 August 1930 (Danzig was not deemed capable of becoming an ILO member, as Poland was responsible for its foreign relations).

32 A body directly appointed by the Security Council in lieu of the trustee, South Africa, which had lost legitimacy – see F. Kirgis, above note 28.

33 *Ibid.*

traditional practice of seeking confirmation of the independence of prospective members who are not part of the UN.³⁴

Kirgis holds that, even though each agency must interpret for itself the criterion of statehood in its statutes (which, he concedes, may lead to conclusions different from customary international law), the political entity that is to be admitted must at least have sufficient control over its territory and people to carry out the functions required of it by the agency – that is, to fulfil the ‘essential, ongoing obligations of membership’.³⁵ This conclusion does not sit happily with his own concession with regard to Namibia as a special case for the ILO, and it can also lead to confusion about the differences between a state as a member and the government that provides its representation: there are many cases in which the government does not have sufficient control of its territory to carry out the obligations of membership, but there has been no suggestion that this should lead to the state’s membership being terminated.³⁶

Outside the UN system, universal intergovernmental organizations such as INTERPOL and the IOM share the approach of limiting full membership to states only.³⁷ The WTO, on the other hand, expressly also provides for the possibility of full membership by any ‘separate customs territory’ that autonomously conducts its external trade relations and the other matters provided for in the WTO Agreement.³⁸ Such a territory’s accession, like that of a state, is to take place ‘on terms to be agreed between it and the WTO’.³⁹ In this way it was possible for Chinese Taipei to be admitted to membership as the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu (shortened to Chinese Taipei).⁴⁰ Similarly, by virtue of this provision, Hong Kong and Macau were admitted while still under the control of the United Kingdom and Portugal respectively, and retain independent membership to this day, despite their reversion to China.⁴¹

The IPU is also distinct in that it not only offers membership to the parliaments of sovereign states⁴² but also to the parliaments of ‘territorial entities’.

34 The ILO did so, for example, when admitting Japan, Germany, and Vietnam in 1951 (the former two were under Allied command, and the latter had only recently gained independence from France). Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation*, Martinus Nijhoff, Dordrecht, 1985, pp. 23–24.

35 F. Kirgis, above note 28, p. 221.

36 Somalia is a case in point – see Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonisation of Sub-Saharan Africa*, Martinus Nijhoff, Leiden, 2004, p. 71. It should be noted that ‘failed states’ are a subject that merits examination on grounds different from those relevant here.

37 INTERPOL Constitution, Art. 4 (stipulating that a country’s membership application must be made by the appropriate government authorities); Constitution of the IOM, Art. 2 (limiting membership to ‘states’).

38 WTO Agreement, Art. XII(1).

39 *Ibid.*

40 See WTO General Council, *Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, Decision No. WT/L/433, 11 November 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/433.doc> (last visited 30 June 2009).

41 Duncan B. Hollis, ‘Why state consent still matters: non-state actors, treaties and the changing sources of international law’, in *Berkeley Journal of International Law*, Vol. 23, No. 1, 2005, pp. 18–19.

42 IPU Statutes, Art. 3(1).

However, this is subject to the UN's recognition of the entity's statehood aspirations, and the entity's admission as an observer in the UN.⁴³ Indeed, as will be seen below, deferral to the UN's position is a common default practice in international organizations (both governmental and non-governmental), even where they are not affiliated to the UN.

Recognition by members

Over and above the objective requirements of statehood, recognition by a majority of other member states is a necessity for purposes of membership in international organizations.⁴⁴ In most cases, the majority requirement is set at two-thirds.⁴⁵ Some organizations also require that an executive body make a recommendation to the plenary body on admission of a new member.⁴⁶ Recognition by a majority of members in the plenary body is perhaps the most important criterion for an aspiring participant, as majority approval in effect sets a working boundary determining which entities are considered states qualified to act as members and which are not. It also serves to circumvent a good many disputes in that regard, by at least ensuring that a large majority of fellow members agree to interact with an entity on an equal basis within the organization.

Subscription to obligations

As membership in an international organization is usually based on accession to its founding instrument, acceptance of the obligations therein is evidently a *sine qua*

43 *Ibid.*, Art. 3(2).

44 See e.g. IAEA Statute, Art. 4(b); IFAD Constitution, Art. 3(2)(b); WHO Constitution, Art. 6. Although participation in the ICAO Assembly *prima facie* only requires ratification of the Chicago Convention on Civil Aviation and not a majority vote (thus putting it in a similar position to that of the International Conference (see Art. 48(b)), the Convention would not in fact allow ratification for a state that a majority of the UN General Assembly does not recognize (see Art. 93 *bis*).

45 See e.g. FAO Constitution, Art. 2(2); ILO Constitution, Art. 1(4); IMO Convention, Art. 7; UNESCO Constitution, Art. 2(2); UNIDO Constitution, Art. 3(b); IOM Constitution, Art. 2(b); INTERPOL Constitution, Art. 4; WIPO Convention, Art. 6(2)(viii), read with Art. 6(3)(d) (with regard to the WIPO General Assembly's exercise of the discretion to invite a non-member of the UN to participate – the WIPO Convention grants the organization's General Assembly discretion to invite states that are not members of the UN (or of various unions for the protection of intellectual property) to become members (Art. 5(2)(ii)); however, in such a case the Assembly must agree by a two-thirds majority). Usually, all members have equal voting rights. It should be noted that in the case of admission to the International Monetary Fund (IMF) and, by extension, the World Bank (see International Bank for Reconstruction and Development (IBRD) Articles of Agreement, Section 1), voting rights are weighted according to financial contribution (IMF Articles of Agreement, Art. XII(5)). This is a possible explanation for Kosovo's acceptance there, in contrast to other international fora, as many states that recognize Kosovo have greater voting rights on the basis of their contributions. See IMF, 'Kosovo becomes the International Monetary Fund's 186th member', Press Release No. 09/240, 29 June 2009, available at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm> (last visited 30 June 2009).

46 See e.g. UN Charter, Art. 4(2); IMF By-Laws, Section 21(b); UNIDO, Art. 3(b).

non for membership.⁴⁷ Besides acceptance of the treaty obligations in the founding document, a few organizations require members to adhere to certain principles: for example, the UN Charter allows membership to ‘peace-loving states’ that accept the Charter obligations;⁴⁸ the IOM Constitution requires a ‘demonstrated interest in the principle of freedom of movement’;⁴⁹ and the UNIDO Constitution specifies that membership is open to ‘states which associate themselves with the objectives and principles of the Organization’.⁵⁰

In practice, inability to fulfil obligations is seldom a factor that is invoked in admissions processes,⁵¹ except in financial and trade institutions.⁵² However, fulfilment of obligations has a bearing on participation in decision-making bodies, as most organizations provide for restriction of a member’s participation if obligations are not fulfilled. In the case of substantive obligations, the sanction may be suspension⁵³ or expulsion,⁵⁴ while non-fulfilment of financial obligations may lead to a limitation of voting rights.⁵⁵ As suspension may preclude a state from exercising its rights as a member in general,⁵⁶ it can also affect the capacity to hold office in the organization.

