Transnational Legal Theory

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rtlt20

A political theory of state equality

Alex Green

To cite this article: Alex Green (2023): A political theory of state equality, Transnational Legal Theory, DOI: 10.1080/20414005.2023.2232597

To link to this article: https://doi.org/10.1080/20414005.2023.2232597

TRANSNATIONAL LEGAL THEORY
https://doi.org/10.1080/20414005.2023.2232597

A political theory of state equality

Alex Green[a,b]

[a]Lecturer, York Law School, University of York, York, UK; [b]Academic Associate, 23 Essex Street Chambers, London, UK

ABSTRACT

This paper advances a novel argument for why states are juridically equal. It embraces a fundamentally political understanding of legal statehood, whereby states provide essential 'focuses' and 'forums' through which politics can take place. On this basis, it contends that state equality cannot be properly grasped until it is acknowledged that states constitute 'political communities' and merit a certain degree of respect as such. It is this respect that grounds juridical equality. Political communities, in the relevant sense, need not be either democratically legitimate or particularly just. Ethically valuable politics typically operates as a response to injustice and illegitimacy. However, the normative core of state equality lies in the structural support that states provide for this distinct form of human activity.

KEYWORDS Statehood; equality; public international law; political philosophy

1. Introduction

The notion that states are juridically equal forms a fundamental principle of the international legal system.[1] It is enshrined, for example, in Article 2(1) of the United Nations Charter, which holds that organisation to be 'based on the principle of the sovereign equality of all its Members'. This commitment is reflected in the preamble of the same document, which declares 'faith … in the equal rights of … nations large and small' and is referenced in numerous judgments by the International Court of Justice.[2] Juridical equality, in this sense, means 'equality before the law … [and] an equal capacity for rights … [in] that all [states] are equally capable of achieving rights, entering into

CONTACT Alex Green alex.green@york.ac.uk Lecturer, York Law School, University of York, York YO10 5GD, UK; Academic Associate, 23 Essex Street Chambers, London WC1R 5AA, UK

[1] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law*, 599, 600.

[2] For example: *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, ICJ Reports 2014,*147, [26]-[28]; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* 99, [57]; and *Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002*, 3, [62]-[71].

transactions, and performing acts'.[3] It also entails – or, more accurately, coincides with – certain adjacent and substantive protections, such as the right to relative political independence, which will be discussed in the sections below. In this paper, the interest in state equality is philosophical and explanatory. The paper asks whether it 'supervenes' upon any intrinsic properties that states possess beyond the nominal fact of their shared statehood. It adopts the view that the juridical equality of states supervenes upon their shared normative status as 'political communities': physical and juridical spaces within which ethically valuable individual political activity takes place. This approach is called 'statehood as political community' here, and contrasted with the popular view that state equality is a legal fiction, rather than an entailment of the 'nature' or 'essence' of states themselves. This non-foundationalist view is usually coupled with an insistence that the fiction of 'sovereign equality' is nonetheless instrumentally valuable, not least because it promotes global peace and security. The aim in contrasting arguments of this kind with statehood as political community is not to show that such instrumental justifications are necessarily wrongheaded but rather to demonstrate that they are normatively incomplete *vis-à-vis* the equality of states as it is practised within contemporary international law.

There may well be instrumental benefits to treating states as each other's equals, however undue focus is often placed upon them. Statehood as political community holds states to be equal because there is something intrinsically valuable about the kind of thing that they are. Emphasising this point accomplishes three things. First, it tightens our conceptual grasp upon the juridical equality of states and so advances our understanding of international law. Second, to the extent that statehood as political community shows why states are intrinsically valuable, it lends normative support to the recognition and respect that international law already provides them. Third, to the extent that the arguments presented here identify potential similarities between states on the one hand and non-state political communities on the other, they also allow us to assess more clearly how much normative importance should be placed not only upon the equality of states but also upon the state/non-state divide itself, as principles for international relations.

The structure of the argument presented is as follows. Section 2 describes several ways in which states are not equal and notes how their factual diversity encourages instrumental accounts of state equality. No substantive arguments against such instrumental justifications are presented: their truth or falsehood are largely beside the point. The only resistance to 'pure' instrumentalism is the suggestion that it exhausts the reasons for state equality. (It is quite consistent with statehood as political community for state equality to also disclose incidental benefits for, say, peace and friendly relations.) Section 3 begins

[3] Edwin DeWitt Dickinson, *The Equality of States in International Law* (OUP, 1920) 3–4.

setting out the positive argument by establishing what a theory of state equality must accomplish. Section 4 explains the kind of properties that non-instrumental theories of state equality must identify. The account of statehood as political community begins in Section 5, with characterisations of 'politics' and 'political community'. (These phrases denote terms of art used to facilitate rational reconstruction, not freestanding conceptions of contested the political concepts to which they might normally refer.) Finally, Section 6 turns to states, using the normative resources developed above to establish their shared status, before briefly considering the position of non-state political communities, which may share many 'state-like' features.

Before beginning, some clarifications are necessary. First, this paper does not advance a full account of legal sovereignty. Juridical equality is one aspect of sovereignty, however it by no means exhausts that concept. Theories of sovereignty must address a range of issues – the permissibility of humanitarian intervention, for example – that fall well beyond my present scope. In recognition of this, the phrase 'state equality' is used, rather than the more usual 'sovereign equality', to avoid confusion in what follows.[4] Second, although my preferred theory is 'statehood as political community', this does not turn upon a standalone theory of politics, or even of political community itself. Instead, these concepts are constructed in an explicitly hermeneutic fashion *vis-à-vis* international law. These are used to offer what Habermas calls a 'rational reconstruction' of state equality, based upon the factual and normative elements that international legal practice typically picks out as salient to that principle. By doing so, the immanent rationality of treating states as equals is explained on the assumption that international law tracks some set of genuine reasons for doing so.[5]

This method has two facets that some readers might find unusual. First, because it takes seriously the reasoning-giving force of state equality, it requires a mode of engagement with international law that is, perhaps, uncommonly 'creative'. When identifying putative legal standards, there is as much an emphasis placed upon their normative weight as upon their basis within a given text or practice.[6] This is necessary to render state equality rationally intelligible as a normative principle: a task that would be impossible without seeking the reasons that justify treating states equally. As Habermas notes, 'reasons can be *understood* only insofar as they are taken seriously as reasons as *evaluated*' [emphasis in original].[7] The second potentially counter-intuitive aspect of this paper's approach is that it is not designed to show, as some normative arguments are, that its preferred theory of

[4] This phrase was common amongst early twentieth-century writers, for example: Dickinson (n 3).
[5] Jürgen Habermas, *Moral Consciousness and Communicative Action*, Christian Lenhardt and Shierry Nicholson (trans.) (Polity Press, 1992) 29–32.
[6] Indeed, what Habermas calls 'rational reconstruction' is methodologically close to the 'creative interpretation' that Dworkin advocates in relation to domestic law: Ronald Dworkin, *Law's Empire* (Hart, 1986) 50–53.
[7] Habermas (n 5) 30.

state equality would, if generally accepted, entail an evaluatively optimal organisation of global affairs. Statehood as political community cannot succeed unless it offers significant normative reasons for treating states as juridical equals, but those reasons need not provide the all-things-considered 'last word' on how international relations should be conducted. The arguments presented here are therefore both ambitious and modest. They seek a genuine normative basis for state equality but also accept that the morality of international relations includes far more than state equality alone.

Another important point concerns the difference between 'instrumental' and 'intrinsic' theories of state equality. Intrinsic theories, such as the one presented here, hold there to be some property (or set of properties) inherent to states as such, upon which their equal normative status supervenes. These theories further contend that state equality can be explained and justified primarily in terms of that shared property. By contrast, instrumental theories hold there to be no shared property upon which the equality of states supervenes, such that state equality constitutes a legal fiction (which may nonetheless have instrumental value).[8] Supervenience, in the relevant sense, is a metaphysical relation akin to covariance,[9] whereby properties of one kind pertain in virtue of those of another.[10] In the context of equality, alleging supervenience amounts to claiming that the equality of two or more things pertains because those things share other properties without which they would not be equal. Moreover, at least insofar as the concept is employed here, supervenience implies explanatory potency on the part of these more basic properties. For example, it both is the case, and is explicable as such, that two people are equally tall because they have the same height. Normative equality is a little more complex, explained in Section 4, however, the basic argumentative structure is the same: states are equal, and are intelligible as such, because they are all political communities.

Finally, this paper focuses largely upon nigh-uncontested instances of statehood, such the People's Republic of China and the French Republic, rather than upon more controversial or marginal cases, such as the State of Palestine or the Republic of China (Taiwan). Considerable cultural, demographic, geographical and governmental diversity pertains even amongst

[8] Intrinsic properties pertain by virtue of the way something is (mass, in the case of something physical), whereas extrinsic properties pertain in virtue of how things react to the world (weight, to continue the example): David Lewis, 'Extrinsic Properties' (1983) 44 *Philosophical Studies* 197. Non-instrumental (or 'intrinsic') value pertains when something is valuable for its own sake (love, for instance), whereas instrumental (or 'extrinsic') value pertains when something has value only in light of other things (such as money): Aristotle, *Nicomachean Ethics*, 1094a, 1153b. Statehood as political community focuses on intrinsic properties of statehood but is agnostic as to whether those properties are valuable 'merely' extrinsically, or whether they have intrinsic value as well. Crucially, neither the intrinsic properties of a thing, nor the intrinsic value of a thing, must be unique either to that thing or to that *kind* of thing.

[9] Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Belknap Press, 2017) 61.

