Defining Statehood: The Montevideo Convention and its Discontents

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Though in recent decades a proliferation of non-state actors has changed the landscape of the international community, the state itself remains a critical component of international law and international relations. One might assume from this that writers and practitioners have a clear definition of 'state.' That, however, is not the case. Though states hold key positions in international organizations, in treaty-making, and in the shaping and controlling of economic space, and, moreover, are the subject of great volumes of academic and policy-making discourse, attempts to set out a formal definition of 'state' have either failed to gain wide acceptance or unsatisfactorily described the concept. The most widely accepted source as to a definition of statehood is the Montevideo Convention of 1933.

In this article, the Author begins by examining the Convention in view of its antecedents, concluding that it reflected then-prevailing views of statehood. Alternative views existed, however, regarding territorial control and 'sovereignty.' In tension with the four criteria enunciated by the Montevideo Convention, these views hinted at deficiencies in the Convention as an instrument to 'codify' the concept of the state. The article goes on to examine how views about statehood have waxed and waned, and turns to scrutinize the Montevideo Convention in light of evolving theories. The Convention in certain dimensions is now probably over-inclusive, in others, under-inclusive. The article details these. Proposing that special conditions in the 1930s made states amenable to a codification exercise such as the Montevideo Convention, the Author suggests that

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attaining consensus on what 'state' means may prove difficult under contemporary conditions. Moreover, that statehood evolves may well render defining it an essentially provisional undertaking.

I. INTRODUCTION ........................................ 404
II. DEFINING STATEHOOD ............................... 409
III. ORIGINS OF THE MONTEVIDEO CRITERIA ............ 414
IV. LEGITIMISM AND ITS DECLINE .......................... 418
V. CONTIGUITY DOCTRINE—ANOTHER ALTERNATIVE TO EFFECTIVENESS ................................. 420
VI. REJECTION OF CONTIGUITY DOCTRINE ............... 429
VII. MONTEVIDEO SCRUTINIZED ............................. 434
   A. Montevideo Criteria Not Universally Accepted as Prerequisites to Statehood ...................... 434
   B. Possible Criteria Not Enumerated by the Montevideo Convention ...................................... 437
   C. Why Codify Statehood? ................................. 447
   D. A Systemic Problem with New Criteria ............ 451
VIII. CONCLUSION ........................................ 453

I. INTRODUCTION

It is difficult to study a legal system without a clear conception of who or what that system recognizes as persons. Yet international lawyers for some time have wrestled to define the entities recognized as persons under the international legal system. It is widely said that at

1. See INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 271, (Hugh M. Kindred et al. eds., 4th ed. 1987). "So long as international society is organized as a matter of law, around the existence of states who exercise independent sovereign authority, there is a need for a mechanism of admission to that society of states." Ian Brownlie, Rebirth of Statehood, in ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE 5 (Malcolm D. Evans ed., 1996). "The fact remains that since 1945 the existence of States has provided the basis of the legal order."

2. 1 D.P. O'CONNELL, INTERNATIONAL LAW 80-86 (2d ed. 1970); 1 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 19 (Hersch Lauterpacht ed., 8th ed. 1955); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 16-17 (1995). "It has often been said that only states are subjects of international law. It is not clear what such statements mean, but whatever they mean, they are misleading if not mistaken." BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 411 (1991). "States, international organizations, individuals, corporations, and other entities have varying legal status under international law."
one time, international lawyers believed that states were the only persons under international law. Putting aside whether in truth writers ever generally excluded non-state actors from international law, it does appear that modern developments have increased the relative legal status of such actors. Strengthening the role of the individual in international law is critical in this regard.

3. D.P. O’Connell wrote in 1970, “A half century ago the international lawyers could content themselves with the proposition that ‘States only are subjects of international law.’” O’Connell, supra note 2, at 80. Louis Cavaré wrote in 1962 that, though by then international society “also consist[ed] of members besides states,” international society once had been “exclusively interstatal” (“exclusivement interétatique”). 1 Louis Cavaré, Le Droit International Public Positif 7 (1962). See also Rosalyn Higgins, Problems and Process: International Law and How We Use It 39 (1994) (“The classic view has been that international law applies only to states.”); Ignaz Seidl-Hohenvelder, Corporations in and Under International Law 5 (1987) (“The idea that public international law addressed itself only to States and that therefore only States could be persons and subjects under public international law was not abandoned until the end of the nineteenth century.”); Hans Kelsen, General Theory of Law and State 342 (Anders Wedberg trans., 1949) (“The traditional opinion that subjects of international law are only States, not individuals, that international law is by its very nature incapable of obligating and authorizing individuals, is erroneous.”).

4. Fiore, for example, wrote as early as 1890 that, though the individual is not a person under international law like the state, the rights of the individual at international law are not solely those rights the individual enjoys as a citizen of a state. Some rights at international law, Fiore argued, ran directly to the individual human being. Pasquale Fiore, International Law Codified and Its Legal Sanction or the Legal Organization of the Society of States 36, 51, 109 (5th ed. 1918) (citing Article 40 of the Act of Berlin of July 13, 1878, which extended rights to subjects of Serbia). Kelsen observed that individuals were subjects of international legal obligation under the norm against high seas piracy and under Article 2 of the International Convention for the Protection of Submarine Telegraph Cables (Paris, Mar. 14, 1884); and that individuals enjoyed recourse to international tribunals under the Versailles Treaty and the German-Polish Convention of May 15, 1922 (regarding Upper Silesia). Kelsen, supra note 3, at 345-48. The Permanent Court of International Justice apparently also acknowledged individual rights in Polish Postal Service in Danzig, 1925 PCJ, ser. B, No. 11 (Advisory Opinion of May 16) (affirming Polish right to collect and distribute mail throughout the Free City of Danzig and, moreover, to finish that service to individuals as well as to state organs).

and natural persons, corporations,\textsuperscript{6} political or religious parties or movements,\textsuperscript{7} organized interest groups, transnational ethnic communities,\textsuperscript{8} and other non-governmental organizations (NGOs)\textsuperscript{9} have proliferated and assumed a role in international society, and this development, too, has required writers to reassess what can constitute a person under international law.\textsuperscript{10} The United Nations (UN) and its specialized agencies,\textsuperscript{11} North Atlantic Treaty Organization (NATO),\textsuperscript{12} 


7. See Hermann H.-K. Rechenberg, Non-Governmental Organizations, 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt ed., 1986) (noting various such entities, including the Union of International Associations, the International Workers' Association, and the British and Foreign Anti-Slavery Society).


10. On the proliferation of possible non-state persons, see Igor Lukashuk & Donna Artz, Participants in International Legal Relations, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA (Lori Fisler Damrosch et al. eds., 1995).

11. Indeed, acknowledgment that the United Nations possessed international legal personality was an early milestone in the diversification of subjects in international law. The International Court of Justice ("ICJ"), in Reparation for Injuries Suffered in the Service of the United Nations, wrote that "throughout its history, the development of international law has been influenced by the requirements of international life" and that "the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States." 1949 I.C.J. 17 (Apr. 11) at 178. But see Nisson v. Attorney-General [1970] AC 179 (ignoring that UN was a legal person).

the European Communities, and more loosely structured interstate political entities such as the Organization for Security and Cooperation in Europe and the Commonwealth number among the many multilateral organizations which add further to the diversity of entities plausibly spoken of as persons under international law. Rapid change as to what categories of entity are legal persons lends uncertainty to the analysis of international law. It might be assumed, however, that a touchstone is furnished by the state, the entity longest contemplated as a person in international law and, to this day, the entity widely viewed as the most important legal actor. Ian Brownlie writes:

Seeking signs of the 'rebirth of statehood' is more than a little premature: there is no evidence that the State has died. It is an intellectual fashion to preach the end of the State and to attack sovereignty. But such iconoclasm has had no impact on the real world.

The fact remains that since 1945 the existence of States has provided the basis of the legal order. A paradox, however, confronts the writer who looks to the state to help clarify the identity of legal persons in the


15. On the origin of the Commonwealth from an international legal perspective, see O'CONNELL, supra note 2, at 346-56.


17. STARKE'S INTERNATIONAL LAW 85 (I.A. Shearer ed., 11th ed. 1994) ("States are the principal subjects of international law."); PARRY, supra note 5, at 2, 9 (noting that, though other actors are assuming elements of personality under international law, "international law is and remains essentially a law for states," and calling the state "the foundation of the legal system we seek to expound."); HENKIN, supra note 2, at 17 (though rejecting view that states are the only persons under international law, noting that international law is a system "of states, made by states, perhaps largely—still—for state"); GEORG DAHM ET AL., 1 VÖLKERRECHT 125 (1989) ("Subjekte des Völkerrechts sind in erster Linie die Staaten."); MCDUGALET AL., supra note 5, at 98 (though skeptical of placing too much emphasis on the state, acknowledging that "[i]n a territorially organized world, the nation-state remains, despite the growing role of other groups, a dominant participant in the shaping and sharing of all values"); PETER MALANZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW (7th ed. 1997) ("International law is primarily concerned with the rights and duties of states."); HIGGINS, supra note 3, at 39 ("International law is, for the time being, still primarily of application to states. States are, at this moment of history, still at the heart of the international legal system."); CARTER & TRIMBLE, supra note 2, at 411-416 ("States are the principal persons under international law."); INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA, supra note 1, at 11 ("States are the principal subjects of the international legal system.").