This lenient position on actual ability to fulfil obligations is further illustrated by the situation of the failed state: that is, a *de jure* state that has lost its ability to exercise its sovereignty effectively⁵⁷ (although this question usually arises after a state has become a member of an organization). Such a loss of effective sovereignty has not been considered as affecting a state’s formal entitlement to participate in international fora. Even in the extreme case of Somalia, which for a long period had no national government and was unrepresented in international fora,⁵⁸ the country’s temporary lack of representation came about on procedural grounds, because it did not present its credentials from 1991 to 2000, and, as

47 See the membership clauses cited in notes 11 and 13 above. In particular, the membership clauses of UN specialized agencies show that even existing UN members must expressly accept the obligations of membership of the particular agency, usually by ratification of the agency’s founding instrument.

48 UN Charter, Art. 4(1).

49 IOM Constitution, Chapter II, Art. 2(b).

50 UNIDO Constitution, Art. 3.

51 For example, states that may have limited ability to fulfil the collective security obligations in the UN, e.g. micro-states and states following a permanent neutrality policy, have all been admitted to the UN – see C. F. Amerasinghe, above note 6, pp. 106 (n. 4), 108–109.

52 The World Bank, IMF, and WTO allow states to join on terms that are to be negotiated and agreed upon (IBRD Articles of Agreement, Art. II(1)(b); IMF Articles of Agreement, Art. II(2)); WTO Agreement, Art. XII(1).

53 E.g. UN Charter, Art. 5; WMO Convention, Art. 31.

54 E.g. UN Charter, Art. 6; UNESCO Constitution, Art. 2(4); IMO Constitution, Art. 11.

55 UN Charter, Art. 19; UNIDO Constitution, Art. 5(2); WHO Constitution, Art. 7.

56 E.g. UN Charter Art. 5; WMO Convention, Art. 31; UNESCO Constitution, Art. 2(4).

57 See Daniel Thürer, ‘The failed state and international law’, in *International Review of the Red Cross*, Vol. 81, No. 836, 1999, p. 734.

58 See *Report of the Secretary-General on the Situation in Somalia*, S/1999/882, 16 August 1999, para. 63. More generally, on the international relations of failed states, see Robin Geiss, ‘Armed violence in fragile states’, in *International Review of the Red Cross*, Vol. 91, No. 873, March 2009, pp. 132–133.

stipulated by Article 19 of the UN Charter, because its finances were in arrears it could not vote.⁵⁹

This stands in contrast to the position of *de facto* states that merely lack recognition, highlighting the greater weight given to recognition in the eyes of fellow member states as opposed to a real ability to fulfil obligations.

Credentials

Many organizations have a committee that examines the credentials of delegates who attend meetings of their plenary bodies.⁶⁰ These committees do not in principle examine whether a particular state is entitled to participate, but whether delegations are properly accredited to represent that state. In some cases, however, competing delegations seeking to represent the same state, with credentials signed by persons asserting the right to sign that document, can pose questions on which the credentials committee will be expected to make a recommendation to the plenary body. If a delegation's presence is challenged by another member, but not by a competitor from the same country, the disputed delegation is usually allowed to be seated provisionally with full participation rights, pending a decision by the plenary body.⁶¹

Rejection of credentials is therefore not an official means of limiting participation. It has, however, been used as a means of excluding or seeking to exclude South African delegations from the UN, as well as the delegations of some other governments. This process has seen credentials committees assume a political role not envisaged by the original constitutive instruments of the organizations; indeed, the UN Legal Counsel confirmed the view that using the rejection of credentials as an effective suspension of membership rights would result in the General Assembly's Rules of Procedure being used to circumvent the UN Charter itself.⁶²

The position of international non-governmental associations with country-based representation

In the decision-making assemblies of international non-governmental organizations (INGOs), the individual members are not organs of state. However, it can be seen that even those bodies – where the composition of membership is often country-based⁶³ – frequently adopt a position in specific admission cases analogous to that of intergovernmental assemblies, and even defer directly to the latter's position (primarily that of the UN). It is increasingly common for INGOs to use

59 G. Kreijen, above note 36, p. 71.

60 See e.g. WHO Rules of Procedure, Rule 23; UNIDO Rules of Procedure, Rule 29.

61 UN General Assembly Rules of Procedure, Rule 29 (read with UN Charter, Art. 18); WHO Rules of Procedure, Rule 23; UNIDO Rules of Procedure, Rule 29.

62 C. F. Amerasinghe, above note 6, p. 65, n. 100.

63 See e.g. FIFA Statutes, Art. 10; IOC Statute, Art. 2; Constitution of the International Chamber of Commerce (ICC), Art. 2(2); World Organization of the Scout Movement (WOSM) Constitution, Art. V(2).

the UN as the default standard when considering politically sensitive membership applications.

As for the requirement of statehood, FIFA's statutes are particularly explicit, requiring that the country represented at its assemblies be an 'independent State recognised by the international community'.⁶⁴ FIFA's admission regulations require an applicant to present documents demonstrating that it represents such a state, as well as reports on, *inter alia*, the political structures in its country.⁶⁵ It has been possible for FIFA to accept membership from such entities as Scotland, Hong Kong, and the Faroe Islands, as well as Palestine and Chinese Taipei.⁶⁶

The statutes of the International Olympic Committee (IOC) require merely that delegations or national committees participating in the assembly represent a 'country'.⁶⁷ This apparently does not preclude the IOC from recognizing 'independent territories, commonwealths, protectorates and geographical areas'.⁶⁸ It is thus quite free to make its own decisions on admission, and has often taken decisions that do not necessarily reflect the general position of other organizations (including the UN). In sensitive cases, however, the IOC appears to have been careful to ensure that participation is arranged on terms accepted by those concerned, for example in ensuring that the National Committee of the People's Republic of China would be the sole representative of China, with Chinese Taipei able to be fully represented in the assemblies of the IOC and other sports federations.⁶⁹ Palestine, Macau, and Hong Kong are also permitted to participate independently in the IOC: an important consideration may be that they were admitted before 1996, when a new IOC rule requiring international recognition came into effect.⁷⁰ Perhaps because of this rule, the IOC now seems more likely to follow the UN's position in politically charged cases such as that of Kosovo.⁷¹

Many INGOs also use UN nomenclature to describe their members: for example, the World Organization of the Scout Movement (WOSM) uses the term 'The former Yugoslav Republic of Macedonia' to designate that country. Similar in

64 FIFA Statutes, Art. 10(1). FIFA invoked this article when rejecting the application of Kosovo: see FIFA, 'FIFA's finances solid', Media Release, 24 October 2008, available at <http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=924258.html> (last visited 20 October 2009).