[10] Simon Blackburn, *The Oxford Dictionary of Philosophy* (OUP, 1996) 368.

near-universally recognised states. That diversity is sufficient to render any non-instrumental theory of state equality both interesting and controversial. Since intrinsic theories cannot rely upon state equality being legally fictitious, the comparative diversity of well-established states needs to be explained, even before more marginal or contested cases are considered. Notwithstanding this point, Section 6 includes several implications for the normative position of postcolonial states and non-state Indigenous communities,[11] which broaden the significance of statehood as political community beyond its power to explain the equality of established states.

2. Inequality and instrumentalism

That 'states are not factually equal, for their powers differ' is well-rehearsed.[12] A considerable literature on law and power has developed, with sometimes none-too-clear lines drawn between those, on the one hand, who take international law to be thinly veiled *realpolitik* and their more optimistic opponents, who argue it to impose genuine constraints upon state action.[13] Within this broader literature, considerable attention has been paid to inequalities of global influence, with some authors explicitly describing the 'Great Powers' as superior in status to other states as a matter of principle.[14] Whatever the truth of this, states clearly differ in military and economic power, as well as in their cultural and diplomatic influence.[15]

If contemporary states are unequal in terms of power, they are surely as divergent in terms of their democratic credentials. For the purposes of this paper, it is presumed that democracy requires, at least as a minimum, the kind of national-level institutions present in political communities such as the United States of America or the Federal Republic of Germany. Generally, this implies a legislature and executive subject to relatively frequent and regular popular election with near universal suffrage. As conceptions of

[11] The phrase 'Indigenous communities' is used here, instead of more specific terminology such as First Nations (Canada) or Native Nations (US), not to conflate their various cultural, spiritual, social and political traditions but to emphasise certain common elements of the injustice and disrespect they face, in particular from settler-states.

[12] Philip Jessup, 'The Equality of States as Dogma and Reality' (1945) 60(4) *Political Science Quarterly* 527, 528.

[13] See, for example: Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP, 2009); James Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Brill 2014), Chapter XV; Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP, 2007).

[14] In particular, by Gerry Simpson: 'The Great Powers, Sovereign Equality and the Making of the United Nations Charter' (2000) 21 *Australian Yearbook of International Law* 133; *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, 2009); 'Great Powers and Outlaw States *Redux*' (2012) 43 *Netherlands Yearbook of International Law* 83.

[15] Although juridical equality empowers smaller states diplomatically, for example by enabling 'strategic litigation' at the international level (Crawford (n 13) 359–60) or via their voting power within the United Nations (James Crawford, 'Islands as Sovereign Nations' (1989) 38(2) *International & Comparative Law Quarterly* 277, 285–6), this is a consequence of, and not a foundation for, that principle.

democracy go this is reasonably thin. Nonetheless, many states enjoy near universal recognition without having them in place.[16] Indeed, it remains fundamental within international doctrine that state equality does not mandate democratic government. As stated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*:

> … adherence by a State to any particular [political] doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[17]

This is borne out by the fact that UN membership is not contingent upon the presence of democratic institutions in the applicant entity. Consequently, to the extent that UN membership is indicative of juridical equality, the presence or absence of democracy in the applicant community is not determinative of its equal status.[18]

Similar disparity exists in the global protection of human rights. If it goes without saying that no contemporary state is blameless *vis-à-vis* the violation of basic liberties, so too must it be accepted that some states are worse than others. For instance, in 2019, although both Germany and the Republic of Turkey had populations of a similar size (around 83 and 82 million respectively),[19] the latter had 9,236 cases pending before the European Court of Human Rights, whilst the former had only 182.[20] Likewise, very few states can match the recent record of the United States when it comes to instigating international armed conflicts with significant civilian fatalities.[21] Such divergences on fundamental freedoms make it impossible to ground state equality upon the equal protection of human rights.

Finally, and notwithstanding the independent importance of national self-determination within international law, it cannot plausibly be claimed that contemporary states are congruent with nations,[22] in that for every

[16] Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', (1999) 48 *International & Comparative Law Quarterly* 545, 556; Gregory Fox and Bradley Roth, 'Democracy and International Law', (2001) 27 *Review of International Studies* 327, 337.

[17] *Judgement*, ICJ Rep. 1986 (27 June), 14, [263].

[18] Whilst the UN Charter frequently uses the word 'state' in an idiosyncratic manner – and therefore sometimes may not entail much for the equal status of the 'states' it references – membership decisions pursuant to Article 4(1) broadly reflect the notion that members must be states under international law, see: Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP, 1963) 11–57.

[19] Information taken at time of writing from Eurostat (online: https://ec.europa.eu/eurostat).

[20] Council of Europe, *Annual Report 2019 of the European Court of Human Rights* (2019) 128.

[21] Neta Crawford estimates that between October 2001 and October 2018, around 244,124 to 266,427 civilians were killed in the post-9/11 wars in Iraq, Afghanistan, and Pakistan ('Human Cost of the Post-9/11 Wars: Lethality and the Need for Transparency', November 2018, Watson Institute for International & Public Affairs, Brown University; online: https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%2C%20Nov%208%202018%20CoW.pdf).

[22] Chimène Keitner, 'National Self-Determination in Historical Perspective: The Legacy of the French Revolution for Today's Debates' (2000) 2(3) *International Studies Review* 3, 4–6.

recognised state there exists a distinct national community, unified by shared cultural or linguistic traits (together, perhaps, with a shared history and unified sense of identity).[23] Many states are either multi- or pluri-national, encompassing diverse nations, and as many contain distinct minority groups with unique identities.[24] To take just a few examples, the constitution of the United Mexican States officially recognises its pluri-national composition,[25] New Zealand comprises several Indigenous Māori communities in addition to its European settler majority,[26] and almost half the total population of the Grand Dutchy of Luxembourg is comprised of foreign nationals.[27] When also accounting for postcolonial states such as the Republic of Kenya or the Democratic Republic of the Congo, which encompass even greater cultural, ethnic and linguistic plurality,[28] it must be conceded that few true 'nation-states' currently exist. Indeed, true congruence between state and nation has arguably *never* existed.[29] One cannot, as a result, use nationhood to ground state equality.

Faced with such global diversity, much contemporary scholarship concerning state equality focuses upon the nature and scope of the juridical benefits that status confers, rather than upon anything intrinsic that individual states might be thought to have in common.[30] Such scholarship typically compiles indicative lists of the powers, rights and liberties that established states possess, identifying what it means to be both 'sovereign' and equal in precisely those terms: states are 'sovereign' insofar as they have the legal entitlements that states characteristically possess and 'equal' to the extent that those entitlements are more or less uniform across the international community.[31] Whilst useful for delineating the practical implications of

[23] David Miller, *On Nationality* (OUP, 1997) 22–8.
[24] Jeremy Waldron, 'Two Concepts of Self-Determination' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010) 398.
[25] Article 2.
[26] Stats NZ, '2018 Census totals by topic – national highlights', online: https://web.archive.org/web/20190923102431/https://www.stats.govt.nz/information-releases/2018-census-totals-by-topic-national-highlights.
[27] CIA World Factbook, *Luxembourg* (last updated 10 August 2021), online: www.cia.gov/the-world-factbook/countries/luxembourg/#people-and-society.
[28] The DRC, for example, contains more than 200 distinct ethnic groups, see: Anthony Appiah and Henry Louis Gates, *Encyclopaedia of Africa* (OUP, 2010) 14–15.
[29] Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton UP, 2009) 89–93.
[30] For example, Andrew Altman and Christopher Wellman, *A Liberal Theory of International Justice* (OUP, 2009) 4, 193 n.3; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP, 2004) 263; Christopher Morris, *An Essay on the Modern State* (CUP, 1998) 36–46; Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP, 2015) 103–266; John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard UP, 1999) 23–30.
[31] Buchanan lists 'the right to territorial integrity; the right to noninterference in internal affairs, ie the internal self-determination (subject to certain restrictions); the power to make treaties, alliances, and trade agreements, thereby altering its juridical relations to other entities; the right to make (just) war; the right to promulgate, adjudicate, and enforce legal rules within its territory (subject to certain restrictions)' (Buchanan (n 31) 263).

statehood, this does little to advance our understanding of state equality. In the first place, explaining juridical equality via lists of entitlements can be misleading. Despite having several entitlements in common no actual state has, or will ever possess, the same entitlements as any other.[32] States hold different territories, have acceded to different treaty regimes, and belong to different international organisations. Some have coastlines whilst some are landlocked, whilst others govern unique ecosystems, cultural sites and Indigenous communities. This combination of factors entails that, whilst many states will have entitlements and obligations that are similar to those possessed by others, very few will have complete sets of entitlements that are exactly the same.[33] As Warbrick concludes, '[i]t is as clearly wrong to speak of the 'equal rights and duties' of states as it is to speak of their material equality'.[34] More importantly, however, even very detailed lists of the entitlements and obligations characteristically held by established states do not so much explain the juridical equality of state as restate and evidence its existence. Juridical equality is an explanandum to which the only explanans can be the kind of normative hermeneutic theory described below in Section 3.

In contemporary scholarship, this interpretive work is often accomplished by using purely instrumental justifications. Warbrick himself readily admits this, arguing that '[e]ntities are equal because they are states: they are not states because they are equal … [thus] legal equality inevitably has a fictional quality to it.'[35] A cognate position is adopted by Ratner, who conducts a detailed normative assessment of state equality in terms of its capacity to promote peace and its coherence with the protection of human rights.[36] He concludes that a 'world without sovereign equality is far worse in terms of the prospects for violence and harm to human rights than one with it'.[37] Similarly, Kingsbury and Kelsen emphasise the role that state equality plays in restraining inter-state coercion and violent conflict.[38] State equality, according to such accounts, can only be explained as a useful but nonetheless artificial construction. These instrumental justifications are not problematic as such, at least assuming their empirical intimations hold true. The objection is rather that such instrumentalism does not exhaust what can be said to explain and justify state equality. There is

[32] James Crawford, *The Creation of States in International Law* (OUP, 2007) 28–33.
[33] Giuseppe Carnazza-Amari, *Trattato sul Diritto Internationale Pubblico di Pace* (1875) 278; Dickinson (n 3) 115–18; Hans Kelsen, 'The Principle of Sovereign Equality as a Basis for International Organization' (1944) 53(2) *Yale Law Journal* 207, 208–9.
[34] Colin Warbrick, 'The Principle of Sovereign Equality' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge, 1994) 206.
[35] *Ibid*, 205.
[36] Ratner (n 30) 190–219.
[37] *Ibid* at 217–18.
[38] Kingsbury (n 1) 618–20; Kelsen (n 33), 207–20, 207.

need for an intrinsic theory, which takes seriously the suggestion that states are equal in some deeper sense.