18. Brownlie, supra note 1, at 5.
This article begins by summarizing how a variety of writers have defined the state. With that survey in mind, I then turn to the source most often cited as an authority on the definition of the state—the Montevideo Convention of 1933. Despite widespread reference to the Convention by writers trying to pin down a definition, the Convention is viewed as deficient by some of the most highly qualified publicists. I will argue that a problem with the Convention is that the meaning of ‘state’ has changed in practice and opinion since the framing of the Convention. Indeed, I will further argue, that problems exist in attempting to codify statehood because ‘state’ is a term, the content of which depends a great deal on context. Use of the term is historically contingent, with criteria for statehood varying over time. Accordingly, codifying statehood has proven fraught with difficulty. Referring to changing theories of sovereignty more generally, I will propose further reasons why statehood remains a concept inadequately fleshed out in authoritative international legal sources.

19. The term ‘publicist’ in this context is a term of art used in public international law writing. The same usage occurs in the Statute of the International Court of Justice, Article 38(1)(d), where “the teachings of the most highly qualified publicists of the various nations” are designated a subsidiary means for determining rules of law. Statute of the International Court of Justice, Annex to the U.N. CHARTER, June 26, 1945, art. 38, para. 1(d), 59 Stat. 1055, T.S. No. 993 [hereinafter I.C.J. Stat.].

20. Political reasons for the paucity of international legal sources defining statehood have been noted elsewhere. For example, ideological divisions among United Nations member states have impeded efforts by the International Law Commission to work out a draft definition of statehood. See DUURSMA, supra note 5, at 112-113 (examining difficulties preventing the International Law Commission from codifying statehood); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 31 n.1, 35 (1979). I focus for purposes of this article on conceptual reasons why defining statehood is difficult, rather than the political obstacles to the project.
Legal writers have suggested many definitions of statehood. Though there are pre-modern antecedents to defining ‘state,’ these are discussed thoroughly elsewhere. By the turn of the century, Franz Von Liszt was writing that independence (Selbständigkeit) and supremacy over territory (Landeshoheit) were indispensable attributes of the state. Earlier, Pasquale Fiore, in Italy, emphasized political power as well, along with law:

The State is an association of a considerable number of men living within a definite territory, constituted in fact as a political society and subject to the supreme authority of a sovereign, who has the power, ability and means to maintain the political organization of the association, with the assistance of the law, and to regulate and protect the rights of the members, to conduct relations with other states and to assume responsibility for its acts.

Thomas Baty, in his 1930 Canons of International Law, called a state “[a]n organized people, that is, an assemblage of human beings among whom the will of an ascertainable number habitually prevails.” This would appear to continue the emphasis on “sovereignty”—the existence of an organized political power over a territory and people. Baty went a little further than some legal writers in defining the internal character of the state. “It is a complex function,” he wrote, “whose elements are the people, their culture and traditions, the land they live in, and their organization as a coherent whole.” Finally, Baty proposed as a criterion of statehood a characteristic akin to independence, though perhaps better described as self-containment: “the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world.”


23. Fiore, supra note 4, at 106.


25. Id. at 11.

26. Id. at 13.
In a departure from other writers, Hans Kelsen attempted to define statehood in terms of law:

The state is not its individuals; it is the specific union of individuals, and this union is the function of the order which regulates their mutual behavior . . . . One of the distinctive results of the pure theory of law is its recognition that the coercive order which constitutes the political community we call a state, is a legal order. What is usually called the legal order of the state, or the legal order set up by the state, is the state itself.

Law and state are usually held to be two distinct entities. But if it be recognized that the state is by its very nature an ordering of human behavior, that the essential characteristic of this order, coercion, is at the same time the essential element of the law, this traditional dualism can no longer be maintained.27

To Kelsen, territorial supremacy was less a criterion in itself than a reflection of the real defining characteristic. The essence of the state was a legal system exercising control over a territory and a people:

[If a power is established anywhere, in any manner, which is able to ensure permanent obedience to its coercive order among the individuals whose behavior this order regulates, then the community constituted by this coercive order is a state in the sense of international law. The sphere in which this coercive order is permanently effective is the territory of the state; the individuals who live in the territory are the people of the state in the sense of positive international law.28

Kelsen's formulation did not emphasize independence, as had previous definitions, nor territoriality. In light of future developments, its most noteworthy omission, however, would be the element of international legality. Though states in the 1930s had expressed doubt whether an entity was a state if brought into existence through violations of international law (e.g., the Japanese-sponsored state in Manchuria), Kelsen did not view this to be significant. It is interesting that a writer conceiving of statehood as a legal order—a progressive conception in comparison to one based solely on effectiveness—did not much develop

28. Id. at 69-70.
the idea that statehood required international legality. Kelsen nonetheless offered a departure from notions of statehood founded on undisciplined power.

However promising, Kelsen’s definition of a state as a legal system did not take hold after World War II. Few, if any, writers significantly downplayed the role of territory and population. Hersch Lauterpacht and Louis Cavaré, for example, emphasized those factors. Kelsen’s idea of legality and statehood would nonetheless be revisited, albeit in the dimension that he himself seems to have neglected—the international one. In the 1950s and early 1960s, Lauterpacht (editing the Oppenheim treatise) and Cavaré (in his Droit International Public Positif) were not as bold as later writers would be in asserting international legality as a prerequisite to statehood; but their writings began to hint at the view, to develop in connection with the Rhodesian crisis of the 1960s and 1970s, that statehood, in addition to involving effective control, also required adherence to minimum international legal standards. Quite appropriately, a number of writers addressing the legality of the controversial state of Rhodesia made reference to Kelsen’s theory of the legal “basic norm.” Other aspects of the evolving conception of statehood seemed also to shift focus away from effectiveness, though it is difficult to discern a single coherent direction in the shift, and writers hesitated to break completely from that standard criterion. Harking back to Baty’s emphasis on sociological features and the history of the state, Cavaré counted “historical evolution” as part of statehood. Clive Parry perhaps echoed Kelsen, to the extent he emphasized internal elements as key to defining the state, but Baty and Cavaré appeared more influential, in Parry’s emphasis on sociological elements to statehood. “The modern state...” Parry wrote, “represents the fullest expression of communal life.”

29. In his own discussion of Manchuria, Kelsen was interested in whether recognition or acquiescence could cure the illegality of a territorial acquisition done by force, not in the putative statehood of ‘Manchukuo.’ HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 415-16 (2d ed. 1968).

30. See OPPENHEIM, supra note 2, at 118-23. See also CAVARÉ, supra note 2, at 253-94 (population), 294-303 (territory), 303 (calling political power “a really decisive third element,” distinguishing the state from other entities having population and territory).

31. See, e.g., R.W.M. Dias, Legal Politics: Norms Behind the Grundnorm, 26(2) CAMBRIDGE L.J. 233 (1968); J.M. Eekelaar, Principles of Revolutionary Legality, in OXFORD ESSAYS IN JURISPRUDENCE 22, (A.W.B. Simpson ed., 2d ser. 1973); J.M. Finnis, Revolutions and Continuity of Law, in id. at 44.

32. CAVARÉ, supra note 2, at 8.

33. PARRY, supra note 5, at 6. Parry was also interested in the contrast between great increases in the power of the state over the affairs of its own subjects and contemporary curbs on the power of the state in international relations. See id. at 5-6.
At the same time, international life made more and more apparent that multilateral organs could govern some aspects of interstate relations. D.P. O'Connell, in his 1970 text, thus emphasized United Nations practice in his definition of statehood. He numbered territory and population among the criteria of statehood but noted that there was no minimum requirement for either. Competence to make treaties, he noted, is part of statehood but is not unique to states. In contemplating independence as a criterion for statehood, O'Connell noted as a paradox that while the state is not subordinate to any other entity, it is increasingly subordinate to international organizations. Georg Schwarzenberger also drew attention to United Nations practice as an indication of the prevailing view as to what makes a state; and he posited that the "ability to stand by itself" is a prerequisite to statehood. Independence, along with population, territory, and governmental capacity, both internal and external, would be widely cited in definitions of statehood from the 1970s on. This view can be found in Canadian publicists and government practitioners, Dahm, Delbrück, and Wolfrum in Germany, Carter and Trimble and the

34. See O'Connell, supra note 2, at 283-85.

35. 3 George Schwarzenberger, International Law as Applied by International Courts and Tribunals 248-49 (1976) (noting that Article 22(1) of the United Nations Charter defines Mandates as territories "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world" and that such territories are not (yet) states). Other writers discuss statehood as closely integrated with the practice of international organizations. See, e.g., Higgins, supra note 3, at 41; Duursma, supra note 5, at 111-12, 170-200 (Liechtenstein's statehood and international organizations), 233-55 (San Marino's statehood and international organizations), 291-304 (Monaco's statehood and international organizations), 352-66 (Andorra's statehood and international organizations), 397-410 (the Vatican City's statehood and international organizations); John Dugard, Recognition and the United Nations 126, passim (1987).