65 Regulations governing the Admission of Associations to FIFA, Art. 3(1)(a) and (g), available at http://www.fifa.com/mm/document/tournament/competition/01/11/80/00/aufnahmefifa_inhalt.pdf (last visited 20 October 2009).

66 FIFA, 'About FIFA: associations', available at <http://www.fifa.com/aboutfifa/federation/associations.html> (last visited 10 February 2010).

67 IOC Statute, Art. 2.

68 IOC, 'National Olympic committees', available at <http://www.olympic.org/en/content/The-IOC/Governance/National-Olympic-Committees/> (last visited 20 October 2009).

69 IOC Executive Board Resolution, Nagoya, Japan, 25 October 1979, reprinted in 'China and Olympism', in *Olympic Review*, No. 191/192, August/September 1983, p. 586.

70 Michel Filliau (senior IOC official), quoted in 'IOC rebuffs Tibetan request for own team at the 2008 Beijing Olympics', in *New York Times*, 10 November 2007, available at <http://www.nytimes.com/2007/12/10/sports/10iht-olytibet10.8670030.html> (last visited 20 October 2009).

71 See e.g. Emmanuelle Moireau (IOC spokesperson), quoted in Stephen Wilson, 'IOC: Kosovo Olympic team "unlikely"', in *Associated Press Online*, 18 February 2008, available at <http://www.encyclopedia.com/doc/1A1-D8USTEBG0.html> (last visited 20 October 2009).

structure to the sports federations discussed above, the WOSM is composed of National Scout Organizations on the basis that there can be only one organization in any one country.⁷² Its constitution does not define ‘country’, but the membership lists include such designations as ‘China, Scouts of (headquartered in Taipei)’ and ‘Palestinian Authority’.⁷³

The International Union for Conservation of Nature (IUCN), a rare example of another forum (besides the International Conference) where states and non-governmental entities interact on an equal basis,⁷⁴ has directly specified its alignment with the UN position in its statutes, despite not being a UN body. The IUCN requires states taking part in its Congress to be either members of the UN or one of its specialized agencies or the International Atomic Energy Agency, or parties to the Statute of the International Court of Justice.⁷⁵ This express *renvoi* to the UN position reflects the fact that states themselves (which would generally also be UN members) are also directly involved in the admission process.⁷⁶

Members of assemblies of INGOs are also required to subscribe to certain obligations and principles⁷⁷ but, being free of state involvement in their decision-making, they are usually able to be much more flexible on questions such as membership.

Treaties

Most treaties simply refer to ‘states’ as the entities capable of signing, ratifying, or acceding. Depositaries, when considering whether to accept an instrument lodged by an entity that is not a member of the UN or a specialized agency, usually refer the instrument to other states parties to obtain an opinion as to whether the instrument should be accepted.⁷⁸ Ratification of a treaty may then confer a right to participate in assemblies tasked with reviewing and implementing the treaty.⁷⁹

A few more recent treaties, however, have looked towards the inclusion of entities other than states (albeit intergovernmental organizations). For example, the UNFCCC expressly extends the ability to ratify or accede to states and ‘regional economic integration organizations’.⁸⁰

72 WOSM Constitution, Art. V(2).

73 For more details see WOSM, ‘National Scout organisations’, 15 February 2010, available at http://www.scout.org/en/around_the_world/countries/national_scout_organisations (last visited 19 February 2010).

74 IUCN Statutes, Art. 1.

75 *Ibid.*, Art. 5.

76 *Ibid.*, Art. 6–11.

77 See e.g. Constitution of the ICC, Art. 1; IOC Statute, Art. 1(1).

78 See the example of the Palestine Liberation Organization (PLO)’s declaration of accession to the Geneva Conventions, below note 133.

79 E.g. the ICAO Assembly, Art 48(b).

80 UNFCCC, Art. 22.

Alternative means of participation: bringing everyone to the table

One common trend is that the general members-only rule is not inflexible when it comes to participation in the broader sense. The need for flexibility has increased over the years, particularly as the growth of regional institutions with significant legislative or quasi-legislative functions has brought new players on to the international decision-making scene. Another factor has been the recognition on the part of some international organizations, particularly those concerned with environmental issues and trade, that it is not possible to achieve adequate international action without involving entities other than states in the assemblies that make the rules. This is also important with regard to reporting on action taken.

For instance, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal included the former European Community as a party, as this entity had decision-making powers relevant to the subject matter of the treaty. In addition, by an accommodation designed to ensure strong worldwide control of hazardous wastes, Taiwan is in effect represented in the deliberations through an NGO, the Institute of Environment and Resources.⁸¹

As the *de facto* affairs of states are seldom as clear-cut as the rules for membership, organizations have had to cope with situations not envisaged when the constitutions were written. They have done so by acting pragmatically as far as possible, and seeking agreement from the governments most directly concerned to advance the mission of the organization itself. This corresponds to the suggestion that since entities that take active part in certain areas of international relations have a duty to implement the relevant rules and regulations, they should somehow be accommodated in rule-negotiation processes and supervisory mechanisms.⁸²

In recognition of this, it is now more and more common for constitutions of new international organizations to allow for non-states to become parties. It is less easy to find instruments that provide participation rights for entities that have not been recognized as sovereign states by a majority of members,⁸³ but various

81 See e.g. the list of participants at the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Ninth Meeting, Bali, 23–27 June 2008, UNEP/CHW.9/INF/45, p. 42, available at <http://www.basel.int/meetings/cop/cop9/docs/i45e.pdf> (last visited 9 February 2010).

82 Neri Sybesma-Knol, 'The United Nations framework for the participation of observers', in Jean-Marie Henckaerts (ed.), *The International Status of Taiwan in the New World Order: Legal and Political Considerations*, Kluwer Law International, The Hague, 1996, p. 167.

83 Sybesma-Knol draws the distinction between state sovereignty, derived sovereignty (e.g. intergovernmental organizations with certain supranational decision-making powers), shared sovereignty (e.g. components of federated states), and potential sovereignty (e.g. liberation movements), as well as groups such as minorities and indigenous peoples who claim a degree of internal autonomy; see Neri Sybesma-Knol, 'Non-state actors in international organisations: an attempt at classification', in Theo van Boven, Cees Flinterman, Fred Grünfeld, and Rita Hut (eds), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-state Actors*, Netherlands Institute of Human Rights (SIM) Special No. 19, Utrecht, 1997, pp. 23–24. In general, the present article focuses only on the participation of entities that either claim full sovereignty or at least have potential sovereignty – the participation of other entities such as NGOs and intergovernmental organizations in international assemblies raises much broader questions, which go beyond the scope of the present analysis.

forms of accommodation are usually possible through such mechanisms as observer status, associate membership, and technical/advisory co-operation.