Instrumentalism itself represents a relatively contemporary turn. In older scholarship, significant reliance was placed instead upon three alternatives. First, legal personhood as a fundamental property upon which the state equality supervened.[39] Second, upon a supposed analogy between states and natural persons.[40] Third upon the notion that equality follows from the right to political independence.[41] Despite their intrinsic nature, these approaches are not taken here. Viewing juridical equality as a consequence of legal personhood is no longer tenable, since contemporary international law admits legal persons that are not juridically equal to states.[42] Similarly, attempts to explain state equality through analogy with natural persons are argumentatively fraught, as can be demonstrated with reference to Vattel, who wrote:

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights.[43]

Any argument that states are equal *because* they are comprised of humans, who are also equal in relation to each other, commits the fallacy of composition. It cannot follow that because each member of a set possesses some property that the set itself shares that property. New clubs may have entirely old members, and teams of individually gifted athletes may nonetheless lack (collective) skill. In the same manner, there is no reason to suppose that just because all members of our polities are equal in status that those polities themselves must be. Even if one understands analogies between states and natural persons to be purely illustrative, they lack force: as Beitz and Waldron have convincingly argued, there are material *dis*analogies between the grounds of our equal status as human individuals and the supposedly equivalent properties possessed by states.[44]

Finally, attempts to ground state equality in the right to political independence risk circularity because independence is part of what must be explained. Consider Bonfils, who writes:

[39] Lassa Oppenheim, *International Law: A Treatise, Volume 1* (Longmans, Green, and Company, 1905) 168.
[40] Dickinson (n 3) 111–13.
[41] *Ibid*, 114–15.
[42] Rowan Nicholson, *Statehood and the State-like in International Law* (OUP, 2019) 193–211.
[43] Emer de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Games Brown Scott, ed (Carnegie 1916) (3), 7.
[44] Charles Beitz, *Political Theory in International Relations* (Princeton UP, 1999) 53, 76; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) *European Journal of International Law* 315.

> As far as they are sovereign and independent with respect to each other, states are on a footing of juridical equality among themselves. Each may exercise in their plenitude the rights and faculties which result from its existence and from its participation in the international community. The attributes of sovereignty are identical for all.[45]

As a definition of state equality this works well, but it cannot function as an explanation. Independence entails that no state has the authority to interfere unilaterally in the protected internal affairs of any other. However, this lack of authority only holds if state equality pertains: if states are not normatively equal to at least some degree, the justificatory basis for their independence is less clear.[46] This might render independence and equality mutually supporting but it cannot without circularity permit the derivation of one from the other. One must look for an intrinsic justification for state equality elsewhere.

3. Reconstructing state equality

Aristotle's classic articulation of equality dictates only that 'like cases must be treated alike'.[47] This may lead the assumption that the more similar two things are, the more 'equal' they are, with perfect equality implying total sameness. But whilst the equality of two things may imply one or more shared properties in respect of which they are equal, this need not imply broader similarity: to use Vattel's classic example, 'a dwarf is as much a man as a giant'.[48] Indeed, to invoke equality is to preclude total sameness. If two things are identical, in the sense that they are completely indiscernible, then they are not equal but entirely the same, which is to say a singular, object.[49] Equality, as opposed to sameness, can be usefully divided into categories: descriptive and normative. Descriptive equality covers things such as equal height, weight or colour, whilst normative equality concerns how things should figure in our practical reasoning.[50] The focus is upon the normative equality of states.

As a purely formal relation, normative equality amounts to this: two things are equal insofar as they hold the same place – and therefore the same status – within a given normative community.[51] You and I are equal because we are both human, even though you might be considerably more

[45] Henry Bonfils, *Manuel de Droit International Public*, 6th ed, Paul Fauchille (ed) (1912) 161.
[46] As put by Chief Justice Marshall in *The Antelope* 23 US 66 (1825), 'No principle of general law is more acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. *It results from their equality*, that one can rightfully impose rule on another' [emphasis added by author]; see also: Fernando Tesón, *A Philosophy of International Law* (Westview Press, 1998) 60–4.
[47] Aristotle (n 8) 1131a10-1131b15; *Politics*, III.9.1280 a8-a15, III. 12. 1282b18-1282b23.
[48] Vattel (n 43).
[49] Bertrand Russell, *An Inquiry into Meaning and Truth* (George Allen and Unwin, 1972) 97–102.
[50] Waldron (n 9) 43–55.
[51] Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) *Philosophy & Public Affairs* 83, 85.

virtuous or intelligent than me.[52] In a similar vein, the French Republic and the Principality of Liechtenstein are juridically equal because they are both political communities, notwithstanding that France has greater military, diplomatic and economic power, as well as a larger population and territory. This account of state equality holds states to possess normative properties (namely, those constituting 'political community') in virtue of which juridical equality pertains. Such supervenience claims tend to be controversial: why should *these* shared properties entail that *these* entities possess *this* status? For instance, the question of why 'common humanity' entails that you and I should be treated as equals is famously vexed. Scholars have disagreed over whether it is the ability to reason,[53] the capacity for moral thought,[54] the ability to experience pleasure and pain,[55] the shared vulnerability,[56] or the capacity to form meaningful relationships,[57] that grounds human equality. Some argue that viewing the world through the lens of human equality is a choice that allows us to live a certain way,[58] whilst others contend there to be no better explanation for our equality than that we are all God's children.[59] This paper is concerned with the juridical equality of states as something that supervenes upon a more basic set of intrinsic properties. As such, when elucidating state equality, it focuses upon doctrines, practices and examples of statehood, which imply some properties shared by all established states. Not just any set of shared properties will do. Those settled upon must render the equality of states intelligible as a normative principle, and so must be capable of generating sufficient normative reasons for respecting the juridical equality that those entities possess. However, before developing this argument, a little more about what the method of 'rational reconstruction' entails here should be discussed.

A rational reconstruction is a kind of interpretation, for example, of a text, social practice, individual speech act, or abstractly formulated practical maxim.[60] The reconstruction presented here concerns 'international legal practice': a deliberately inclusive set of descriptive facts, encompassing the text and context of international instruments, including but not limited to binding treaties; international judgments; and statements about the content of the law made by the representatives of established

[52] Stephen Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36, 39.
[53] Cicero, *De Legibus*, in *On the Commonwealth and On the Laws*, James Zetzel (ed) (CUP, 1999) 113.
[54] Immanuel Kant, *Groundwork to the Metaphysics of Morals*, Mary Gregor (trans.) (CUP, 1997) 57.
[55] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns and H.L.A. Hart (eds) (Athlone Press, 1970) 282–3.
[56] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' 20(1) *Yale Journal of Law & Feminism* (2008), 1–23: 8–12.
[57] Bernard Williams, *Problems of the Self* (CUP, 1973), 232.
[58] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace, Jovanovich, 1973) 301.
[59] Waldron (n 9) 177.
[60] Habermas (n 5) 29.

states.[61] One example is paragraph 4 of the 1943 Four-Nations Joint Declaration, made between the United States, the United Kingdom, the Soviet Union and China, which holds each state to:

> … recognize 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.

This was eventually reflected in Article 2(1) of the UN Charter, which establishes that organisation as 'based on the principle of the sovereign equality of all its Members'. That sentiment is echoed, not only in the preamble of the Charter, but also in Article 1(2), which declares one purpose of the UN to be the promotion of 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. These commitments were elaborated upon by the UN Special Committee on the Sovereign Equality of States, which, in 1965, recorded a consensus in favour of the following propositions:[62]

(1) l. All States enjoy sovereign equality. As subjects of international law they have equal rights and duties.
(2) In particular, sovereign equality includes the following elements:
   (a) States are juridically equal.
   (b) Each State enjoys the rights inherent in full sovereignty.
   (c) Each State has the duty to respect the personality of other States.
   (d) The territorial integrity and political independence of the State are inviolable.
   (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems.
   (f) Each State has the duty to comply fully and in good faith with its international obligations, and to live in peace with other States.[63]

That list was adopted, in unaltered form, by the General Assembly in the Friendly Relations Declaration.[64] Unfortunately, it reads as somewhat vague

[61] In adopting this broad understanding of legally relevant material, the paper follows Mark Greenberg ('How Facts Make Law' (2004) 10 *Legal Theory* 157, 157).
[62] Proposals were put to the Committee by Czechoslovakia (A/AC.119/L.6), by Yugoslavia alone (A/AC.119/L.7), by the United Kingdom (A/AC.119/L.8), and then jointly by Ghana, India, Mexico and Yugoslavia. Several elements of those were rejected, either for lack of additional support or for lack of eventual consensus. Significantly, no consensus was reached on the relationship between state equality and control over natural resources: 'United Nations: Consensus on Principle of Sovereign Equality of States Reached by Special Committee on Principles of International Law Concerning Friendly Relations of States' (1965) 4 *International Legal Materials* 28, 44.
[63] *Ibid*, 43.
[64] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA 2625 (XXV), Annex, 24 October 1970 (A/RES/25/2625), at 124.

and seemingly incomplete. Defining state equality in terms of 'the rights inherent in full sovereignty' is particularly unhelpful, whilst it is not entirely clear what it means for 'the personality of other States' to be respected, at least not insofar as that is distinct from respecting their juridical equality, territorial integrity and political independence.[65] As far as incompleteness goes, certain important powers and immunities go unenumerated.[66] Notable amongst these are the immunity states enjoy from the jurisdiction of other states for certain official acts and their *de jure* equal capacity to create international law, both of which are generally accepted to follow from their equal statehood.[67]

However, whatever prescriptions a complete account of the relevant legal practice might include, it would necessarily be insufficient *vis-à-vis* rational reconstruction. To provide the latter, an interpretation of state equality must do more than enumerate the consequences or incidents of that doctrine: it must also elucidate its normative basis. This is because rational reconstruction aims to make sense of its object, given the kind of thing that it is.[68] Since state equality is a normative principle, it requires an explanans that elucidates its internal rationality, which implies a resort to normative reasons.[69] As such, the aim here is to supply an argument that not only fits the descriptive content of international legal practice, but also putatively justifies what that content seems to entail. This implies three things for what follows.