37. See Dahm et al., supra note 17, at 126-32. Note however that the authors also include elements of history, culture, and internal constitutive structure, not unlike Baty, Cavaré, and Parry:

Die Staaten, wie sie heute bestehen, sind vielmehr ein Produkt der Geschichte, Gebilde des politischen Lebens, und an diese Wirklichkeit schließt sich die rechtliche Begriffsbildung an.... Der Staat ist die Organisation, in der die in einem bestimmten Raum der Erde ansässigen Menschen zusammengefaßt werden, ein zu einer konkreten Lebensordnung zusammengeschlossener Inbegriff von Menschen, Einrichtungen, Anstalten, Beziehungen, der vom Recht als 'Person,' als Einheit gedacht wird. Der Staat knüpft also an eine geschichtliche und politische Wirklichkeit an, aber er ist im letzten doch ein gedankliches Wesen. [States, as they endure today, are very much a product of history, creatures of political life, and in this sense conform with legal abstraction.... The state is the organization in which a people, settled in a definite area of the planet, has been embraced, an amalgamated embodiment of persons, institutions, establishments, and relations which, through a concrete regimen [Lebensordnung], is under law thought of as a 'Person,' as a unity. The State
Restatement (Third) of Foreign Relations Law in the United States, 39 Higgins, 40 Starke, and Shearer in the United Kingdom, 41 and Dinh, Daillier, and Pellet in France. 42 While “objective criteria” such as population and territory are prevalent in contemporary proposed definitions, “subjective criteria” such as history and sociological evolution are also widely included. 43 A substantial literature, expressing a range of views, addresses statehood.

In attempting to define ‘state,’ the problem, then, is not an absence of academic sources. Scholars provide a wealth of guidance on the matter. The problem, rather, is one of legal sources. 44 Despite the length at which the literature discusses statehood and its parameters, there are few authoritative sources that offer a workable definition of the state.

The source most often cited 45 as a textual basis for statehood is the Montevideo Convention of 1933 and, in particular, its section
entitled On the Rights and Duties of States.\textsuperscript{46} The Montevideo Convention proposes four criteria for statehood. The entity aspiring to be regarded as a state must possess a permanent population; it must occupy a clearly defined territory; it must operate an effective government over the extent of its territory; and it must display capacity to engage in international relations—such capacity including the ability to fulfill international treaty obligations.\textsuperscript{47} This list of criteria—to which I will refer as the Montevideo criteria—provides a succinct and perhaps easily employed standard to assess whether a community is a state. It is not, however, clear that the Montevideo criteria provide a satisfactory definition of statehood. The criteria have held a prominent place in efforts to define statehood. Indeed, many of the contemporary writers discussed above cite them.\textsuperscript{48} This may reflect, however, the lack of a better model rather than the sufficiency of Montevideo itself. To understand the position of the Montevideo criteria in modern discourse over statehood, it is necessary first to explore the background of the Convention.

III. ORIGINS OF THE MONTEVIDEO CRITERIA

The text of the Montevideo Convention does not explain the origins of the criteria it enunciates. Since its formulation at the Seventh International Conference of American States, however, the Montevideo Convention on the Rights and Duties of States has been a primary point of reference in efforts to define statehood. James Crawford, in his book, The Creation of States in International Law, aptly calls Article 1 of the Convention the “best known formulation of the basic criteria for statehood.”\textsuperscript{49} The 1930s and 1940s, immediately following the signing of the Convention by the United States and the other Pan-American nations,\textsuperscript{50} witnessed ample citation to the Convention by the United States and the other Pan-American nations,\textsuperscript{50} witnessed ample citation to the Convention. The four-point


\textsuperscript{47} Article 1 of the Montevideo Convention reads: “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.” Id.

\textsuperscript{48} See, e.g., Starke’s International Law, supra note 17, at 85; Restatement, supra note 39, § 201 cmt. a; Higgins, supra note 3, at 39; Dinh et al., supra note 42 at 399; Malanczuk, supra note 17, at 75-79; Carter & Trimble, supra note 2, at 412-13.

\textsuperscript{49} Crawford, supra note 20, at 36.

\textsuperscript{50} The signatories were Honduras, the United States of America, El Salvador, the Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Mexico, Panama, Bolivia, Guatemala, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru, and Cuba. 28 AM. J. INT’L. L.
enumeration of the elements of statehood offered by the Convention has perhaps been even more frequently cited in recent years; citation to the Convention in contemporary discussions of statehood is nearly a reflex.51 Some sources, without attributing their definition of statehood to the Convention, repeat the Montevideo criteria nearly verbatim. The United States Department of State, for example, wrote in 1976:

In [judging whether to recognize an entity as a state], the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organized governmental administration of that territory; and a capacity to act effectively to conduct foreign relations and to fulfill international obligations.52

(Supp.) 52 (1934). Ratifications as of May 1936 had been deposited at Pan-American Union archives in Washington, D.C. by five powers: the United States, Dominican Republic, Chile, Guatemala, and Cuba. 65 L.N.T.S. 19, No. 3802.


Even though the Montevideo criteria have become a touchstone for the definition of the state, little if any examination is to be found of their origin. References to the Convention in the academic literature of the 1930s and 1940s offer no insight into why the drafters chose the adopted phrasing.\textsuperscript{53} Nor, when publicists have mentioned the Montevideo criteria in the last half-century, has much light been shed on the matter.

That the framing of the Montevideo Convention has gone largely unexamined may reflect the fact that its content was a restatement of ideas prevalent at the time of the framing. So apparent were the Montevideo criteria to contemporary observers that few thought to inquire as to their basis or origin. At the crux of the Montevideo criteria lay the concepts of effectiveness, population, and territoriality. In the late 1930s, these may have seemed a long-established feature of international law. They certainly were not new. Georg Jellinek, writing in the late nineteenth century, had posited a Drei-Elementen-Lehre—a "doctrine of three elements"—and this was the essential core of the Montevideo criteria.\textsuperscript{54} By the 1930s, the three elements were widely assumed to be a mainstay of statehood. Reflecting their prevalence, the elements of effectiveness, population, and territoriality were enumerated as a basis for statehood (or of sovereignty) by many leading publicists of the half-century leading up to the Montevideo Convention.

Henry Wheaton wrote, "The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign State."\textsuperscript{55} Wheaton added this to a definition of statehood which he attributed to classical scholars: Cicero, Wheaton claimed, had defined a state to be "a body political, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength."\textsuperscript{56} Power played a central role in Wheaton's definition of statehood.


\textsuperscript{54} GEORG JELLINEK, \textit{ALLGEMEINE STAATSLLEHRE}, 396 et seq. (3d ed. 1914). Akehurst and Malanczuk note the link between the Montevideo criteria and Jellinek. See generally MALANCZUK, supra note 17.


\textsuperscript{56} Id. at 25.
James Lorimer also suggested that the effectiveness of a putative state was critical to its claim. "In order to be entitled to recognition, a State must presumably possess: (a) the will to reciprocate the recognition which it demands; (b) the power to reciprocate the recognition which it demands." Lorimer, who proposed this formula in 1883, would be followed by others. Hannis Taylor wrote at the turn of the century that both Rome and its successor to organized power in the Mediterranean world—the Christian Church—embraced universalist notions of the state. This view contemplated only a single state, encompassing the width and breadth of the known world, and it denied full legal status to entities falling outside the imperium. Roman universalism gave way, however, to a belief that territorial sovereignty lay at the root of statehood. The medieval and classical West conceived of the state as a singular instance of human organization, deriving its validity from principle. The early modern thinkers, by contrast, began to admit that there could be a multitude of states, and that it was their effectiveness in controlling a land and a population which lent them legal stature.

This view took center stage by the early twentieth century. Georges Scelle, writing in 1932, described the state as "une collectivité, fixée sur un territoire délimité, juridiquement organisée." William Hall, the publicist perhaps most closely approximating the Montevideo criteria before their codification, wrote, "The marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control." Hall further emphasized the territorial aspect of statehood by focusing on the permanence of territorial control. According to Hall, a fugacious people could not qualify as a state:

From the invariable association of land with sovereignty, or in other words with exclusive control, over the members of a specific society, to the necessary association of such control with the possession of land, is a step which could readily be made, and which became inevitable when no instances were present of civilized communities without fixed seats.

58. See HANNIS TAYLOR, INTERNATIONAL PUBLIC LAW 75 (1902).
59. ["a collectivity—fixed on a delimited territory—juridically organized"]. GEORGES SCELLE, PRECIS DE DROIT DES GENS: PRINCIPES ET SYSTEMATIQUE 74 (1932).
61. Id. at 19.
The ideas behind the Montevideo criteria were well-rooted by the time of the Convention—so much so that the arbitrators in *Deutsche Continental Gas-Gesellschaft* (1929) could posit with little explanation that a "[s]tate does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory."62

The consensus on territoriality, population, and effectiveness by the eve of Montevideo probably explains the dearth of examination surrounding the elements of the Convention. However, consensus obscured the fact that the concepts were not absolute. Though the criteria enunciated at Montevideo were very much a part of the international legal milieu by 1933, territorial power, population, and effectiveness had not monopolized state theory for very long. At least two ideas had offered competing conceptions of the foundation of statehood—or at least of sovereignty. Contiguity doctrine and legitimism held key places in nineteenth century thought and practice, sometimes alongside the future Montevideo criteria, sometimes alone. Though the earlier doctrines would eventually fade, their one-time prevalence suggests the need to examine more carefully the assumption that Montevideo criteria are conclusive as to the nature of statehood.