Observer status

Observer status is the principal means by which many international organizations (intergovernmental and non-governmental alike) permit a limited form of participation in their assemblies by entities that cannot – or do not wish to – become members, but nevertheless may have an interest in following the proceedings. Observer status generally entails limited participation rights in plenary assemblies⁸⁴ but a wider range of opportunities in committees and technical meetings. Observers do not enjoy the right to vote or to hold office,⁸⁵ although they can sometimes be elected to positions within the technical committees where their representation adds value.

The granting of observer status or the invitation of an observer usually requires the approval of a majority of the plenary conference or assembly itself,⁸⁶ except in cases where criteria are set upon which an executive committee or the chief executive of the organization can act.⁸⁷ Another option is offered by INTERPOL: police bodies that are not members of the organization may be invited as observers when nominated by the Executive Committee and invited by both the state hosting the conference and the Secretary-General.⁸⁸

The types of entities that may be admitted as observers usually fall into the categories of non-member states,⁸⁹ groups of states,⁹⁰ and international governmental or non-governmental organizations.⁹¹ The International Fund for Agricultural Development (IFAD) and UNIDO assemblies have considerable additional latitude, as they are also empowered to invite ‘any other entity’⁹² or ‘other observers’⁹³ respectively. In practice, this discretion has only been used so far to invite non-member states eligible for membership, and the Holy

84 See e.g. WHO Rules of Procedure, Art. 45.

85 See e.g. the limitations on the participation rights of observers in the WHO, which are expressly stated in the WHO Constitution, Art. 18(h). Otherwise, most provisions regulating voting and office-bearing in organizations expressly mention that only ‘Members’ may do so.

86 WHO Constitution, Art. 18(h); UNIDO Constitution, Art. 4(2); IFAD Rules of Procedure, Rule 43(1). UNESCO and WIPO require a two-thirds majority (UNESCO Statute, Art. IV(E); WIPO Convention, Art. 6(2)(ix) and 7(2)(v), read with Art. 6(3)(d) and 7(3)(c) respectively). The UPU Constitution confers a right of observership upon Restricted Unions; however, such unions must consist of member states (Art. 8).

87 UNFCCC, Art. 7(6) describes how observers with expertise in matters covered in the Convention, and who have informed the Secretariat of their wish to be represented, may be admitted to the Conference of the Parties, unless one third of the states parties present at the meeting object.

88 INTERPOL General Regulations, Art. 8.

89 IFAD Rules of Procedure, Rule 43(1); WIPO Convention, Art. 6(2)(ix) and 7(2)(v); WHO Rules of Procedure, Rule 3.

90 E.g. UPU Constitution, Art. 8 (‘Restricted Unions’, comprising groups of existing member states).

91 UNESCO Statute, Art. IV(E)(13–14); WIPO Convention, Art. 6(2)(ix) and 7(2)(v); WHO Constitution, Art. 18(h) (which also allows national NGOs to be invited if the government concerned consents).

92 IFAD Rules of Procedure, Rule 43(1).

93 UNIDO Constitution, Art. 4(2).

See.⁹⁴ In contrast to the above predefined frameworks for admitting observers, the United Nations has evolved different practices for its various principal organs and for subsidiary bodies. It is not easy to compare these practices, but it can be said that the UN General Assembly has accorded observer status either to states that are not members of the UN (Switzerland was a case in point until 2002) or to organizations and other entities through the adoption of specific-purpose resolutions. Relatively few organizations have achieved this status, and it is largely restricted to intergovernmental organizations or to those that have a strong governmental relationship or treaty basis.⁹⁵

NGOs are not normally granted observer status at the UN General Assembly. The Charter of the UN envisaged that their main contribution would be through the Economic and Social Council (ECOSOC).⁹⁶ This has meant that the granting of such status in the General Assembly is usually seen as connoting something much more than the consultation envisaged for NGOs with ECOSOC,⁹⁷ and has led to consideration being given to differentiated forms of observer status in other organizations. The trend, however, is to find ways to seek increased involvement in international debates by institutions beyond government, as shown by the 2004 Report of the Panel of Eminent Persons on UN–Civil Society Relations (the Cardoso Report).⁹⁸ By the end of 2009, over 13,000 civil society organizations were listed with the UN Department of Economic and Social Affairs under procedures established by ECOSOC.⁹⁹

In the context of recognition of the right to self-determination and the UN's decolonization mission, observer status was also used as a means of affording national liberation movements a measure of participation in the UN General Assembly, despite the fact that they did not meet formal statehood criteria. These entities were granted such a status because they were regarded as 'states *in statu nascendi*',¹⁰⁰ that is, as representatives of future states, and also of their populations, that were not deemed to be truly represented by the power that controlled their territory.

94 See IFAD Rules of Procedure, n. 3.

95 The ICRC and the International Federation qualified for UN General Assembly observer status on this basis, in particular owing to the ICRC's special role and mandates under the Geneva Conventions and the International Federation's specific role in international humanitarian relations. See UN General Assembly (UNGA), Resolution 45/6, 16 October 1990 (ICRC); UNGA, Resolution 49/2, 19 October 1994 (International Federation). See also Christian Koenig, 'Observer status for the ICRC at the United Nations: a legal viewpoint', in *International Review of the Red Cross*, No. 280, 1991, pp. 37–48; Wilfried Remans, 'The granting of observer status by the General Assembly of the United Nations to the International Federation of Red Cross and Red Crescent Societies', in Wellens (ed.), above note 9, p. 348.

96 UN Charter, Art. 71.

97 On the 'degrees of sovereignty' of observers, see Neri Sybesma-Knol, 'The continuing relevance of the participation of observers in the work of the United Nations', in Wellens (ed.), above note 9, pp. 372f.

98 *We the Peoples: The UN, Civil Society, and Global Governance*, Report of the Panel of Eminent Persons on UN–Civil Society Relations (Cardoso Report), UN Doc. A/58/817, 11 June 2004.

99 See United Nations, 'UN and civil society', available at <http://un.org/en/civilsociety> (last visited 19 February 2010).