First, since the argument presented is itself an interpretation of international law, some of the following claims will be legally controversial. This is inescapable, particularly when dealing with state equality.[70] Second, since the concern is with the normative reasons that explicate such equality, the legal arguments assume that the moral importance of the law is as relevant to its existence and identification as its basis within any particular set of social sources. This 'non-positivist' approach, which Dworkin famously expresses through the language of 'fit' and 'justification', is controversial but not unprecedented within international legal scholarship.[71] Those such as Letsas and Suttle have used it, for example, to examine European

[65] Carmen Pavel, *Law Beyond the State* (OUP, 2021) 166.
[66] It is possible that these omitted entitlements were understood by some members of the General Assembly to fall within the scope of paragraph 2(b); even if this were so as a matter of psychological fact, the Declaration remains unhelpfully imprecise.
[67] For example, *Jurisdictional Immunities of the State* (n 2) [57]; Ann van Wynen Thomas, 'Equality of States in International Law: Fact or Fiction?' (1951) 37(6) *Virginia Law Review* 791, 806–9.
[68] Habermas (n 5) 27.
[69] The reasons I have in mind are what Parfit calls 'genuine practical reasons' (Derek Parfit, *On What Matters: Volume One* (OUP, 2011) 31): considerations that actually count for, or against, particular kinds of behaviour. Nonetheless, this paper might also be interpreted as providing reasons of less objective kind, such as those 'from the legal point of view', see: Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 141.
[70] As Hart notes, the 'expression 'a state' is not the name of some person or thing inherently or 'by nature' outside the law' (HLA Hart, *The Concept of Law* (OUP, 2nd edn, 1994) 221).
[71] Dworkin (n 6) 65–70, 225–75.

human rights and international economic law.[72] What is attempted here is similar, albeit in relation to a more 'structural' legal doctrine.[73] Third, although my argument considers elements of state creation, as well as the characteristic capacities that states possess, it does not provide complete criteria for differentiating states from other things, nor does it prescribe principles for state creation.[74] Instead, it offers an explanans for the equality of states, which proceeds by identifying certain normatively important properties that all states possess.

4. Intrinsic and range properties

Statehood as political community offers an intrinsic account of state equality.[75] Intrinsic properties pertain simply in virtue of what things are and are at least partly constitutive of their 'nature' or 'essence'.[76] That is not to say that states have some manner of 'pre-legal' essence, explicable wholly without reference to international law.[77] As Crawford notes, a 'State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said that a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices'. Just as you and I are equal because we are both human, states are equal due to their shared nature as political communities. In both cases these properties are intrinsic: your moral agency is a fact about you, whilst 'being political community' is, on my account, a fact about, say, the Republics of Chile or Mauritius.

Besides being intrinsic to states, the aspects of political community that are interesting have another important feature, in that they are 'range' properties.[78] Human equality is once again helpful: assume our moral agency makes people equal and that it arises from their capacities to ascertain, understand and respond to moral reasons.[79] On this account, their equality

[72] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007); Oisin Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (CUP, 2018); see also John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16(1) *Oxford Journal of Legal Studies* 85, 111–15.

[73] 'Non-positivism', in this sense, is methodologically distinct from the natural law approaches of earlier authors. Compare, Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Yearbook of International Law* 1; Ronald Dworkin, 'A New Philosophy for International Law' (2014) 41(1) *Philosophy & Public Affairs* 2.

[74] For this author's attempt at the latter task, see: Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (CUP, 2023).

[75] Crawford (n 32) 5.

[76] For more on the relationship between legal practice and normative reasons in the determination of international law, see: Alex Green, 'The Precarious Rationality of International Law: Critiquing the International Rule of Recognition' (2021) 22(8) *German Law Journal* 171.

[77] Cf. Oppenheim (n 39) 264.

[78] John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 444; Waldron (n 9) 118–27.

[79] Immanuel Kant, 'Critique of Practical Reason' in Mary Gregor (trans.), *Practical Philosophy* (CUP, 1996) 169, 204, 210.

turns upon properties which exist in humans to differing degrees: some individuals have heightened capacities for practical reason, for example, whilst others struggle with simple rules. Nonetheless, '[t]he sheer fact of the existence of the moral capacity … is a momentous thing, whose metaphysical significance commands the greatest respect and dwarfs the variations in its all-too-human exercise'.[80] In other words, the 'range' property of moral agency stands in a very particular relation to the 'scalar' properties of our varying capacities for reason. Waldron characterises this relation in the following terms:

> We know that a given range property, R, will be defined in relation to a scalar property, S … [and i]n each case a certain range within S is specified as a basis for the attribution of R … Understanding a range property is partly a matter of understanding the back-and-forth between recognition of the sheer presence of R and the making of particular judgments within the part of S that is covered by R's range … [nonetheless w]e use a range property, R, when we are interested more in whether particular cases are located within a given range along a scalar dimension, S, than in *where exactly* they are located within that range.[81]

With the view adopted here on state equality, political community operates in a similar manner: the relevant question is whether a state enables ethically valuable politics sufficiently to be considered a political community of the sort described. My contention is that almost all established states in fact meet this standard, such that their equality under international law can be meaningfully explained in reference to that range.

5. Political community

Unlike some conceptions of politics, the one presented here is explicitly normative. It demarcates politics in terms of its ethical importance to individual and collective lives, with some phenomena that might otherwise be considered 'political' falling outside its scope. For instance, any suggestion that 'War is the continuation of politics by other means' is contrary to the understanding of this author, which centres on individual behaviours that, characteristically, cannot take place amidst endemic violence.[82] What follows is an outline of that suggested kind of behaviours that and a discussion on why they enrich our existence. In so doing, the presumption is that, the overall success or failure of our lives matters – objectively speaking and not just to us – and that certain kinds of behaviour, including politics, are conducive to this.[83] The goal is to show that politics, so defined, is a good

[80] Waldron (n 9) 125–6.
[81] *Ibid*, 128–30.
[82] Carl von Clausewitz, *On War*, Michael Howard and Peter Paret (eds) (Princeton UP, 1984) 87.
[83] Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP, 2013) 195–9.

thing, such that institutions enabling its existence are worthy of some respect. As mentioned above, neither this conception of politics, nor this author's connected conception of political community, are intended to function as freestanding and comprehensive theoretical accounts of either concept. Instead, they are tools designed to elucidate something of normative importance about contemporary states for the purposes of rationally reconstructing their juridical equality.

Most of the people live in states with questionable records when it comes to justice and democracy. Indeed, even within the Western constitutional tradition, conceptions of democracy tend to be 'thin' – perhaps even nominal – and guarantees of social justice, equality and human rights are inconsistent at best.[84] The activity called 'politics' here responds to these circumstances of endemic imperfection. Political action takes place wherever individuals or groups act to support or enhance the justice or legitimacy of their respective communities. Such activity can take many forms, including lobbying, protest, voting, bringing legal actions, going on strike and even telling stories, jokes, or engaging in more diffuse public debate. Nonetheless, all politics is either aimed at, or has the effect of, supporting or enhancing the justice or legitimacy of the relevant community.

Consider the Jordanian uprisings beginning in January 2011, which targeted, amongst other things, a perceived democratic deficit in Jordan's constitutional monarchy.[85] By placing popular pressure on their government through collective demonstrations, those involved pushed for greater legitimacy within their state in a paradigmatically political manner. But politics is not restricted to moments of revolutionary change. Voting, where available, provides another way to strive for justice and legitimacy, along with many other kinds of individual action, such as writing to, or otherwise petitioning, our governments. Whilst relatively few people will ever filibuster a senate or spearhead a civil society campaign, politics is by no means restricted to statesmen. Most individuals provide small, commonplace contributions to the political 'ethos' of our communities, whether through the opinions they express in public or through the legal claims we make upon state institutions.[86]

Taken cumulatively, these discrete contributions influence how justice and legitimacy are understood within our societies, and since state power is always to some extent dependent upon the tolerance of the governed, governments hoping to rule through largely non-violent means need to remain

[84] Jurgen Habermas, *Legitimation Crisis* (Polity Press, 1988) 33–9.

[85] Andrew Spath, 'Change Without Revolution: Jordan's Missed Opportunity?', *New Middle East* (2011), online: http://new-middle-east.blogspot.co.uk/2011/04/change-without-revolution-jordans.html (accessed 29 May 2020).