IV. LEGITIMISM AND ITS DECLINE

Legitimism, the prevalent theory of sovereignty during the age of monarchy,63 was primarily concerned with regulating changes in government. It nonetheless played a role, albeit secondary, in theories of statehood. Eighteenth century princes were awake to the threat posed by the revolutionary context. As noted by historian Eugen Weber, the rise of national sovereignty in the early modern period was due in part to the threat posed by the revolutionary context. The idea of a sovereign state was seen as a way to prevent the kind of disorder and confusion that characterized the French Revolution. As a result, the idea of a sovereign state became increasingly important, and legitimism played a role in shaping this conception of sovereignty.

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62. *Deutsche Continental Gas-Gesellschaft* v. Polish State, 5 ANN. DIG. I.L.C. 11 (Germano-Polish Mixed Arb. Trib. 1929). A German business corporation, Deutsche Continental Gas-Gesellschaft, had owned property in Warsaw when that city had been part of the Russian Empire. Warsaw became the capital of a reconstituted Polish State in 1918, so the company's Warsaw assets came to lie under Polish jurisdiction. The Versailles Treaty, Article 297, allowed states damaged by Germany during the Great War to expropriate German assets within their jurisdictions. Poland expropriated the Warsaw property of Deutsche Continental Gas-Gesellschaft in December 1923. The company sued, arguing that, upon the date the Versailles Treaty went into effect (January 10, 1920), Russia had not ceded, and thus had not recognized Polish title over, the formerly Russian part of Poland. Polish control, the company argued, had been recognized only over those Polish lands formerly part of Germany. Accordingly, as the Versailles Treaty provisions for restitutory expropriation reached only assets in the territory of the state conducting the expropriation, Poland had no authority to seize the Warsaw assets of Deutsche Continental. The arbitral tribunal rejected the German position, however, holding that whether Russia recognized the Polish State was not dispositive. Control, not recognition, is what mattered. The expropriation was upheld.

to their dynasties by popular unrest, family dissension, and external attack. The eighteenth century system of states rested on the principle of inheritance and equated the state to personal ownership of land by the monarch. Eighteenth century notions of statehood went so far, famously, to posit an identity between state and ruler—"L’État c’est moi."  

This system relied on the proposition that a dynasty enjoyed historic rights to rule a state, and, thus, the prince continued to be sovereign even if in fact displaced from his throne. Though firmly entrenched for much of the eighteenth century, legitimism would not prove immune to historical contingency. The French Revolution put legitimism under great strain. The collapse of the ancien régime in France was a fact which the monarchies of Europe—essentially all the states of Europe—could scarcely ignore, but the monarchies hesitated to attribute legal effect to that fact.

With the sheer power of his empire insufficient to overturn legitimist assumptions about statehood, Napoleon resorted to the terms and forms of the European monarchies in a bid for recognition. Bonaparte fashioned himself Emperor and various of his relatives kings of conquered European states. In trying to integrate himself into the ancient system of European dynasties, Napoleon seems to have reaffirmed the notion of dynastic legitimacy. Though existing dynasties took a hostile view of the effort, it could be viewed to have born fruit when, later in the period of Empire, Napoleon’s enemies were willing to treat with him as an equal. At Napoleon’s peak, Tsar Alexander I of Russia held a “summit” with the French Emperor on the River Nieman, and Prince Metternich made several offers of dynastic security to the Bonapartes after French military fortunes had declined. In the aftermath of Napoleon’s bid for European dominion, a Holy Alliance was established by the conservative monarchies. Installing a Bourbon anew on the throne of France, the alliance of Russia, Prussia, and Austria pledged to revive legitimist tests of sovereignty, and thus to make dynastic credentials the sine qua non of statehood. Under the legitimist theory promoted by the Holy Alliance, an entity could be considered a state “irrespective of the compelling force of facts.”

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64. See Wheaton, supra note 55, § 19, at 27 (“Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: ‘L’État c’est moi.’ [‘I am the State’].”)

65. See Weber, supra note 63, at 540-42 (noting also that Napoleon re-established hereditary titles such as "Duke").

Some international legal thinkers of that time, however, rejected the strong-form view of legitimism. Justi, Steck, Martens, and Klueber argued that political change in a community could create a new state or government. Such a state or government, according to the more progressive publicists, could enjoy status on the world stage equal to that of other, longer-established ones. Nonetheless, the Congress of Aix-la-Chapelle in 1818 vigorously reiterated the legitimist position. Though the Congress won the adherence of France and Britain, the latter approached the legitimist thesis with reservation. The Congress, British statesmen made clear, “never was . . . intended as a union for the government of the world, or for the superintendence of the internal affairs of other States.” The proposition that political reality could trump dynastic legitimacy was gaining force. Though many powers long remained cautious toward revolutionary changes of state structure or government, effective control became, as the nineteenth century progressed, a more important indicator of statehood than historic dynastic prerogative.

V. CONTIGUITY DOCTRINE—ANOTHER ALTERNATIVE TO EFFECTIVENESS

By mid-century, legitimism was fast-fading. The fact of effective control began to displace political theories of who ought to rule a given territory and people. Effectiveness did not completely prevail, however, in the theory of sovereignty. Nineteenth century doctrine on acquisition of territory admitted title in situations where a claimant entirely lacked effective control. Contiguity doctrine provided a basis for claims over territory during much of the period of European imperialism. Like legitimism, contiguity doctrine did not hold effective control to be a prerequisite to sovereignty over a given territory. The doctrine, in its essentials, held that control of a territory could give the sovereign title to adjacent lands that were themselves not actually subject to the

67. Justi, Steck, Martens, and Klueber are discussed at length in Alexandrowicz, supra note 66. The works that Alexandrowicz takes as representative of their views are JOHANN HEINRICH GOTTLIEB VON JUSTI, HISTORISCHE UND JURISTISCHE SCHRIFTEN [HISTORICAL AND LEGAL WRITINGS] (1760); JOHANN CHRISTIAN WILHELM STECK, VERSUCHE ÜBER VERSCHIEDENE MATERIEN POLITISCHER UND RECHTLicher KENNTNISSE [EXAMINATION OF DIFFERENT MATTERS OF POLITICAL AND LEGAL KNOWLEDGE] (1783); GEORG FRIEDRICH MARTENS, A COMPENDIUM OF THE LAW OF NATIONS FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 18 et seq. (Cobbett trans., 1802) (1789); JEAN LOUIS KLUEBER, DROIT DES GENS MODERNES DE L’EUROPE [MODERN INTERNATIONAL LAW IN EUROPE] (1831).

68. Alexandrowicz, supra note 66, at 194 (quoting WHEATON, supra note 55, at 114-17).
southern’s effective control. So long as no other European power claimed those adjacent lands, and so long as no other recognized state authority existed there, the state controlling the contiguous territory could extend its claims beyond the scope of its effective control.

Contiguity doctrine has been described as generating a rebuttable presumption of title—rebuttable, that is, by “better evidence of sovereign possession by a rival claimant.” Any rival claimant had to be a sovereign itself, however, and sovereignty, under the constitutive view then gaining currency, was contingent on recognition by existing states. Existing states little admitted that aboriginal peoples might form sovereign powers and thus exercise state-like claims of their own. Territory not organized under European conceptions of statehood was thus perhaps at times treated almost as terra nullius. In this way, the view that state power could be transmitted by mere contiguity dovetailed with the then-ascending constitutive view of recognition, and together, the two ideas formed a potent helpmate to imperialism. Claims to ‘empty’ territory were accepted as valid even when the claimant exercised no effective control over the territory. If lands were ‘empty,’ they were deemed terra nullius—subject to no one’s title. In turn, the condition of emptiness was determined to obtain not only in places devoid of humanity, but indeed wherever European powers declined to recognize an indigenous society as a state. Absence of state power made a territory available for European acquisition, and the states

69. Portugal’s claims in south-central Africa were probably the most prominent example of attempted application of the doctrine. Portugal in Africa is discussed, infra, this part. Acquisition of territory, of course, is not synonymous with statehood. Oppenheim warns, “The acquisition of territory by an existing State and member of the international community must not be confused . . . with the foundation of a new State.” OPPENHEIM, supra note 2, § 209, at 544. At the same time, acquisition of territory and statehood bear an important relationship. Both involve the status of a territorial fact under international law. Over the last century, the international community has seldom recognized territorial acquisition absent a demonstration by the claimant that it exercises effective control. Obtaining recognition of a claim to statehood required a similar factual showing. This view of the territorial character of statehood and of title was the prevailing one at the time the Montevideo Convention was signed. But, as discussed above, it had not always been. For further discussion of the relationship between statehood and sovereignty, see J.G. Starke, The Acquisition of Title to Territory by Newly Emerged States, 41 BRIT. Y.B. INT’L L. 411-16 (1965-66). See also ROBERT YEWDAJN JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963); Sovereignty: Its Acquisition and Loss, 1 Moore DIGEST §§ 80-89, at 255-301; MALCOLM N. SHAW, TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES (1986).