100 C. Koenig, above note 95, p. 44.

Koenig notes a ‘well-established cooperation’ between the United Nations and regional organizations with regard to the observer status of national liberation movements.¹⁰¹ The General Assembly confirmed its practice of granting observer status to liberation movements recognized by the former Organization of African Unity (OAU).¹⁰² It also called on states hosting other international conferences to afford to liberation movements recognized by the OAU and the League of Arab States (as well as holding observer status in the UN) ‘the facilities, privileges and immunities necessary for the performance of their functions’ contained in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.¹⁰³

It was in this context that the African National Congress (ANC) and the Pan-African Congress (PAC) of South Africa, as well as the South West African People’s Organization (SWAPO), were invited as observers to the UN General Assembly.¹⁰⁴ Following recognition of the right of self-determination of the people of Palestine,¹⁰⁵ the Palestine Liberation Organization (PLO) was also granted the right to participate in plenary deliberations on the question of Palestine.¹⁰⁶ Since 1988, however, the term ‘Palestine’ has been used as the official designation in place of the name of the organization, but without prejudice to the observer status of the PLO itself.¹⁰⁷ Today, the delegation’s quaintly described status qualifies it as an ‘other entit[y] having received a standing invitation to participate as [an] observe[r] in the sessions and the work of the General Assembly and ... maintaining permanent offices at Headquarters’.¹⁰⁸ Yet, in protocol terms, this status comes immediately after the member and observer states, and outranks all other observer entities.

Recognition as an observer by the UN General Assembly has repercussions in other assemblies because it applies automatically to many other UN bodies (such as ECOSOC)¹⁰⁹ and specialized agencies (such as UNIDO),¹¹⁰ as well as to international organizations that take their guidance from the UN (e.g. the IPU).¹¹¹ Some

101 *Ibid.*

102 UNGA, Resolution 3280 (XXIX), 10 December 1974.

103 UNGA, Resolution 35/167, 15 December 1980, operative para. 2; UNGA, Resolution 37/104 of 16 December 1982, operative para. 2. The additional proviso stating that such organizations must also have observer status in the UN means that the UN is nevertheless not bound to grant such status to movements recognized by these organizations.

104 SWAPO was formally invited as an observer to the General Assembly, as well as all other conferences convened by UN organs, by UNGA Resolution 31/152, 20 December 1976.

105 UNGA, Resolution 2649 (XXV), 30 November 1970, operative para. 5.

106 UNGA, Resolution 3210 (XXIX), 14 October 1974.

107 UNGA, Resolution 43/177, 15 December 1988.

108 UN Executive Office of the Secretary-General, *Permanent Missions to the United Nations*, United Nations, New York, March 2008, p. 293, available at <http://www.un.int/protocol/bluebook/bb298.pdf> (last visited 3 November 2009).

109 ECOSOC Rules of Procedure, Rule 73.

110 UNIDO Constitution, Art. 4(1).

111 See Inter-Parliamentary Council, ‘Practical modalities of the rights and responsibilities of observers at IPU meetings’, 164th session, Brussels, 11 April 1999 (as amended in April 2009), available at <http://www.ipu.org/strct-e/obsrv-new.htm> (last visited 1 November 2009).

older international organizations (e.g. the ILO) have constitutions and rules of procedure that were written before the evolution of the General Assembly observer process and do not easily make the same accommodations.

In the realm of INGO assemblies, a notable example of differentiated participation levels exists in the ISO. Participants in the ISO General Assembly – each of which is the body most representative of standardization activities in its country – are classified as member bodies, correspondent members, or subscriber members. While member bodies have full participation rights in the assembly, the latter two may attend as observers but do not participate in the development of standards. The differentiation is based on technical considerations (i.e. whether the country has a developed standardization activity).¹¹² Thus, observer status does not necessarily bring with it such political connotations as in some other organizations.

Associate membership

Associate membership is a means of limited participation by territories that do not control their own international affairs. It ensures the representation of some population groups that may have concerns distinct from those of the rest of their state, as reflected in the WHO Constitution, which specifies that representatives of an associate member must come from the native population of the territory.¹¹³ The fact that relevant territories are designated as not being responsible for their own international affairs seems to imply that eligible entities must have an elevated degree of independence in their domestic affairs (were this not the case, then any province or, indeed, municipality within a state would be eligible). Therefore, aside from ensuring representation, the status of associate membership is also a means of taking into account these entities' greater responsibility for their own populations. Similarly to observer status, associate membership normally entails all participation rights except for the rights to vote on decisions and to hold office.¹¹⁴

Admission as an associate member usually requires application (or consent) by the state responsible for the entity's international affairs¹¹⁵ or the UN,¹¹⁶ and/or the approval of the organization's members.¹¹⁷ In practice, it is therefore not an option for territories whose sovereignty is disputed. Indeed, the desire of states

112 ISO, 'ISO members', available at http://www.iso.org/iso/about/iso_members.htm (last visited 28 December 2009).

113 WHO Constitution, Art. 8.

114 FAO Constitution, Art. 3(3); Convention on the IMO, Art. 9; UNWTO Statute, Art. 9(3), as amended by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005; World Health Assembly Rules of Procedure, Rule 44: World Health Assembly, 'Rights and obligations of associate members and other territories', 21 July 1948, Official Records of the WHO, 13, 100, 337, Section 1. However, in the WHO, associate members are permitted to vote and to hold office in certain committees and sub-committees not attached to the World Health Assembly (Section 1(1)(ii)).

115 FAO Constitution, Art. 2(11) (the responsible state is required to undertake the associate member's obligations on its behalf); UNWTO Statute, former Art. 6(1); UNESCO Constitution, Art. 2(3); Convention on the IMO, Art. 8; WHO Constitution, Art. 8.

116 Convention on the IMO, Art. 8.

117 UNESCO Constitution, Art. 2(3); UNWTO Statute, Art. 6(3).

to ensure that this does not serve as a way in for such entities is clearly reflected in the amendments to the UN World Tourism Organization (UNWTO) Statutes. These formerly permitted territories not responsible for their own external affairs to become associate members of UNWTO,¹¹⁸ but in 2005 the statutes were amended so that associate membership by territories was confined to those which already had this status at 24 October 2003.¹¹⁹ From then on, associate membership became limited to intergovernmental organizations, NGOs, and other associations.¹²⁰ An indication as to the reasons can be gathered from a further simultaneous amendment, which bars the Assembly from considering the candidature of any entity headquartered in a territory that is the subject of a dispute before the United Nations, or whose activity is related to such a territory, unless no member state objects.¹²¹ Thus, states not only closed this door to disputed entities, but firmly shut the windows as well.

The United Nations Organization has developed its own way of handling associate membership differently in its regions. The Economic and Social Commission for Asia and the Pacific has nine associate members, including two countries that are states for treaty and full membership purposes in some other organizations, and others that are parts of another country.¹²² A comparable pattern is in place in Latin America and the Caribbean, but not in the other regions.¹²³

Technical/advisory co-operation

Some organizations have made arrangements as they have seen fit for representatives of other entities to participate on purely technical matters, in such a manner that there is no elevation of status of that entity. For example, in the ILO a state responsible for a non-metropolitan territory's international relations may appoint advisers from the territory to their delegation to advise on matters relating either to that territory's self-governing powers or to non-self-governing territories.¹²⁴ Such advisers' participation rights are very limited – they may not vote and may only speak in very restricted circumstances;¹²⁵ furthermore, inclusion of

118 UNWTO Statutes, Art. 6(1).

119 UNWTO Statutes, Art. 5 (amendment adopted by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005).

120 I.e. 'tourism bodies without political competence subordinate to territorial entities, professional and labour organizations, academic, educational, vocation training and research institutions and to commercial enterprises and associations whose activities are related to the aims of the Organization or fall within its competence': UNWTO Statutes, Art. 6(5) (amendment adopted by UNWTO General Assembly Resolution 511(XVI), 16th Session, Dakar, November–December 2005).