[86] For more on the *legal* impact of 'ethos' within political communities, see: Aristotle (n 27) II.8 (11269a); Gerald Postema, 'Law's Ethos: Reflections on a Public Practice of Illegality' (2010) 90(4) *Boston University LR* 1847.

receptive to that ethos.[87] This will often not be as straightforward as 'giving the people what they want': political communities are usually too diverse for uniform popular sentiments to arise.[88] However, maintaining an appearance of acceptability is crucial to maintaining stable rule.[89] Given these points, an individual who participates in public debate, whether through writing, speech or physical demonstration, who votes wherever she is able, and who makes use of her legal rights, may contribute significantly, if not always quantifiably, in political terms. For every Martin Luther King Jr there are multitudes who contribute in less visible ways, without which the power and influence of such figures would be impossible.

5.1. Politics and ethics

The first reason why politics matters, ethically speaking, is that the results of one's political actions can make their lives more successful by counting as personal achievements. When one contributes to a political success, they have accomplished something valuable, even if the extent of that value will depend upon the nature of our success. The negotiations that lead to the fall of apartheid in South Africa between 1990 and 1993 were an important episode in that state's political development. However, they took place only because of a more diffuse political background in which numerous individuals played a part. Early strikes, boycotts and organised acts of disobedience were conducted by South Africans under the leadership of the African National Congress and its 1952 Defiance Campaign. Around 8,000 people were arrested during this movement for their attempts to resist the enforcement of racial segregation.[90] Each of those individuals can count the fall of apartheid as a success in which they played some role, notwithstanding that their individual causal impact might be difficult to quantify. The point is not that each person was a necessary actor, without which the world could not have changed: it is enough that they contributed to a collection of actions that were cumulatively sufficient for that outcome to have taken place.[91]

The second reason why politics matters is based, not on the significance of people's potential successes, but on the value of their attempts. Whether or not they succeed, what people try to do creates something – a history or

[87] David Hume, *Essays, Moral, Political, and Literary*, Eugene Miller (ed) (Liberty Fund, 1987) I.IV.1.
[88] Furthermore, it is unusual for this kind of political ethos to develop through community-wide interaction. Far more usual is the development of informal 'deliberative enclaves' within which discussion takes place, see, Cass Sunstein, 'The Law of Group Polarization' (2002) 10(2) *Journal of Political Philosophy* 175, 176.
[89] Niccolò Machiavelli, *The Discourses*, Leslie J Walker (trans.), Bernard Crick (ed) (Penguin, 1983) i.4.
[90] 'The Defiance Campaign', *South Africa: Overcoming Apartheid Building Democracy*: http://overcomingapartheid.msu.edu/multimedia.php?id=65-259-9 (accessed 29 May 2020).
[91] HLA Hart & AM Honoré, *Causation in the Law* (OUP, 1959) 104–8, 116–19, 216–29.

'personal narrative' of our doings – in relation to which our lives can be judged.[92] When they act, politically or otherwise, people's actions imply particular attitudes. Whether they play games, till fields, or write poetry, their actions express an endorsement of the permissibility, importance, or necessity of what they undertake. This endorsement is not always conscious or intentional: they often give such things no thought at all. However, it is always latent and part of being a self-aware moral agent.[93] This implicit endorsement cannot be avoided whilst having the capacity for moral and ethical judgement. As time passes, people accrue a history of action and inaction. Their characters may be transient, but these personal narratives are transitive and attach to us no matter how we may have changed. This is captured most evocatively by Arendt:

> In acting and speaking, men show who they are … This disclosure of "who" in contradistinction to "what" somebody is – his qualities, gifts, talents, and shortcomings, which he may display or hide – is implicit in everything somebody says and does. It can be hidden only in complete silence and perfect passivity … [94]

One can, in a word, act 'authentically' by attempting to live according to their personal judgements of value. To use Dworkin's example, an artist who could have been admired for producing conventional work but nonetheless risks an innovative project may eventually fail. Nonetheless, they have arguably made the more courageous choice by taking that risk: it speaks to the seriousness with which they take their art and the value they believe to be found there.[95] The same authenticity can be expressed by people's attempts to promote justice or legitimacy, whether or not they possess a deep understanding of those concepts. One's support for constitutional reform may fall on deaf ears or might be undermined by those with conflicting agendas. Nonetheless, the fact that they pursued what they believed to be just or legitimate demonstrates the authenticity with which they approached the relevant issues. This cannot be diminished by my lack of success: where they engage in such attempts, they have authentically approached the 'challenge' of my existence.[96]

Subject to certain qualifications, this cannot be negated by them being mistaken about the actual justice or legitimacy of the goal or act they have pursued. Such questions are essentially contested and living authentically requires one to pursue what they honestly believe to be worthwhile, particularly when others disagree. Furthermore, although the ethical value of their attempts to promote valuable ends assumes the possibility of their achieving

[92] Dworkin calls this the 'performance value' of our lives (Dworkin (n 83) 197–8).
[93] *Ibid*, 241–7.
[94] Hannah Arendt, *The Human Condition* (Chicago UP, 1958) 179.
[95] Dworkin (n 83) 199.
[96] *Ibid*, 197.

them, it is not contingent upon their objective potential for success in any particular case. Just as one might be destined to fail due to events beyond their control, so too might one be destined to fail because what they honestly believed to be either just or legitimate is in fact not so: their political actions, misguided though they may have been, nonetheless help to constitute an authentic personal narrative. To take some extreme examples: racist, misogynistic, or other odious forms of political activity can still have value to the extent that they are authentic, even though this is perhaps all that can be said for them. Authenticity, in this sense, cannot pretend to offer an account of political or social justice. Nonetheless, it does capture something independently valuable about politics, understood as presented here.

5.2. Political communities

Activity of the sort just described is only possible in a normatively imperfect world. The very notion that each of us might authentically pursue greater justice and legitimacy within our respective states trades upon these communities exhibiting significant room for improvement. However, this very limitation is what makes *valuable* politics possible: it depends, not upon the idealised polities of philosophical thought experiments, but upon the concrete disadvantages and disagreements faced by real individuals in contemporary states. The fact of injustice is what creates the opportunity for this kind of ethical success. Nonetheless, politics cannot take place just anywhere. Certain social conditions must pertain before a realistic chance of promoting justice and legitimacy can emerge. This subsection characterises those conditions in terms of the 'focuses' and 'forums' that facilitate political action. It is argued that political communities exist wherever these features pertain and that the juridical equality of states can be explained in terms of the equal intrinsic value of communities that pass this threshold.

Consider the need for politics to have a focus. Modern societies tend to be very large. At the time of writing, China has a population well in excess of one billion[97] and even states many times smaller have populations in the tens of thousands.[98] Such large groups cannot interact on a purely interpersonal, non-hierarchical basis.[99] This is not only a matter of communication: even allowing for internet-based technologies, that volume of interpersonal

[97] National Bureau of Statistics of China website (online: http://data.stats.gov.cn/english/, accessed 29 May 2020).

[98] Discounting the somewhat atypical case of the Vatican City, the two smallest Member States of the United Nations, the Republic of Nauru and Tuvalu, both have a population of around 11,200, see, Nauru Bureau of Statistics website (online: http://nauru.prism.spc.int/, accessed 29 May 2020); 'Country Facts', Permanent Mission of Tuvalu to the United Nations website (online: www.un.int/tuvalu/tuvalu/country-facts, accessed 29 May 2020).

[99] Martin Loughlin, *The Idea of Public Law* (OUP, 2004) 5.

interaction cannot be sustained.[100] Print, digital and social media allow information to be disseminated to large groups. However, politics requires more than this: there must be something to talk about and act in relation to. Governance institutions can fulfil this role whenever they constitute publicly identifiable points of reference around which political activity can be coordinated and at which it can be directed. Such institutions, alongside the activities of governance that take place within and around them, provide the substance of political discussion. Communities with functioning governments and visible institutions are more likely to converge in agreement and disagreement than they would otherwise. This value exists even in circumstances of relative autocracy. Dictators and dominant classes provide visible political targets for protestors, reformers and revolutionaries: consider the internal political opposition to the government of President Zine El Abidine Ben Ali in Tunisia. The mere visibility of such regimes cannot make them just or legitimate, but it would be wrong to dismiss their value completely whilst they operate as effective political focuses. The value of visibility will be negligible where oppression is so extreme that tyranny pertains. However, relative civil peace and a sufficient degree of personal liberty characteristically enables at least some political activity, even on the part of the disenfranchised and destitute. The consciousness of the desperate conditions faced by such individuals should not tempt one to infantilise them or to conceive of them as totally disempowered.

In addition to requiring focuses, politics also needs one or more forums. As Parkinson argues, politics is 'not merely the interplay of arguments and reasons in some abstract public sphere but is performed by people, with aims, on stages' and so needs a space within which to take place.[101] While this space need not always be physical (it could be digital or print-based) at some point a physical space *will* be required, if for no other reason than to supply infrastructure. Sometimes, there will also need to be a juridical space, where the freedom to act politically is guaranteed by law. Forums for political activity can be one or a combination of these things: spaces within which individuals can engage in politics. Contemporary governance institutions characteristically provide such spaces in at least two ways.

First, such institutions themselves can function as forums. Most obviously, wherever a governance institution allows for popular participation, politics will be facilitated: this is one value democratic governance possesses, even on relatively thin conceptions. But governance institutions need not provide for such participation directly to constitute political forums. Often, their physical manifestations within public space can be

[100] Jacob Jacoby, Donald Speller and Carol Berning, 'Brand Choice Behavior as a Function of Information Load: Replication and Extension' (1974) 1(1) *Journal of Consumer Research* 33.