70. JENNINGS, supra note 69, at 75.

71. This was apparently the case in Australia. However, in its Western Sahara Advisory Opinion, the International Court of Justice studied late nineteenth century theories of territorial acquisition and determined that lands in northwest Africa acquired by Spain in the 1880s were not treated as terra nullius. Western Sahara, 1975 I.C.J. This is significant in that it illustrates that even at the high tide of European colonial expansion, not all territory was viewed as ‘no man’s land.’ It may be that viewing territory as terra nullius was the exception rather than the rule.
interested in expanding their own territorial holdings espoused a theory of recognition which gave them the discretion to constitute—or to decline to constitute—a state.

Constitutive doctrine left it to communities that were already acknowledged members of the international system to determine whether a given community not yet a member of the society of states would become a state. Territories with human societies not yet constituted as states by the existing international community were potentially treated as terra nullius and thus subject to sovereignty notwithstanding absence of control. This theory was, to say the least, convenient for states which desired to acquire lands occupied by societies unwilling to accept European overlordship: the prospective European holder of title, under constitutive doctrine, itself determined whether a state existed; if no state existed, there was no antecedent title-holder; absent title-holder, the expanding colonial power could take title without contest. This logic operated in the case of the Eastern Greenland littoral, where Norway and Denmark disputed sovereignty until the 1930s, ignoring the well-known indigenous presence in Eastern Greenland as a legal factor.72 Contiguity doctrine reflected obliquely on theories of how Europeans could create states—after all, it was primarily about accreting space to states already in existence, rather than making new states. But in its implied negation of non-European state-building, the impact of contiguity doctrine was very direct indeed.

However useful contiguity doctrine might have been to expanding imperial states, both in its lowering of legal requirements for the assertion of sovereignty and in its implicit denial of statehood to indigenous peoples, the doctrine did not last long. Nor was it stable while it lasted. Even at the high tide of European colonial expansion, it would be a mistake to characterize notions of sovereignty as fixed. The fluidity of the term ‘state’ was perhaps best displayed in the inconsistency of the colonial powers in their relations with non-European peoples. Where Europe was least inclined to acknowledge local rights in non-Europeans (Africa, Australia, the Pacific, and the

72. The Permanent Court of International Justice in Legal Status of Eastern Greenland stated, “[In] many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.” Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53, at 22, 46 (Apr. 5, 1933). The Permanent Court noted Danish claims to protected the “Eskimo people” from “uncontrolled contact with white races,” but it did not admit of any state-making ability in the indigenous population. Id. at 37. In fact, the Court, though addressing European acquisition of title to territory by conquest, seems to have excluded that the native people could maintain a claim to title through force of arms. Id. at 47.
expansion was nonetheless often accompanied by diplomacy and treaty-making.

There were notable exceptions. In Australia, the absence of political communities discernible as such to the early British arrivals meant that European expansion on that continent was rarely accomplished through treaties. Except for some halting efforts at negotiation in northern Australia, the British took possession of the continent with no semblance of recognition of native rights. According to a Select Committee of the House of Commons in 1837, the aboriginal peoples of Australia were “the least-instructed portion of the human race” and thus there was “no political society [in Australia] to be dealt with.”

D.P. O’Connell explained that the “Australian aborigines were held incapable of intelligent transactions with respect to land, [so] Australia was treated as terra nullius.”

Contrasting with the near-uniform non-recognition of local social organization in Australia, British conduct in New Zealand varied from place to place. The Treaty of Waitangi of February 1840 purported to cede the North Island of New Zealand to the British Empire. The South Island was taken without negotiation or treaty.

If Britain treated native New Zealanders differently in different places, then the United States treated Native Americans differently at different times. Treaty-making was an integral part of the westward expansion of the United States. The growing republic often dealt with native tribes on a formal basis, and many treaties were concluded between the United States and tribal governments. Some of these were treaties of cession, others of surrender. Even treaties of the

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74. O’CONNELL, supra note 2, at 470. For a fascinating challenge to the view that the native Australians were a passive and ‘incompetent’ presence, see HENRY REYNOLDS, THE OTHER SIDE OF THE FRONTIER: ABORIGINAL RESISTANCE TO THE EUROPEAN INVASION OF AUSTRALIA (1982).

75. See THE OXFORD HISTORY OF NEW ZEALAND 52-53, 58, 172-74 (W.H. Oliver & B.R. Williams eds., 1981). Oliver and Williams note material differences between the English and Maori texts of the Treaty of Waitangi. The text in Maori bargained away fewer native rights than did the text in English. See also O’CONNELL, supra note 2, at 470. O’Connell also notes that the British treated the North Island and South Island quite differently.

76. Many treaties of cession are recorded. For representative examples, see Treaty of Cession of the Menomonee Tribe, Oct. 18, 1848, U.S.-Menomonee Tribe of Indians, 14 Martens Nouveau Recueil (ser. 1) 244 (1856); Treaty of Cession of the Indians of Stockbridge, Wisconsin, Nov. 24, 1848, U.S.-Indians of Stockbridge, Wis., 14 Martens Nouveau Recueil (ser. 1) 254 (1856); Convention of Cession of the Pawnees, Aug. 6, 1848, U.S.-Pawnees, 14 Martens Nouveau Recueil (ser. 1) 214 (1856); Agreement of Cession of the Delaware Nation of Indians and the Wyandott Nation of Indians, Dec. 14, 1843, Delaware Nation of Indians-Wyandott Nation of Indians, 14 Martens Nouveau Recueil (ser. 1) 211 (1856); Treaty of Cession of the Chippewa Indians of the Mississippi and Lake Superior, Oct. 4, 1842, U.S.-
capitulatory sort illustrated some acknowledgment that the territory into which the republic was expanding was not land vacant and free for the taking. If the North American continent had been regarded strictly as terra nullius, Americans would have had no reason to conclude so much as a surrender treaty with any tribe. Dealing with the original inhabitants of the continent in a form at least nominally diplomatic ended, however, before the completion of the conquest of the West. In 1871, Congress enacted a law forbidding the initiation of any new treaty ties with the Native Americans:

[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.  

Though preserving the rule of *Turner v. American Baptist Missionary Union* (holding that treaties with native tribes were the law of the land like treaties with any recognized foreign power), the 1871 law relegated Chippewa Indians of the Mississippi and Lake Superior, 6 Martens Nouveau Recueil (ser. 1) 610 (1849). These treaties typically provided, in exchange for an extensive territorial cession by an indigenous people, government pledges of annual stipends and retirement of tribal debt to American creditors. It would be interesting to inquire whether the United States offered the more generous treaties of cession to those tribes that borrowed from Americans. Tribes indebted to American creditors would have had an inroad to processes of authority that other tribes lacked: indebted tribes had a contractual relationship with U.S. creditors, who in turn, as influential American citizens, could have shaped federal policy toward indigenous peoples. It would have served the creditors' interest to secure a guarantee against the insolvency of an indebted tribe. Moreover, it would have served the creditors' interest to preserve the legal continuity of the indebted tribe. It is therefore plausible that creditors lobbied Congress to draft treaties of cession in such a way that: (1) tribal debts were covered by the federal government (curing the insolvency problem); and (2) the indebted tribes retained legal personality (curing the continuity problem). Treaties of surrender contained terms harsh in comparison to the terms of treaties of cession. See, e.g., Treaty of Surrender of the Navajo Tribe of Indians, Sept. 9, 1849, U.S.-Navajo Tribe of Indians, 14 Martens Nouveau Recueil (ser. 1) 582 (1856). It would be interesting to inquire whether tribes subject to treaties of surrender had borrowed less from American creditors than the more leniently treated tribes party to treaties of cession.

77. See, e.g., Treaty of Surrender of the Navajo Tribe of Indians, supra note 76; Treaty of Submission of the Uinta Tribe of Indians, Dec. 30, 1849, U.S.-Utah Tribe of Indians, 14 Martens Nouveau Recueil (ser. 1) 696 (1856).


79. 24 F. Cas. 344 (C.C.D. Mich. 1852) (No. 14,251), noted in 1 Moore DIGEST, supra note 69, § 17, at 37.
the native tribes of America to a status more akin to that of their Australian counterparts.\textsuperscript{80}

Though statesmen were unsure how to treat native peoples in Africa, North America, and Australasia, they nevertheless deemed great expanses of territory devoid of antecedent claims and thus open to conquest. Today, with the possible exception of the floor of the territorial sea, terra nullius is not widely thought to exist in international law.\textsuperscript{81} However, the concept was often employed in the past. Indeed, during the nineteenth and early twentieth centuries, theories of acquisition of territorial title oblivious to pre-European local rights developed in a number of contexts. Perhaps the most prominent of such theories dispensed with the notion that effective control was a prerequisite to title. Under the contiguity doctrine, European powers attempted to dispose of territories as diverse as southern Africa and the polar caps.