121 *Ibid.*

122 The former are Niue and the Cook Islands; the latter include Hong Kong and Macau, The full list can be seen at <http://www.unescap.org/about/member.asp> (last visited 8 January 2010).

123 See the list of members and associate members of the Economic Commission for Latin America and the Caribbean, available at http://www.eclac.org/cgi-bin/getprod.asp?xml=/noticias/paginas/7/21497/P21497.xml&xsl=/tpl-i/p18f-st.xsl&base=/tpl-i/top-bottom_acerca.xsl (last visited 8 January 2010).

124 ILO Constitution, Art. 3(3).

125 At the request of the delegate they accompany and with special permission from the President of the Conference – ILO Constitution, Art. 3(6).

such advisers is entirely at the discretion of the responsible state. Nevertheless, it is a model of participation that demonstrates how internal representation of particular territories in a depoliticized, technical role is employed to ensure that their specific interests are taken into account on matters of universal concern.¹²⁶

The WMO already has a broad approach to participation, allowing for full membership of territories not responsible for their own external affairs. However, owing to the technical nature of the organization, which requires coverage to be as wide as possible, the WMO President has the discretion to invite the director of any meteorological service (or any other individual) to attend and participate in the discussions of the Congress.¹²⁷ This is not limited to meteorological services of member states, meaning in effect that such an official from any territory at all could be invited.

Thus, the ILO and WMO have left open the possibility of participation by individuals representing an entity whose sovereignty is partial – or possibly even disputed, although it is unknown what the reaction would be if the relevant provisions were invoked to that effect. These arrangements seem to reflect the broader functionalist approach that has influenced the participation practices and policies of other technical bodies such as the UPU, the International Telecommunication Union, and the ISO. At the same time, the ILO and WMO provisions have seemingly aimed at minimizing the political impact of this representation by limiting the participation rights of the individuals concerned: in the former case, by effectively making them observers within a delegation; in the latter case, by allowing them only to participate in discussions without a vote.

Participation in the International Conference of the Red Cross and Red Crescent

The Movement's components – that is, the International Committee of the Red Cross (ICRC), the International Federation, and the National Red Cross and Red Crescent Societies themselves – and the states parties to the Geneva Conventions, each represented by one delegation, may all participate in the International Conference, the supreme deliberative body for the Movement.¹²⁸ States participate 'in exercise of their responsibilities under those Conventions and in support of the overall work of the Movement'.¹²⁹ Each delegation has one vote,¹³⁰ thus placing states and components of the Movement on an equal footing.

126 While this is specifically addressed in the ILO Constitution, it is common for countries to include in their delegations to such meetings persons who are equipped to handle the issues in question from the perspective of the population affected.

127 WMO Convention, Art. 7(c).

128 Movement Statutes, Art. 9(1).

129 *Ibid.*, Art. 8. Again, it should be noted that separate requirements exist for the recognition and participation of National Societies, and that questions relating to participation of National Societies fall outside the scope of the present analysis.

130 *Ibid.*, Art. 9(2).

Unlike other organizations, the Movement's constitutive document (the Statutes of the Movement) is not a treaty with parties. It is a document adopted by the International Conference in a decision-making process involving states and National Societies, the ICRC, and the International Federation. Furthermore, as noted above, the Movement itself does not include states, and the recognition of National Societies (and thereby the process of their entry into the Movement) is assigned by the Statutes to the ICRC alone,¹³¹ albeit on the recommendation of the Joint ICRC/International Federation Commission for National Society Statutes (the Joint Statutes Commission).¹³² This creates a difference as to how participants are admitted into the Conference. Whereas the constitutive documents of organizations normally require a majority of members to accept a new participant in their assemblies, the Geneva Conventions – like most other multilateral treaties – may be ratified by states through a unilateral act of accession;¹³³ conversely, National Societies become participants through the separate process of being recognized as members of the Movement.

Usually, the fact of being a party to the Geneva Conventions is a clear-cut, objective criterion, which should avoid controversies over determining the status of an entity within the Conference. Nevertheless, there have been participation disputes, which can be roughly divided into situations where a delegation's entitlement to represent an existing state party is contested (disputed legitimacy) and those where the entitlement of the entity itself to participate as a state has been called into question (disputed status). Cases of disputed legitimacy have included the competing claims of the People's Republic of China (PRC) and the Republic of China (ROC) to represent China, as well as the minority apartheid government's representation of South Africa. Disputed status has been the crux of the matter in the case of Namibia (which was under South African control) and Palestine.¹³⁴ The frameworks and precedents for dealing with these two types of issue will now be examined.

Disputed legitimacy

Disputes over admission to the International Conference of a delegation purporting to represent an existing state create fundamental problems for the Movement.

131 *Ibid.*, Art. 5(2)(b).

132 An information note on the Joint Statutes Commission is available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/council-delegates-2007-strategy-151007/\\$File/CD07_7-3_NSStatutesJointCom_Annex4_FINAL_ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/council-delegates-2007-strategy-151007/$File/CD07_7-3_NSStatutesJointCom_Annex4_FINAL_ENG.pdf) (last visited 8 January 2010).

133 Geneva Conventions of 1949, Common Article 60/59/139/155.

134 In 1989, the Permanent Observer of Palestine to the United Nations Office at Geneva sent a letter to the Swiss Federal Council (depository of the Conventions), signalling the intention of the PLO – 'entrusted with the functions of the Government of the State of Palestine' – to adhere to the Conventions and the two 1977 Additional Protocols. The Swiss Federal Council stated that it was not in a position to decide whether the letter constituted an instrument of accession, 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine'. See ICRC, 'State Parties to the Geneva Conventions of 12 August 1949', available at <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited 28 October 2009). For the full texts, see 'Law reports: for the record', in *Palestine Yearbook of International Law*, 1989, pp. 318–321.

Such situations raise issues that directly touch on the universality of the Movement, as well as on its neutrality. Should the Movement engage with *de facto* but unrecognized governments – or governments with inhumane policies – in this forum? Does inclusion or exclusion of an entity amount to taking a stance on the legitimacy of a government, thus possibly jeopardizing humanitarian operations? The highly volatile and divisive nature of such questions means that they can in turn easily threaten the unity of the Movement as participants polarize along political lines. Although such decisions may be taken mostly by state participants and thus not reflect the standpoint of the components of the Movement,¹³⁵ the Conference's decisions can certainly influence the perception of the Movement's neutrality, and thus its working relationship with certain authorities.