[101] John Parkinson, *Democracy and Public Space: The Physical Sites of Democratic Performance* (OUP, 2012) 23.

enough. As Parkinson explains: 'groups can organize demonstrations at sites of power or sites of symbolic importance, perhaps adding a march from one site to another … [this] could involve stunts designed to attract the television cameras – remembering that news is about the unusual, the extraordinary, not the commonplace'.[102] This holds even in the absence of a guaranteed juridical space for political action, for instance where the activity in question is illegal. Take Greenpeace, who placed several protesters on the roof of Westminster Hall on the first day of the new parliament in 2009.[103] In that case, an institutional forum (or at least the building commonly associated with it) was used to engage with political issues in a manner otherwise than provided for by its constitutional role. This not only demonstrates the importance of having physical spaces for politics but also shows that governance, when tied to a specific focus, can create forums by imparting symbolic meaning: a protest outside the Kremlin only has the significance it does because of the function that building serves.

Second, even when governance institutions themselves are not political forums, they can support their creation and maintenance by facilitating a social environment within which politics can occur. There are many ways in which this might be done – through the distribution of resources or the guarantee of basic liberties, for example – but perhaps the most important and widespread is through the maintenance of civil peace. Even violent political movements, be they protests or revolutions, require relative stability within which to organise themselves, and they must quickly secure (or at least lapse into) peace if they are not to produce anarchy. By securing relative stability through the coordination of power and violence, governance makes politics possible. True, political activity does not automatically thrive in the absence of civil war: under extremely oppressive rulers it may be impossible. But however insufficient stability may be for ethically valuable politics, it is necessary. Indeed, with the exception of territories subject to particularly invasive tyrants or an endemic lack of necessary resources, any peaceful physical space possesses political potential.

6. States and other communities

Political communities need not be particularly just or even especially democratic. They must, however, facilitate ethically valuable political action through the provision of meaningful focuses and forums. Those that fall within an acceptable 'range' of doing so merit at least some respect as sites of ethical value. In this section, it is argued that several legal criteria for

[102] *Ibid*.
[103] 'Greenpeace protesters spend night on parliament roof' *The Guardian*, 12 October 2009 (online: https://www.theguardian.com/environment/2009/oct/12/greenpeace-westminster-roof-protest, accessed 29 May 2020).

state creation, along with many of the legal benefits that statehood provides, can be rationally reconstructed to characterise states as political communities of this kind. This entails that they merit respect by virtue of *being* political communities, which makes it rationally intelligible why international law treats them as juridical equals: they each instantiate a range property that justifies the possession of a discrete status. To begin this interpretive task, consider Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which reads as follows:

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.

These criteria are not only significant because they provide (admittedly somewhat controversial) elements for the identification of states, which allows to distinguish those entities from other things.[104] The first three also reflect the most generally accepted factual antecedents of 'effectiveness' that nascent communities must possess to exist as states.[105] In this regard, strong coherence between these 'Montevideo criteria' and the conception of political community advanced above will be highly indicative.

Take the first two. The salience of a 'permanent population' is most obviously explicable by the fact that politics cannot occur without people to act politically. The same holds in relation to a 'defined territory': politics must take place within (and often in relation to) physical space. Political marches and rallies require roads, squares and parks, whilst smaller-scale interactions also require physical venues, be they coffee shops for private discussions or local halls for union and party meetings.[106] Perhaps even more importantly, *stable* territorial units are conducive to civil peace and, as noted above, individual political action cannot take place amidst conditions of endemic violence. Where governments control territory – assuming they are not unusually tyrannical or bereft of resources – that territory provides a space within which the immediate demands of self-preservation do not dominate everyday life. Politics is possible only under such conditions.

[104] The text of the Convention was largely supported by Latin American states, with the motivation of excluding foreign recognition as a criterion for the identification and creation of legal statehood, see: Milena Sterio, 'Changes in the Legal Theory of Statehood' (2011) 39 *Denver Journal of International Law & Policy* 209, 215–16.

[105] Dapo Akande, 'The Importance of Legal Criteria for Statehood: A Response to Jure Vidmar' *EJIL: Talk!* (7 August 2013), online: https://www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-response-to-jure-vidmar/ (accessed 29 May 2020); Crawford (n 32) 45–88; Green (n 76) Chapter 3; Cf. Nicholson (n 42) 109–12; Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart, 2013) 39–42.

[106] Due to our physical materiality, this remains the case notwithstanding the existence of the internet. Moreover, it should be remembered that (as of 7 April 2021) around 40% of the global population remains without access to the internet (Joseph Johnson, 'Worldwide Digital Population as of January 2021' *Statista*, online: https://www.statista.com/statistics/617136/digital-population-worldwide/, accessed 7 August 2021).

The third Montevideo criterion, which is often described in terms of 'effective' governance, is also essential for political community.[107] First, relatively stable and effective governance institutions are what provide the forums that politics needs to flourish, whether in and of themselves or by facilitating additional, non-governmental, spaces within which political action can take place. Indeed, such stability is arguably a necessary condition for the existence of any and all 'sub-state' political communities. Second, these institutions also provide important focuses for politics, acting as focal points for the political action of a pluralistic multitude. Such forums and focuses also enable considerable diversity in domestic political ethos: as Kingsbury notes, 'the apparent homology among state institutions for international purposes does not reflect homogenization of local political forms, let alone uniformity in the social and economic patterns to which effective political institutions must be responsive'.[108] The exercise of state power itself provides the paradigmatic political focus for such diversity, meaning that it is primarily through the power exercised by effective governance institutions that discrete political communities can be demarcated, both philosophically and as a matter of general international law.[109]

Doctrinally, the territory over which an emerging state can claim title is determined by the control that is factually exercised by its nascent government.[110] Consequently, unless their boundaries are demarcated by treaty, it is known where one political community ceases and another begins only by looking to the activity of their respective governments. What is more, since the population of nascent states are defined primarily in territorial terms, the people of a political community can only be identified by looking to the same.[111] This emphasis upon effective governance as a method for territorial demarcation has been criticised by some political philosophers: if one believes that only just or legitimate states should hold territory or define their own membership, such criticism follows naturally.[112] But statehood as political community is more modest. It recognises that

[107] The final criterion – the capacity for international relations – is arguably either identical to this one, or automatically follows from it, since it is governments that represent states internationally. International relations enable a distinct branch of ethically valuable domestic politics and is morally relevant to the emergence of new states for that reason: Alex Green, 'Successful Secession and the Value of International Recognition', L Raible, J Vidmar and S McGibbon (eds) *Research Handbook on Secession* (Edward Elgar, 2022) 75–90.

[108] Kingsbury (n 1) 621.

[109] Loughlin expresses this philosophical proposition through the idea that a community's 'constituent power cannot be understood without reference to constituted power' (Martin Loughlin, *Foundations of Public Law* (OUP, 2010) 227).

[110] *Island of Palmas (or Miangas) (The Netherlands v. United States)*, 2 *Reports of International Arbitral Awards* 829 (1928), 840.

[111] Alex Green, 'Three Models of Political Community: Delineating 'The People in Question'' (2021) 41(2) *Oxford Journal of Legal Studies* 565, 584–5.

[112] See, for example, the approaches taken in: Margaret Moore, *A Political Theory of Territory* (OUP, 2015); and Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (OUP, 2019).

significant value exists, even in observably unjust and illegitimate states, wherever there is the potential for politics. According to that view, any state that facilitates this ethically valuable activity merits some respect.

That respect is reflected in many of the consequences of state equality, particularly those listed in the Friendly Relations Declaration. Take the notion that states are entitled to territorial integrity and political independence, which, amongst other things, guards against the domination characteristic of colonialism. Colonial domination wrongs foreign populations in two salient ways. First, insofar as territorial infringements and denials of independence obstruct political activity within the dominated community, they implicitly deny the value of political activity taking place there. Second, dominated communities are disrespected as political collectives by being asymmetrically denied self-governance. Consider the British government's relationship with colonial India. During colonial rule, the former directly governed England, Wales, Scotland and (at least to some extent) Ireland. Whilst almost certainly not legitimate in respect of those territories or populations, the British government at least purported to exist for their benefit.[113] Individuals living within Britain thereby lived under institutions to which their governance was nominally an end, rather than a means. Conversely, the British government did not even purport to govern India solely for the benefit of those who lived there: British nationals were considered to have a stake in colonial government as well.[114] For this reason, colonial subjects in India were governed by institutions that officially served an additional political community (Britain itself) to which they lacked membership. By implicitly denying that colonised peoples should be left alone to shape their own political communities, this asymmetry expressed a distinct form of disrespect for their capacity to do so.[115] Territorial integrity and political independence prohibit this manner of disrespect, thereby instantiating and cohering with political community.

[113] Indicative phrasing exists in: the Bill of Rights (1688); *Entick v Carrington & Ors* [1765] EWHC KB J98 (02 November 1765).

[114] This stake was generally taken to be economic, see: Pramod Nayar, *Colonial Voices: The Discourses of Empire* (Wiley-Blackwell, 2012) 57–59. This asymmetry and concomitant disrespect existed in even the most enlightened of contemporary sources: in his *Speech on Fox's East India Bill* (1 December 1783), Edmund Burke argued that the conduct of the East India Company could either be a 'great disgrace or great glory to the whole British nation' (E H Payne (ed), *Selected Works of Edmund Burke* (Liberty Fund 1990), Volume 4). As David Armitage's analysis illustrates, this notion of unequal benefit pervaded British imperial discourse since its inception (*The Ideological Origins of the British Empire* (CUP, 2000) 146–69).

[115] The relevant form of (dis)respect is akin to that identified by Martha Nussbaum as turning on 'the moral importance of the state as an expression of human autonomy' ('Women and the Law of Peoples' (2002) 1(3) *Politics, Philosophy & Economics* 283, 298). However, this author does not believe it to be due only if 'the nation is, if in many respects imperfect, still above a certain threshold of democracy' (*ibid*). Unlike Nussbaum, the basis for inter-community respect advanced here is not (democratic) legitimacy but rather the 'mere' potential for ethically valuable politics: this pertains even when a state is not republican in the Kantian sense she advances.