The early twentieth century was a period of competition over territorial rights in the Arctic and Antarctic. Not surprisingly, the states adjacent to the Arctic Circle expressed the most interest in the north polar region, with Canada, and later the Soviet Union, asserting sovereignty on the basis of contiguity.\textsuperscript{82} On similar bases, the United Kingdom, New Zealand, Australia, France, Norway, Germany, Argentina, and Chile would make claims to Antarctic territories.\textsuperscript{83}

Perhaps the clearest enunciations of national intent to extend sovereignty without actually extending effective state presence came from Canada. Senator Pascal Poirier in February 1907 called for a Canadian territorial claim up to the North Pole. Charles Stewart, the foreign minister, in 1924 proposed that state title could vest, by virtue

\textsuperscript{80} Other examples of treaty-making between the expanding European powers and non-European nations include: Agreement between Rear-Admiral Thomas and the King of the Sandwich Islands, July 31, 1843, Gr. Brit.-Haw., 5 Martens Nouveau Recueil (ser. 1) 477 (1847) (a set of provisions between Great Britain and King Kamehameha III of Hawaii); Treaty of Protection, Nov. 3, 1883, Fr.-Firdou, 9 Martens Nouveau Recueil (ser. 2) 699 (1884) (a protectorate treaty between France and the King of Firdou in West Africa); and Treaty of Friendship between the United States and the Queen of Madagascar, May 13, 1881, U.S.-Madag., 11 Martens Nouveau Recueil (ser. 2) 732 (1887). This last, interestingly enough, contained articles of mutual recognition.

\textsuperscript{81} Marston, tracing the development of the law of the territorial sea, notes that, before World War II, submarine soils outside territorial waters were viewed as a res nullius to which State acts of effective occupation could extend sovereignty (provided those acts did not impede free passage and use of superjacent waters). See Geoffrey Marston, The Incorporation of Continental Shelf Rights into United Kingdom Law, 45 INT'L & COMP. L.Q. 13, 16 (1996).

\textsuperscript{82} BROWNLIE, supra note 5, at 151-52 (noting that Denmark, Finland, Norway, and the United States, though interested in the Arctic, did not make claims based on contiguity doctrine there).

\textsuperscript{83} See id. at 152.
of contiguity, over territory as far as one hundred miles from the closest effective state control. The control requirement, Stewart said, was inapplicable.\textsuperscript{84} Even after World War II, Canadian statesmen continued to assert title to Arctic regions, absent effective state presence. The Canadian ambassador to Washington, DC requested on June 5, 1946 that the United States recognize Canadian claims to polar territory, on the basis of a ‘sector principle.’ The idea was that sovereignty should be assigned over all territory, a sector, between a pair of longitudinal lines converging at the poles, notwithstanding the lack of permanent state presence in the claimed territory.\textsuperscript{85} Prime Minister St. Laurent reiterated on December 8, 1953 that Canadian sovereignty embraced all land up to the North Pole.\textsuperscript{86} Effective control was viewed as dispensable to Canadian state claims over lands of the far north.\textsuperscript{87}

\textsuperscript{84} See Donat Pharand, \textit{Canada’s Arctic Waters in International Law} 8-9, 30 (1988). Similar claims were being made at around the same time in regard to Eastern Greenland, the less hospitable side of the mostly-ice-capped North Atlantic island. See Danish Arguments in Eastern Greenland, (Nor. V. Den.), 1933 P.C.I.J. (Ser. A/B) No. 53, at 46 (Apr. 5).

\textsuperscript{85} See Pharand, supra note 84, at 53, quoting 12 DOCUMENTS ON CANADIAN EXTERNAL RELATIONS 1566 (1946).

\textsuperscript{86} See id. at 54, noted in CAN. H.C. DEB. 700 (1953-4).

Portugal, during the so-called scramble for Africa, was arguably the most enthusiastic adherent to the contiguity doctrine. The Lusitanian Kingdom had long possessed trading posts on several coasts of the continent, but these were little more than toeholds, and by the nineteenth century, the Portuguese settlements were moribund. Portugal's presence was most tenuous on the southeastern coast of Africa, in Mozambique:

South of the Zambezi, the next Portuguese authority was at Sofala, the scene of the first Portuguese occupation on the coast in 1505, and from where the first penetration of the interior had taken place. The fort still stood, though it urgently needed repair, the nominal home of a detachment of troops, but it was no longer the capital of the district of Sofala. In fact, by this time, in the whole of the Sofala area, . . . there was not a single Portuguese resident, there was not a mulatto; there was not a single literate native. The seat of government had been removed, from fear of attack . . . to the island of Chiloane, and the authority of the Governor did not extend to the mainland. 88

Actual Portuguese power scarcely exceeded this level in other parts of Mozambique. 89 Nonetheless, on the basis of this string of nearly extinct colonial posts, Lisbon asserted a claim to a vast hinterland. During the second half of the nineteenth century, this claim would inflate to embrace a territory stretching from Portuguese Angola on the Atlantic to Mozambique on the Indian Ocean. Hopes for a "New Brazil" indeed exercised Portuguese statesmen and nationalists. Amazingly, despite the tenuousness of Portugal's position, other powers acknowledged Portuguese claims, if not to the whole of central southern Africa, at least to substantial spaces. That acknowledgment of Portuguese sovereignty far exceed Portuguese effective control was demonstrated by a number of incidents.

Part of the southern African interior constituted the Kingdom of Gaza. The leader of Gazaland, King Umzila, pledged himself a vassal to Portugal in 1862. In 1870, Umzila approached the governor of the British colony of Natal and proposed that Britain set up posts along the Limpopo River, to route the ivory trade from Gazaland through Natal. Recognizing Portuguese claims over Gazaland, the Natal governor rejected King Umzila's advance, noted the 1862 vassalage, and further noted that to establish posts on the Limpopo would be to encroach on Portuguese territory. Encounters with the Boer Republic of Transvaal

88. ERIC AXELSON, PORTUGAL AND THE SCRAMBLE FOR AFRICA, 1875-1891, at 8 (1967).
89. See id. at 3, 8.
similarly evidenced Portuguese sovereignty in Mozambique. The president of Transvaal, Pretorius, declared the annexation of mile-wide bands of territory on either bank of the Maputo River, in order to give the landlocked republic a corridor to Delagoa Bay on the Indian Ocean. Portugal protested the declaration, and Pretorious reversed it. In 1869, Portugal and Transvaal concluded a Treaty of Peace and Commerce to build a railroad from Lourenço Marques to the Transvaal. This again acknowledged Portugal's claim to a hinterland well beyond the enclaves of effective Portuguese control on the Mozambican littoral. In 1870, French warships seized the Hero, a vessel of the North German Confederation, near Banana at the mouth of the River Congo (Zaire). A German complaint alleged that the seizure violated Portuguese territorial waters. France released the vessel, even though Portuguese presence around Banana was negligible. The evidence shows that European states during the late nineteenth century recognized sovereignty over 'empty' territory devoid of any but merely notional administrative control by the claimant.

Even after the Montevideo Convention of 1933, states used contiguity as a support for claims to territory, echoing Portuguese claims to south-central Africa. Peru and Ecuador fell into dispute over the Maynas Tract, a territory at the headwaters of the Amazon comprising 100,000 square miles—an area twice the size of the state of New York. Effective occupation was limited, and both claimants attempted to justify their assertions of sovereignty by reference to the proximity of the tract to territories that they did in fact control. Though the contiguity claims were ultimately unsuccessful, the doctrine showed some resilience in the continued efforts of some states to use it as a basis for sovereignty.

As a norm of public international law, however, contiguity doctrine faced prolonged pressure. Though future territorial disputes

90. See id. at 11-12.
91. See id. at 41.
92. Brownlie expresses doubt as to whether the European states in fact recognized sovereignty where effective control was lacking. "Modern research," Brownlie writes, "has given cause to doubt that [discovery absent effective control] gave more than an inchoate title in this period: an effective act of appropriation seems to have been necessary." BROWNLIE, supra note 5, at 146. Brownlie does, however, note that the evidence of effective occupation required to establish title may have been less in cases of terra nullius than in cases where there existed competing claims to title. See id. at 139.
may lead parties to revisit contiguity doctrine, the trend this century has been toward its erosion, and opinion has grown that effective control is the evidence necessary to show title. International case and treaty law illustrate the skepticism which eroded contiguity doctrine.

VI. REJECTION OF CONTIGUITY DOCTRINE

The General Act of Berlin of 1885 seems to have initiated the erosion of contiguity doctrine in international law. The General Act stated that, in order to acquire territorial sovereignty over any territory in Africa, the European claimant had to make a clear notification to other powers of its claim, and this notification had to be coupled with effective occupation of the territory in question. Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, and the Ottoman Empire were parties to the Act. Though a clear expression of international intent to restrict the application of contiguity doctrine, the General Act did not prevent Portugal from persisting in claims to south-


95. Chapter VI of the General Act made this dual provision:

[Chapter VI

Art. 34. La Puissance qui dorénavant prendra possession d’un territoire sur les côtes du Continent Africain situé en dehors de ses possessions actuelles, ou qui, n’en ayant pas eu jusque-là, viendrait à en acquérir, et de même, la Puissance qui y assumera un protectorat, accompagnera l’acte respectif d’une notification adressée aux autres Puissances signataires du présent Acte, afin de les mettre à même de faire valoir, s’il y a lieu, leurs réclamations.