In practice, questions of which delegation should be invited to represent a country have first fallen to the Standing Commission (the Conference's trustee body, composed of ICRC, International Federation, and National Society representatives),¹³⁶ because it is charged with convoking delegations to the Conference.¹³⁷ In addition, it is capable of making interim decisions on such issues, because it has the broad mandate of interim settlement of disputes on interpretation of the Statutes of the Movement,¹³⁸ as well as to take 'any measures which circumstances demand' between Conferences.¹³⁹ It may also establish ad hoc bodies,¹⁴⁰ and hence could, for example, establish a body that could examine admission in more detail, such as a credentials committee. The Standing Commission's decisions are, however, subject to the final approval of the Conference. Disagreement with measures taken regarding admission has thus opened the way for heavily politicized debates that should have strictly no place in this humanitarian forum.

In the cases both of China/Taiwan and of South Africa under the apartheid system, it can be seen that the Standing Commission has leaned towards universality and to allowing participation of authorities that effectively have responsibility for implementing the Geneva Conventions in their territory, regardless of questions over the legitimacy of that authority. In the case of China, the Standing Commission initially took the same position as for other 'divided states' (e.g. North and South Vietnam, North and South Korea) and invited both the PRC and ROC delegations, each as the representative for the part of the territory that they controlled (i.e. effectively treating those parts as two states). This was initially

135 E.g. the suspension of South Africa, where the ICRC and a large number of National Societies refused to vote (i.e. rejecting the vote's legality), and the League of Red Cross and Red Crescent Societies abstained – see *Report of the 25th International Conference of the Red Cross and Red Crescent*, Geneva, 23–31 October 1986, p. 98.

136 Movement Statutes, Art. 16–17.

137 Rules of Procedure of the International Red Cross and Red Crescent Movement ('Movement Rules of Procedure'), Rule 5.

138 Movement Statutes, Art. 18(2)(a).

139 *Ibid.*, Art. 18(8).

140 *Ibid.*, Art. 18(7).

confirmed by the Conference after a heated dispute.¹⁴¹ However, the controversy continued in light of the parties' claims to each represent China in its entirety, and the Conference was postponed on this basis. Eventually, the UN resolution recognizing the PRC as the sole representative of China¹⁴² gave the Standing Commission grounds to decide not to invite the ROC delegation.¹⁴³

The case of South Africa was distinct in that it did not involve rival delegations. Instead, the issue was the Standing Commission's decision to invite the delegation of a non-representative and oppressive government to represent the country. The debate for the first time questioned 'the representative character of the delegation of a government of a state which nobody denies is party to the Geneva Conventions'.¹⁴⁴ After a lengthy deliberation, the Conference voted in favour of suspension.¹⁴⁵ Nevertheless, critics were vocal, and fifty-one members of the Conference refused to take part in the vote, thus challenging its very legality.¹⁴⁶

The official record of this debate, along with the subsequent statements on the various delegations' positions,¹⁴⁷ is a striking illustration of the Fundamental Principles being invoked by each side for or against the participation of a government that was almost universally viewed as illegitimate. Those wishing South Africa to be suspended referred frequently to 'humanitarian principles' or even humanitarian law.¹⁴⁸ Those who were against suspension, on the other hand, argued that universality was essential in order to maintain dialogue with governments that do not respect humanitarian principles, in the hope of advancing humanitarian objectives.¹⁴⁹ In addition, concern was expressed that the suspension would jeopardize the neutrality of the Red Cross, and hence its humanitarian mission.¹⁵⁰ Thus the participants' obligation to respect the Fundamental Principles, during the Conference as well as at other times,¹⁵¹ did nothing to defuse the debate.

Tempted as supporters may have been to hold up the suspension of South Africa as a triumph of the principle of humanity, political factors almost certainly came into play as well.¹⁵² To date, this suspension from the Conference has remained a unique case, despite any number of violations of humanitarian

141 See François Bugnion, 'The International Conference of the Red Cross and Red Crescent: challenges, key issues and achievements', in this issue, pp. 675–712.

142 UN General Assembly Resolution 2758 (XXVI), 25 October 1971.

143 See F. Bugnion, above note 141.

144 Mr. A. Hay (ICRC President), *Report of the 25th International Conference*, above note 135, p. 98.

145 *Ibid.*, pp. 79–97.

146 Mostly National Societies, and including the ICRC. The League of Red Cross and Red Crescent Societies abstained. See *ibid.*, p. 98.

147 *Ibid.*, pp. 98–109.

148 See e.g. the intervention of Ambassador D. D. Afande (Government of Kenya), who proposed the motion of suspension on behalf of the African delegations: *ibid.*, p. 80.

149 See e.g. the address of Brigadier B. Wallberg (Swedish Red Cross): *ibid.*, p. 91.

150 See e.g. the addresses of Mr. J. Mouton Brady (Government of France), and Admiral E. Zumwalt, Jr. (Government of the USA): *ibid.*, p. 85.

151 Movement Statutes, Art. 11(4).

152 Mr. L. Marin of the Spanish Red Cross, representing a group of seventeen National Societies that had refused to participate in the vote, stated that the group had done so because they 'considered that the

principles around the world. Thus it has not set a precedent, and for good reason: the International Conference *is* unique in its nature as a non-political forum for humanitarian discussion among states and humanitarian organizations, and this could be jeopardized if the Conference were to make a habit of excluding participants because of their violations of humanitarian principles. Other fora exist today for participants to take a stand on a specific government's actions, whereas no other can bring states and humanitarian organizations together to work on the implementation of humanitarian law.

These examples show that any invitation to the Conference that is opposed by another member will in any event lead to a debate, for the Standing Commission does not view itself as 'a direct instrument to settle disputes',¹⁵³ and the measures that it takes – including the invitation of certain entities – are subject to the final decision of the Conference.¹⁵⁴ The importance of the Chairman's task of curtailing any 'controversies of a political, racial, ideological or religious nature'¹⁵⁵ cannot therefore be understated.

Disputed status

The Conference has also faced situations in which the question is not the legitimacy of the delegation but the eligibility of the entity itself to claim that it is a state party to the Geneva Conventions. Entities of this kind have generally been allowed to attend the Conference as observers to enable them to be present while issues concerning them are discussed, thereby also defusing the inevitable debates over their status. Past examples of such entities that have attended as observers include pre-independence Namibia (the UN Council for Namibia was present as an observer in 1986)¹⁵⁶ and Palestine (the PLO was granted observer status).