Similar considerations explain why the Friendly Relations Declaration guarantees states the right to choose and develop their political, social, economic and cultural systems, subject to the requirement of complying fully, and in good faith, with their international obligations. For whilst a commitment to particular international human rights principles – such as the freedoms of speech and assembly – are no doubt conducive to political action, a certain sphere of governmental autonomy is also necessary for politics. Both the value of authentic political attempts and the potential for successful political actions, turn upon the existence of a government that is to some degree responsive to the actions of its population. To be responsive in this way, a government must be permitted its own 'space' in which to rule. For, as cases like Manchukuo (1932 to 1945) or Slovakia under German control (1939 to 1945) illustrate, puppet-states ruled from abroad are more likely to heed the instructions of their metropolitan 'parents' than the political ethos created by their own people.[116]

Finally, consider the duty to live in peace listed in the Friendly Relations Declaration. The primary motivation for this is obvious: the entire UN system is geared towards preventing the use and threat of force in international relations. However, international law's abhorrence of war also coheres firmly with the importance of ethically valuable politics.[117] As already indicated, the authentic pursuit of justice and legitimacy cannot take place where private individuals are wholly occupied with their immediate self-preservation: in such circumstances politics is replaced by violence.[118] That states are required to be peaceful further suggests that international law treats them as political entities. In this way, statehood as political community can accommodate many instrumental arguments used to justify state equality whilst still maintaining that there are intrinsic and normatively salient properties that all states share.

6.1. State equality within a range

This subsection focuses on the relational nature of state equality, building upon the previous argument that political community can both explain and justify several cognate aspects of legal practice. It is argued that the

[116] Crawford (n 32) 78–9.

[117] 'Coherence' refers to more than 'mere' consistency between statehood as political community and international peace. Consistency implies logical non-contradiction, whilst coherence entails deeper connections between the underlying normative considerations of both ideals (Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (OUP, 2005) 190–4). Indeed, the normative coherence that exists between political community and the maintenance of peace arguably renders statehood as political community doubly attractive in justificatory terms: since it acknowledges the importance of peace whilst *also* invoking the importance of individual political action, it is normatively richer than an account which relies upon the value of (international and domestic) stability alone.

[118] Hannah Arendt, *On Violence* (Harcourt, 1970) 42–44.

vast preponderance of contemporary states fall within an acceptable range as far as political community is concerned. In this connection, it is again instructive to consider what Waldron has to say about human equality:

> … in ordinary social life and political life, I think we will be more concerned with the inside of the range than with its borderlines. It is perhaps a mistake to think that the range must be defined from the outside in, beginning at its boundaries … it's our (justifiably) being struck by … [observable] similarity, together with our refusal to be distracted by the differences, which constitutes the use of a range property.[119]

This section follows Waldron's advice by considering some familiar differences between established states, which, upon closer inspection, show them to be equal *vis-à-vis* political community. By doing so, statehood can be demonstrated as political community to fit global reality, while also providing a set of heuristic paradigms to guide legal reasoning in more difficult cases.

First, take the physical disparities between established states, such as their geographical extents and relative populations, which are often used to allege their inequality. *Contra* these allegations politics can, in principle, take place amongst any number of people. This explains why, in international law, there are no criteria for minimum or maximum population size: Tuvalu and the Republic of Nauru are no less states than Republic of India and China.[120] Similarly, the provision of meaningful political forums does not require a community to exist upon either a particularly large, or even a contiguous, area of land. This explains why international law prescribes no minimum territorial area,[121] as well as why territorial discontiguity represents no obstacle to statehood.[122] The Republic of Indonesia, which is comprised of around 17,500 separate islands,[123] is no less a political community than the Republic of Kenya or the Republic of Bulgaria. Indeed, so long as small, archipelagic, or otherwise fragmented territories are free from endemic conflict, the potential for politics will exist there: as examples like San Marino and the Federated States of Micronesia show, neither small size, nor fragmented territory, necessarily leads to the kind of domestic instability that threatens political action.

Second, consider the global disparity in power and resources: for every 'Great Power' there are numerous 'micro-states' like Liechtenstein, which so is logistically dependent upon its neighbours that it makes use of Austrian

[119] Waldron (n 9) 133–4.
[120] Crawford (n 32) 52.
[121] Thomas Franck and Paul Hoffman, 'The Right of Self-Determination in Very Small Places' (1976) 8(3) *New York University Journal of International Law* 331, 383–4.
[122] Crawford (n 32) 47.
[123] 'Identification of Islands and Standardization of Their Names', submitted by Indonesia to the 11th United Nations Conference of the Standardization of Geographical Names, 8–17 August 2017, E/CONF.105/115/CRP.115 (30 June 2017), 1.

prisons rather than maintaining its own.[124] This, as conceded above, constitutes a genuine inequality: no intrinsic theory of state equality could plausibly be premised upon equivalent power or influence. But nothing about statehood as political community requires this kind of parity to exist. Even in cases like Liechtenstein and the Republic of Austria, where one state is logistically dependent on another, the absence of external, unilateral exercises of control or claims of unequal right indicate a concomitant absence of inter-state domination, which would be the only relevant stumbling block as far as political community is concerned. Contrast this with the historic position of colonies: Great Britain once claimed an entitlement to bind its Dominions to the 1924 Treaty of Lausanne without their permission, indicating an enforced subservience with all the implications of inherent disrespect discussed above.[125] Contemporary international law does not license such control, which enables equality of respect to thrive in its absence, notwithstanding continuing differences in power. Indeed, the decolonisation movement itself – and the subsequent juridical equality of postcolonial states – indicates a historical move away from disparities in power as a basis for formal differentiations in status. To take another example, numerous micro-states have freely joined the UN, whereas they were once excluded from the League of Nations on the basis of their size.[126] Moreover, even formally dependent entities, like the Isle of Man, have recently moved towards discrete international personality, indicating that where distinct political communities pertain in relation to formally defined geographical units, relative power is increasingly immaterial from the perspective of international law.[127]

Third, consider the differences in governance that persist globally, including those of basic constitutional structure, which sometimes have considerable implications for the national prevalence of democracy and the protection of basic human rights. This is not only the heart of state equality but also touch upon its conceptual borders. There are perhaps some regimes that claim (and are treated as possessing) statehood but cannot plausibly be characterised as political communities. Ultimately, the line here is between relative injustice and illegitimacy, which form necessary conditions for politics, and tyranny, which, through endemic and violent oppression, renders individual political action practically impossible. One such example might

[124] For more on the use of foreign institutions by 'micro-states', see: Jorri Duursma, *Fragmentation and the International Relations of Micro-states: Self-determination and Statehood* (CUP, 1996) 161–70, 274–88.

[125] Crawford (n 32) 71–2.

[126] Kingsbury (n 1) 607.

[127] The Isle of Man is not independent. Since 2007, however, it has enjoyed increased guarantees of international autonomy, see, Framework for developing the international identity of the Isle of Man, 1 May 2007. The Crown Dependencies of Jersey (1 May 2007) and Guernsey (18 December 2008) have functionally identical agreements with the United Kingdom.

be Democratic People's Republic of Korea, although reaching any firm conclusion would require a deeply contextual exercise of judgement, utilising the kind of paradigms provided in this subsection by way of interpretive guidance. What matters is that, notwithstanding these few potential exceptions, one should not dismiss any tradition of governance *qua* political community purely because it has some (or even several) morally problematic elements. Politics undertaken within, and in relation to, unjust and illegitimate regimes need not be easy, pleasant, or even commonplace for it to instantiate enough ethical value to fall within range. For instance, there could be no better recent example of widespread action against ongoing injustice than the demonstrations that began in Minneapolis, following the death of George Floyd on 25 May 2020. In the words of the Black Lives Matter movement:

> George Floyd's violent death was a breaking point – an all too familiar reminder that, for Black people, law enforcement doesn't protect or save our lives … We call for an end to the systemic racism that allows this culture of corruption to go unchecked and our lives to be taken.[128]

Notwithstanding the undeniable history – and contemporary reality – of racial injustice with the United States, that state manifestly constitutes a political community, well within the conceptual core of the characterisation advanced here. Indeed, the George Floyd protests are in many ways characteristic of the authenticity that makes politics so ethically important. Once again, what matters is that a given state falls within the range property of political community: if it does, then it will qualify for equal status under international law.

This point – that equal statehood amounts to normative imperfection within an acceptable range – has an interesting implication for the category 'developing states'. As Anghie argues, the concept of development has 'transform[ed] cultural differences into economic differences … [and] translate[d] the categories of civilization and non-civilization into the categories of the advanced and backward'.[129] Notwithstanding the 'urgent and desirable' nature of economic development, this shift often produces a view within postcolonial communities that 'the 'primitive' … must be managed and controlled in the interests of preserving the modern and universal'.[130] Suppressions of practices that are Indigenous, economically unproductive, or culturally divisive, often manifest as attempts to achieve 'developed' status, whereby statehood is somehow rendered complete. However, as argued above, political community is never static or universal but dynamic and

[128] '#DefundThePolice', *Black Lives Matter*, 30 May 2020, online: https://blacklivesmatter.com/defundthepolice/ (accessed 2 June 2020).
[129] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2012) 204.
[130] *Ibid*, 207.

particular. As such, all statehood is forever 'developing', since all states are ongoing political projects. According to statehood as political community, this is not a contingent fact but an essential feature of legal statehood, which underpins the equality of diverse communities. Admittedly, the language of development has been crucial when emphasising the 'overdevelopment' of colonial powers at the expense of their erstwhile colonies.[131] Nonetheless, recognising state equality as a range property, and statehood itself as characterised by normative imperfection, cautions against using concepts such as 'developing statehood' to advance cultural hegemony. Since states can never become fully politically developed, such hegemonic attempts must be viewed as not only morally problematic on their own terms but also self-contradictory *vis-à-vis* the normative foundations of international law. It also suggests, contrary to those who believe non-imperialist international law to be a contradiction in terms,[132] that even apparently formal doctrines such as the juridical equality of states can be reconstructed to possess some radical implications.