Art. 35. Les Puissances signataires du présent Acte reconnaissent l’obligation d’assurer, dans les territoires occupés par elles, sur les côtes du Continent Africain, l’existence d’une autorité suffisante pour faire respecter les droits acquis et, le cas échéant, la liberté du commerce et de transit dans les conditions où elle serait stipulée.

[Chapter VI

Art. 34. The Power that hereafter takes possession of a territory on the coasts of the African continent situated outside its actual possessions, or which, not having any [territory] there, comes to acquire some, and likewise the Power that there assumes a protectorate, shall accompany the respective act with notification addressed to the other Powers signatory of the present Act, in order to assure respect for any such claims, should they be challenged.

Art. 35. The Powers signatory of the present Act recognize the obligation to assure, in territories which they occupy on the coasts of the African continent, the existence of authority sufficient to enforce respect for vested interests and, if the case should arise, freedom of commerce and of transit upon conditions where stipulated.]

central Africa on the basis of contiguity. In 1888, the Marquis of Salisbury would protest against Lisbon’s claims of a coast-to-coast empire, and British pressure finally cut Portuguese ambition to size.  

Around the same time, and for some decades afterward, international cases further pressed toward rejection of contiguity doctrine. The Monks Island case (1885) involved a guano island near Venezuela. United States nationals had been exploiting the principal resource of the island, but Venezuela expelled them and seized equipment which the Americans had brought there at some expense. An international Claims Commission rejected Venezuela’s contiguity argument and stated that occupation was the critical issue. Nearly twenty years later, Britain and Brazil fell into dispute over the border between British Guyana and the Amazon. The final arbitral award stated:

"The effective occupation of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole de facto."

One might interpret this opinion as support for a restricted form of contiguity doctrine: from real control of a part of a territory, sovereignty may be imputed over the whole; thus mere contiguity can convey title. Under a plainer reading, however, this repudiates contiguity. Some pieces of territory form compact units, not logically or cleanly divisible. Islands are the most obvious example. Where only one state exercises any effective control within such a unit, even if that control does not reach every corner, it makes sense to impute title to the whole of the unit to that state.


97. Numerous tropical islands—habitats for migratory birds—contain deposits of guano of commercially significant size. Such deposits, especially during the late nineteenth century, were exploited for fertilizer. Among the many guano islands spread across the lower latitudes of the Pacific are Starbuck, Nassau, the Carolines, the Phoenix Group, Fanning, and Christmas Islands. To regulate the right to mine such islands, the U.S. Congress in 1856 passed the Guano Islands Act. Concerning guano islands, see Beatrice Orent & Pauline Reinsch, Sovereignty over Islands in the Pacific, 35 Am. J. Int’l L. 443, 446-47, 451 & n.78 (1941). The environmental and economic impact of over-mining spawned litigation in the 1990s. See Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240.


This is not the same as asserting that mere proximity of one territory to another effectively controlled by a state gives the state title to the former. The rationale behind imputing sovereignty over an entire island when the claimant actually controls only a fraction of it is that the territory, for reasons of geography, should be kept a single political unit. At least absent circumstances militating against such unitary treatment (e.g., presence of a competing sovereign), imputing sovereignty over the whole makes sense in view of the lay of the land. The holding in the British Guyana case was based on a desire for geopolitical economy and rationalization, not on contiguity doctrine. Contiguity doctrine allowed the extension of sovereignty over territory related to the zone of actual control merely by proximity, whereas British Guyana required a more comprehensive geographic logic.

The issue of partial control and discrete territorial units arose again in the Island of Palmas case (1928). The Netherlands and the United States contested an inhabited but isolated island forty-five miles south of the Philippines. Max Huber, as arbitrator, rejected a contiguity argument by the United States and awarded the island to the Netherlands. “The title of contiguity,” Huber wrote, “understood as a basis of territorial sovereignty, has no foundation in international law.” Contiguity, he explained, may be a basis for a claim of initial possession (as with a discrete island group or discrete land mass), but to establish sovereignty, control throughout the territory is necessary: “[W]e must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.” Effective control may convey certain rights beyond its immediate orbit to the whole of a compact territorial unit, but it does not convey sovereignty by virtue of proximity alone.

Still another example of the repudiation of contiguity doctrine was furnished by argument before the Permanent Court of International Justice in Eastern Greenland (1933). Norway and Denmark disputed sovereignty over the eastern littoral of Greenland, and the Permanent Court ruled that Norwegian incursions on the territory violated Danish rights. The Court enumerated three grounds for the award: certain international agreements, implied recognition of Danish sovereignty by Norway, and Danish state presence in the disputed territory. Counsel

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100. British Guyana suggested that title may be imputed through partial control of a coherent territorial unit. This emphasis on coherent territorial units seems related to the concept of ‘self-determination units’ proposed by James Crawford. See Crawford, supra note 20, at 105-106.

for Denmark, during oral argument, expressly conceded the invalidity of a contiguity doctrine argument which had appeared in the Danish memorial.102

Contiguity doctrine would reappear on at least two occasions, post-Montevideo, but these proved unimportant. In both the Minquiers and Ecrehos case (a dispute between Britain and France over islands near the Jerseys)103 and the Western Sahara case (a Moroccan claim over a former Spanish possession on the northwest coast of Africa),104 contiguity arguments were rejected. In Minquiers and Ecrehos, a French contiguity argument was barely addressed by the Court, and in the Western Sahara case, a Moroccan claim failed for lack of a showing that actual authority extended to the disputed territory. Despite these clear rejections, the International Court of Justice (ICJ) found it necessary again to address contiguity arguments in the Gulf of Maine case (1984):

The boundary results from a rule of law, and not from any intrinsic merit in the purely physical fact. In the Chamber's opinion it is therefore correct to say that international law confers on the coastal State a legal title to an adjacent continental shelf or to a maritime zone adjacent to its coasts; it would not be correct to say that international law recognizes the title conferred on the State by the adjacency of that shelf or that zone, as if the mere natural fact of adjacency produced legal consequences.105

The International Court found another later occasion to renounce contiguity doctrine in the continental shelf context. "How far each continental shelf extends," wrote Judge Oda in a separate opinion in the Case Concerning East Timor (Portugal v. Australia), "is determined not in geographical terms but by the legal concept of the continental shelf."106 Even after the establishment of effectiveness as a central criterion of sovereignty and statehood, geographical theories proved stubbornly resilient.

Failure to satisfy the criteria which were later codified in 1933 at Montevideo was not necessarily fatal to a claim of sovereignty in the

late nineteenth century. States recognized one another’s claims over empty territory, even when the claimant state lacked administrative presence in the region in question. The theories on which states argued sovereignty mirrored the realities of imperial dominion. As the era of colonial conquest drew to a close, however, international law began to impose stricter requirements on claims for territorial control. International case law and state practice eventually put to rest the theory of sovereignty by way of geographic proximity or exploration. Effective control would provide the strongest evidence to vindicate territorial claims. Waldock wrote after World War II:

> The hinterland and contiguity doctrines as well as other geographical doctrines were much in vogue in the nineteenth century. They were invoked primarily to mark out areas claimed for future occupation. But, by the end of the century, international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of the establishment of title to new lands.107

Contiguity doctrine had been expressly rejected by the 1930s. F.A.F. von der Heydte in 1935, for example, proposed that merely notional extensions of sovereignty are no substitute for effective control.108 Another commentator a little earlier had rejected contiguity doctrine as a basis for sovereignty over the North and South Poles,109 and still other publicists joined in rejecting contiguity doctrine in various contexts.110 Indeed, territoriality and effectiveness had assumed overwhelming prevalence in thought about sovereignty in the years leading up to the Montevideo Convention. By 1933, legitimism had long been dead, and the other nineteenth century alternative basis for sovereignty, contiguity doctrine, was receiving express, if not its final, rejection.

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Despite its prevalence after 1933, the enumeration of statehood criteria found in the Montevideo Convention has come under scrutiny. Some writers doubt that the Convention offers a complete definition. Others have argued that it is over-inclusive, enumerating elements not essential to statehood. It has also been argued that the Convention is of limited law-making force and therefore, regardless of the quality of its content, has little normative reach. In short, there has arisen a body of scholarly opinion that calls into question past reliance on the Montevideo Convention as an authoritative pronouncement on the characteristics of the state. The last of these three objections—that the Convention has limited lawmaking force—I will address in the Conclusion. It is helpful first to treat problems in the scope of the criteria enumerated under the Convention.