Practice since the China debates has gradually seen a *de facto* acceptance of UN ground rules for what is and what is not a state. This is also the net effect of the Swiss decision not to proceed with the PLO's purported adherence to the Geneva Conventions in 1989. But, because of its linkage to the UN headquarters, it is a practice that has not adapted to the realities now perceived by the specialized agencies and a growing number of other intergovernmental organizations dealing with technical issues.

This dilemma is also shown by the way in which the Movement handles the granting of observer status in the International Conference. As the Standing Commission's power to invite observers is not restricted¹⁵⁷ and little guidance is

vote was being taken from political positions': *Report of the 25th International Conference*, above note 135, p. 98.

153 Standing Commission of the Red Cross and Red Crescent, 'The birth of the Standing Commission', 2007, available at <http://www.rcstandcom.info/history2.shtml> (last visited 27 October 2009).

154 Movement Statutes, Art. 18(2)(a).

155 *Ibid.*

156 *Report of the 25th International Conference*, above note 135, p. 39.

157 Movement Statutes, Art. 18(1)(d).

available from the Rules of Procedure,¹⁵⁸ it has developed its own more explicit criteria in this regard.¹⁵⁹ It divides observers into three categories: National Societies awaiting recognition and admission; international organizations, NGOs, and academic institutions; and the category on which we will focus, namely ‘States not yet parties to the Geneva Conventions and other political entities’.¹⁶⁰

The ghost of conferences past is manifest in the Standing Commission’s criteria: when considering an entity from the third category for observer status, the Commission is required ‘to give special consideration to political issues that might be detrimental to the neutrality of the Conference and divert attention from humanitarian matters’.¹⁶¹ In this process, it has been recommended that the Commission ‘seek the opinion of the International Federation and the ICRC, as well as advice from the Group of Ambassadors and Switzerland’.¹⁶²

It is also relevant to note the criteria for admitting observer NGOs and other organizations, as these are designed to prevent non-eligible political entities from gaining observer status through the back door of ‘government-operated NGOs’ (commonly known as GONGOs). A key requirement for admission is that their membership and activities must be of a ‘global, regional or international’ nature, thus excluding organizations that represent one ‘country’. Organizations that do not meet this criterion may, however, be invited as ‘guests’,¹⁶³ indicating that such entities would only be invited to such parts of the Conference as the Standing Commission or Bureau of the Conference decides that they may attend¹⁶⁴ and, unlike observers, are not granted any right to speak or to access documents.

One effect of these provisions and practices has arguably been to limit the ambition of universality. As we have observed, some other organizations have seen their own practices evolve so that entities such as GONGOs, whose participation might be essential to develop fully universal measures on the issues of concern to them, can be brought under their umbrella. Furthermore, the fact that the Movement does not have a system of associate membership also arguably limits its capacity to include the views of non-self-governing territories in regional and technical deliberations of relevance to them.

158 Movement Rules of Procedure, Rule 9(3). ‘Invited organizations’ usually include those that ‘have working relations with the Movement or a special interest in humanitarian law or related problems’: Philippe Abplanalp, ‘The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement’, in *International Review of the Red Cross*, No. 308, 1995, pp. 567–599.

159 Standing Commission of the Red Cross and Red Crescent, ‘Guiding criteria: observers to the International Conference of the Red Cross and Red Crescent’, available at http://www.rcstandcom.info/documents/Observers_30th_IC_Criteria_eng.pdf (last visited 27 October 2009).

160 *Ibid.*, pp. 1–2.

161 *Ibid.*, p. 1.

162 *Ibid.*

163 *Ibid.*, p. 2.

164 Movement Rules of Procedure, Rule 10.

Conclusion

Although full participation in the assemblies of international organizations remains very much a question of majority acceptance of an entity's statehood, it could be said that concessions and compromises are part and parcel of the normal business of any universal organization. As such organizations involve the majority of the world's states in dealing with matters of universal concern, it can reasonably be expected that decisions taken in these fora will have an impact on non-member entities.

The latter will accordingly have an interest in at least observing the proceedings. Use of subordinate participation statuses has shown that the real issue is often the standing in which the entity is placed vis-à-vis member states and the status that this may be seen to imply. This explains why member states may not approve an entity's full membership but be satisfied to allow it to take part with observer status. Given the universal importance of the topics negotiated in and regulated by many international organizations, the impact of multilateral co-operation in these areas on the wellbeing of populations, and the growing interdependence of states in a globalized world, the inclusive ethos of universal organizations is more important than ever. Opportunities for non-member entities to participate in an observer capacity provide a useful way to extend that ethos.

In the interests of ensuring that all populations are represented in international arenas where their fundamental interests are at issue, cognisance should be taken of who is *de facto* in charge of safeguarding those interests, and provision should then be made for the responsible party to participate in some way in the relevant forum. This could be done either through increased use of existing alternative participation mechanisms (observer status in particular, as it is the most flexible), or through the negotiation of new forms of participation that would allow for a wider range of stakeholders to participate, while at the same time tailoring the conditions and effects of this participation so as to make it acceptable to member states (most notably, the depoliticization of such participation mechanisms by expressly detaching them from notions of sovereignty and rather linking them to more objective criteria, for example *de facto* control of relevant infrastructures, or exercise of certain powers or capacities).

In the case of the International Conference of the Red Cross and Red Crescent, certain specificities of this unique forum need to be taken into account when addressing participation questions. First, there is the Conference's underlying commitment to the Fundamental Principles, which is incumbent upon all participants. Although the Principles should be the guide for any decision taken on participation, the appearance in previous debates of a tension between neutrality and universality shows that this is easier said than done. Further study on the meaning of the principles in the context of the Conference would certainly provide a valuable guide for the future.

Second, the Conference's role as a forum for decision-making on humanitarian matters should be kept in consideration. The Conference's material scope is, on the one hand, expanding to areas where it may be more important to

engage with a wide range of authorities, for example on matters such as epidemics and the management of natural disasters. On the other hand, the traditional and legal basis of the Conference remains international humanitarian law, which involves issues on which states have been resistant to engaging with entities whom they may regard as not having a base founded on adherence to the Geneva Conventions.

Third, and alongside the first two points, it follows that a minimum condition for the acquisition of observer status at the International Conference might need to be a form of written acceptance of the Geneva Conventions, at least insofar as they can apply to a non-party.

This thinking would have an impact on the existing arrangements for observers at the International Conference, namely international organizations and NGOs. This article does not canvass this point, but it is clear that new arrangements for non-member entities would need to address all such entities. Such new arrangements would need to take account of the importance that the Conference achieves through its unique ability to bring states and humanitarian actors (i.e. National Societies) together as equals, in order to discuss the humanitarian problems affecting the populations whom they represent.

The crux of the participation issue for the future lies in allowing a voice to those who do in fact have responsibility for populations, while at the same time taking care to maintain this unique line of communication between states and the humanitarian world.