6.2. Non-state political communities

It has been argued that established states are political communities but not that *only* states can be communities of this kind. This is intentional: it cannot be incumbent upon a theory of state equality to show that states are 'distinctively' equal in this manner. Rather, it need only show them to be 'continuously' equal, in that there are no significant conceptual discontinuities occasioned by characterising all established states as sharing a particular status.[133] It could hardly count against a theory of human equality that it also admits particular non-humans as our normative equals.[134] Imagine that dogs were proved to be moral agents. That fact alone provides no real justification for discounting moral agency as a basis for human equality, assuming there were independent reasons to accept it.[135] Indeed, it would be problematically anthropocentric to abandon moral agency purely because

[131] R P Anand, 'Attitude of the Asian-African States Towards Certain Problems of International Law' in F Snyder and Surakiart Sathirathai (eds), *Third World Attitudes to International Law* (Martinus Nijhoff, 1987) 5–22.

[132] Chhaya Bhardwaj and Abhinav Mehrotra, 'Crawford, TWAIL, and Sovereign Equality of States: Similarities and Differences' (2023) 40(1) *Australian Year Book of International Law* 89, 112–13.

[133] Waldron (n 9) 30–2.

[134] Claiming otherwise would imply that theories of human equality must show why humans are distinct from other things. But this discounts the possibility that humans, although equal, are not normatively distinctive; and that this holds purely because of a conceptual claim about theories of normative equality. It is by no means clear that this conception of normative equality is true. If anything, the very fact that we can speak of continuous equality without considering distinctiveness indicates otherwise. (To put the same point another way, we should not prejudice the study of human equality by assuming that *humanity* must explain our shared status.)

[135] See generally, Jeff Sebo, 'Agency and Moral Status' (2017) 14(1) *Journal of Moral Philosophy* 1; Marc Wilcox, 'Animals and the Agency Account of Moral Status' (2020) 177(7) *Philosophical Studies* 1879.

it precludes us from conceptualising our species as normatively distinct.[136] For the same reasons, one could hardly claim that Bentham has no theory of human equality because he located our shared status in our ability to feel pleasure and pain, or that Fineman has no account of human equality because some non-human animals share our material vulnerabilities.[137] The same must be true of state equality. If one discovers some non-state entity to instantiate political community, then that is an important but distinct discovery and provides no cause to reject statehood as political community *qua* rational reconstruction of international law.

Moreover, it is important to observe what states have in common with entities have that are not counted amongst their number. For instance, political community may possess explanatory value in relation to international organisations, many of which arguably function as political focuses and forums themselves. Invoking political community may help to explain, for example, the legal personality of certain organisations, given that the personality of states has sometimes been defined in terms of their equality.[138] Even more importantly, international law seemingly recognises several non-state political communities to which it nonetheless denies the benefits of statehood.[139] This is particularly glaring *vis-à-vis* the historical and ongoing violations of sovereignty suffered by Indigenous communities. For whilst Anaya is correct that, 'international law, although once an instrument of colonialism, has developed and continues to develop, however grudgingly and imperfectly, to support indigenous people's demands',[140] many Indigenous communities continue to face denials and erosions of their sovereignty by states who themselves enjoy recognition as 'sovereign' equals.[141] Statehood as political community is particularly well-placed to expose the hypocrisy of this treatment (although it does not purport, in its current iteration at least, to provide an account of state *sovereignty*). As Watson points out, 'the same mechanisms used to create international law and achieve decolonisation remain under the control of the same powers, which legitimised colonisation in the first place;[142] a fact exacerbated by the asymmetric

[136] Discovering one's dog to be a moral agent tells them something interesting and important *about their dog*. It would be rankly solipsistic to claim that the important discovery was, in fact, about them.
[137] Bentham (n 55); Fineman (n 56).
[138] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion:* I.C.J. Reports 1949, 174, 177–8.
[139] As Milena Sterio observes, '[s]tatehood functions as a sovereignty shield and protects its subject from external intervention … [a] non-state cannot easily protect itself' ('Grotian Moments and Statehood' (2022) 54 *Case Western Reserve Journal of International Law* 71, 77.
[140] S James Anaya, *Indigenous Peoples in International Law* (OUP, 2004) 4.
[141] See, in general: S Bruce Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism* (OUP, 2013); John Burrows, *Freedom & Indigenous Constitutionalism* (University of Toronto Press 2016); Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (CUP, 2003); Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake against the State* (Minnesota University Press, 2017).
[142] Iren Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015) 150.

relationship that continues between Indigenous communities and the settler-states that oppress them.[143] The reconstruction of state equality presented here empowers such critiques by demonstrating the incoherence of international practices that recognise some political communities as worthy of juridical equality but not others. Indeed, it grounds a form of anti-colonial critique that is internal to the values underpinning international law itself.

Despite the value of not insisting upon the distinctiveness of states, some readers may worry that failing to do so undermines the overall approach. Since statehood as political community hopes to rationally reconstruct international law, surely it must do so on the basis that states are normatively distinct, because international legal practice (for better or for worse) treats them as such? Notwithstanding earlier points presented, there is one important sense in which states are distinctive. At least under prevailing global conditions, they are uniquely basic and ubiquitous *qua* political focuses and forums. Except in highly unusual circumstances, such as when action is taken upon the high seas or in Antarctica, politics necessarily takes place *within* states and is therefore conditioned by their existence. Even individuals taking action online and in relation to transnational issues do so from their state of residence. They are, as such, supported by whatever degree of civil peace and infrastructural support their state offers, without which any sub- or supra-state politics would be almost impossible. Moreover, to the extent that states obstruct politics, the power they exercise presents an immediate and pressing focus for political action, even if the latter finds expression only through defiance.

This distinctive importance turns on the relationship between statehood and territory, on the one hand, and the unique nature of territories as political forums on the other. States are, as established above, uniquely territorial entities, being defined in large part through their relationship with the governance of physical spaces. Moreover, individual territorial units provide the ultimate forums upon which politics takes place because they encapsulate and define the physical spaces necessary for embodied beings to act politically. Altering this fact would require truly fundamental changes to prevalent global conceptions of place and space.[144] To that extent, insofar as politics shapes our world,[145] states place essential conditions upon this in a

[143] *Ibid*, 78–9.

[144] This point is challenging in the case of Small Island States, many of which are at risk of losing their land-based territory due to human-caused climate change. I argue elsewhere that losing inhabitable land should not be fatal to continued statehood of these communities, both as such (Alex Green, '*The Creation of States* as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship' (2023) 40(1) *Australian Year Book of International Law* 67) and in relation to political community (Green (n 76) Conclusion). Such questions are, however, to use Krystyna Marek's words, a 'problem of [Small Island States'] very existence' (*Identity and Continuity of States in Public International Law* (Librairie E Droz 1954) 2) and cannot be properly addressed within a piece on state equality.

[145] Arendt (n 125) 175–236.

manner that no other political communities are presently capable of doing. Even where sub-state entities exhibit considerable territorial autonomy, such as the Special Administrative Region of Hong Kong or the Swiss Cantons,[146] the bedrock coercive power that states wield position them as the final guarantors of whatever political forums exist within those spaces.[147] Moreover, the endemic nature of state power positions their institutions as key political focuses, even within sub-state entities that possess important focuses of their own.

7. Conclusion

Established states are 'political communities', in the special sense in which this paper has employed that term. This explains not only why they merit at least some respect but also why they are equal. In providing an intrinsic account of state equality, statehood as political community offers a rational reconstruction of international law which renders that doctrine intelligible as a normative principle. It also provides a benchmark for judging the importance of state equality as a normative constraint upon international relations, as well as a critical basis for assessing international practices of recognition. This is instructive not just for borderline cases of statehood, such as Palestine or Taiwan, but also *vis-à-vis* Indigenous communities, who have been systematically denied equality by settler-states.

To reach these conclusions, this paper has argued for the ethical importance of politics before detailing the necessity of institutional focuses and forums as conditions for it to take place. Conceptualising political community as a range property, it used the latter to both explain and justify international legal practice, including the 1933 Montevideo Convention and the Friendly Relations Declaration. Notably, this heuristic endeavour never contradicted those who argue state equality to possess instrumental utility. Indeed, it endorsed such claims. Nonetheless, it did insist upon one central point: that states are not just nominally equal but intrinsically so. Their material diversity, to that extent, belies what they have in common – a shared status that supervenes upon their intrinsic properties; properties which explain, and provisionally justify, their equal standing within our normatively ambiguous world.

Acknowledgements

Thanks are due to Chimène Keitner, Simon Palmer, Martins Paparinskis, Oisin Suttle, Scott Veitch, Emmanuel Voyiakis, the University of Leeds Public

[146] Roda Mushkat, 'Hong Kong's Exercise of External Autonomy: A Multi-Faceted Appraisal' (2006) 55(4) *International & Comparative Law Quarterly* 945; Katharina Füglister and Fabio Wasserfallen, 'Swiss Federalism in a Changing Environment' (2014) 12(4-5) *Comparative European Politics* 404.

[147] Max Weber, *From Max Weber: Essays in Sociology*, H H Gerth and C Wright Mills (eds) (Routledge, 1991) 77–128.

International Law Discussion Group, the American Society of International Law International Legal Theory Interest Group, and my anonymous reviewers at *Transnational Legal Theory* for their comments on earlier versions of this paper. All websites accessed 17 August 2021 unless otherwise indicated.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

Elements of this research were funded by the Modern Law Review Covid-19 Response Fellowship.