A. **Montevideo Criteria Not Universally Accepted as Prerequisites to Statehood**

The criterion that has received the most scrutiny is that of capacity. The Convention indicated that "capacity to enter into relations with the other states" was a prerequisite to statehood. 111 This, the fourth criterion on the Montevideo list, Crawford specifically identifies as problematic. Capacity, he writes, "is not a criterion, but rather a consequence, of statehood, and one which is not constant but depends on the status and situation of particular States." 112 Ingrid Detter also writes representatively, "It could be argued that [capacity] is, in effect, a consequence, rather than a condition of statehood." 113 The Akehurst treatise agrees that capacity is "not generally accepted as necessary." 114 The views of various other writers accord with this. 115 O'Connell noted that, whether or not treaty-making capacity stems from statehood or contributes to the creation of the state, to indicate that a state has that capacity is not particularly useful in distinguishing states from other

111. Montevideo Convention, supra note 46, at 76.
112. CRAWFORD, supra note 20, at 47. Crawford may have been anticipated in this proposition by Salmond, Gemma, and Kelsen. See OPPENHEIM, supra note 2, at 118 n.3, citing J.W. SALMOND, ON JURISPRUDENCE 145 (7th ed. 1924); SCIPIONE GEMMA, APPUNTI DI DIRITTO INTERNAZIONALE, DIRITTO PUBBLICO 180 (1923); HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT 70-76 (1920); DONATI, STATO E TERRITORIO, at iii, 27, 30 (1924).
114. MALANCZUK, supra note 17, at 79.
115. See, e.g., CARTER & TRIMBLE, supra note 2, at 415-20; INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA, supra note 1, at 11-12.
Treaty-making competence (i.e., capacity) is possessed by various entities besides states. O'Connell had in mind international organizations when he criticized the Montevideo Convention criterion of capacity. It may be added that various sub-state entities also possess treaty-making competence and further erode the utility of the fourth Montevideo criterion. In any case, the proliferation of 'capacity' to entities other than states casts doubt on its inclusion in a definition of statehood. A central task of a definition is, after all, to isolate its object from all others. Even if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an element in a state's creation.

A second element of the Montevideo definition sometimes criticized is that of territory. Starke and Shearer take the view that territory is not necessary to statehood, at least after statehood has been firmly established. Crawford even suggests that effectiveness—the linchpin of Montevideo—is not critical to statehood. States annexed from 1936 to 1940, Crawford notes, continued to enjoy legal personality. Though their governments lost all territorial power, the Polish, Yugoslav, Czechoslovak, and Baltic states retained recognition, at least by the Allied Powers. In the context of the recent civil strife in Somalia, it has also been noted that statehood survives illegal occupation. It therefore appears to be the case that once an entity has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory. To be sure, the Montevideo Convention was concerned with whether an entity became a state, not with how an entity might cease to be a state. Cases of entities subsisting as states while lacking one or another Montevideo criterion are nonetheless illuminating.

116. See O'Connell, supra note 2, at 284-85.
117. Most common among sub-state entities able to enter into agreements are the constituent units of federations, such as the 'states' of the United States of America or the 'Länder' of Germany. The ability of the 'states' of the United States to enter into agreements short of treaties is examined in the RESTATEMENT, supra note 39, § 302 cmt.f, and Peter R. Jennetten, State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States, 8 GEO. INT'L ENVTL. L. REV. 141, 158, 164-168 (1995). But even unitary states (i.e., non-federal states) such as France have admitted some, albeit limited, agreement-making power in their administrative subdivisions.
118. See Dinh et al., supra note 42, at 398-99 (criticizing the Montevideo Convention for failing to provide criteria that distinguish 'state' from other international actors).
119. See also Crawford, supra note 20.
120. See Starke's International Law, supra note 17, at 85, 722-28.
121. See Crawford, supra note 20, at 78-79.
Going a step further, it may even be that an entity can become a state in the first instance without having yet acquired territory. Though not a common event in state practice, ‘nationhood’ has been attributed to entities that never before enjoyed any territorial control. France recognized Poland and Czechoslovakia as ‘nations’ during World War I. Though Poland had once been a state, this had little direct legal consequence. The Polish National Committee which benefitted from French recognition was headquartered at Paris, had never had a seat in Poland, and could make no realistic claim of continuity to a state which had disappeared from the map of Europe in 1815. Poland and Czechoslovakia had no territory, yet the French act “recognized their right to raise an army, to have a national flag, to have military tribunals authorized to judge their nationals.” An extensive set of state-like competencies was thus recognized in entities lacking any territorial foothold, and, more remarkably, never having had a territorial foothold.

Further reasonably well-established propositions, though not in themselves excluding ‘territory’ as a requirement of statehood, further erode the territorial criterion. That territory need not be extensive—indeed, that there is no territorial minimum required of a state—is essentially agreed. It is also fairly clear that ambiguity as to the territorial limits of a putative state does not defeat its claim to statehood. A prevalent discontent over the Montevideo definition is that it includes elements that are not clearly necessary to statehood.

124. See generally Duursma, supra note 5; Restatement, supra note 39; Crawford, supra note 20; Shaw, supra note 21; Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal (1995). See also O’Connell, supra note 2, at 284-85.
125. Deutsche Continental Gas-Gesellschaft v. Polish State, 5 ANN. Dig. I.L.C. 11 (Germano-Polish Mixed Arb. Trib. 1929); see supra note 62 and accompanying text. Consider also the State of Israel and uncertainty over the Mandate boundaries in 1949. Kelsen also took the view that fixed territory is not necessary. See Kelsen, supra note 112, at 70-76 (1920), cited in Oppenheim, supra note 2, at 118 n.3.
126. Interestingly, despite declining confidence in the Montevideo Convention as a definition of statehood, at least one court explicitly relied on it in the late 1980s. Certain members of the armed forces of Bophuthatswana had organized and participated in a coup against the government of that entity. The coup failed, and the organizers and participants were charged with treason. Bophuthatswana, however, was a ‘Homeland’ or ‘Bantustan,’ constituted by South Africa in furtherance of apartheid, a system of governance condemned by most states as well as by United Nations practice, and South Africa alone recognized the entity as a state. (On Bophuthatswana and the other Bantustans, see John Dugard, Human Rights and the South African Legal Order (1978)). The persons charged with treason argued that treason could only be committed against a state; Bophuthatswana was not a state; therefore an element essential to the offense of treason were lacking in the case against them. The bench of the Bophuthatswana General Division cited the Montevideo Convention as an authoritative source defining ‘state’ and treated the Convention criteria as conclusive. The court held that Bophuthatswana satisfied the Montevideo criteria and was therefore a state. See S v. Banda, 1989 (4) SALR 519, 529-31 (Bophuthatswana General Division). That the Montevideo
At the same time, writers argue that the Montevideo definition is missing elements essential to statehood. Crawford argues that the critical criterion for statehood is independence. While, according to Crawford, diminutiveness, political alliance, belligerent occupation, and illegal intervention do not derogate from actual independence, a number of factors may. Crawford proposes several derogations from actual independence. Substantial illegality of origin may put an entity's "title to be a 'State' . . . in issue." Formation of the putative state under belligerent occupation (e.g., Manchukuo) casts doubt on independence. A putative state experiencing "substantial external control" also may lack the essential attribute of statehood. Freedom from outside constraints is the aspect of independence that some writers stress. Others describe independence as a form of self-containment, at least for certain functions. Baty called it "the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world." Power to exclude other states may be a related factor. Writers outside the legal field have certainly identified exclusion of others as an essential attribute of state power.

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127. See, e.g., DINH ET AL., supra note 42, at 398-399 (arguing that the Montevideo criteria are "necessary but not sufficient.")

128. CRAWFORD, supra note 20, at 58.

129. See id. at 59-60.

130. Citing Duff Development Co. v. Kelantan, [1942] A.C. 797, 800, Crawford lists protectorates in this third category of derogations from independence (see id. at 61-62), puppet states (see id. at 62-65), and, citing the World War II independence of Syria, purported but largely substanceless grants of colonial independence (see id. at 65-68).

131. See DINH ET AL., supra note 42, at 398 (positing no state "subordinate to any other member of the international community"); O'CONNELL, supra note 2, at 284 (identifying lack of subordination as key to statehood).

132. BATY, supra note 24, at 13. Henkin writes of statehood involving "privacy" or "impermeability." HENKIN, supra note 2, at 10-12. Kelsen used the term "impenetrability" in a related, though distinct, sense: "The principle that the national legal order has exclusive validity for a certain territory, the territory of the State in the narrower sense, and that within this territory all individuals are subjected only and exclusively to this national legal order or to the coercive power of this State, is usually expressed by saying that only one State can exist on the same territory, or—borrowing a phrase from physics—that the State is 'impenetrable.'" KELSEN, supra note 3, at 212.

133. John Keegan, the military historian, for example, describes the French colonial empire in North America as one based not so much on control of territory as on exclusion of non-French fur traders. JOHN KEEGAN, WARPATHS: TRAVELS OF A MILITARY HISTORIAN IN NORTH AMERICA 95-99 (1995).
Many authors agree in general outline that independence is a critical criterion of statehood. At least two ambiguities arise in connection with the proposed criterion of independence. First, it is unclear what the growth of competence in international organizations means for statehood if independence is inseparable from statehood. O'Connell, for example, notes that, despite the requirement that an entity be independent if it is to be a state, states are increasingly becoming subordinate to international organizations. Dinh, Daillier, and Pellet posit that a distinguishing feature of the state is that it is "directly subordinate to international law," but this merely repeats the problem: if the state cannot be separated from international law by an intermediating agency, what does the growth of legislative competence in international organizations mean for statehood? A possible reconciliation between independence as a prerequisite to statehood and the increasing competence of non-state actors is to observe that independence contains multiple dimensions, having multiple purposes. Thus, legal independence is not the same as political or military independence. It may be that independence in the legal dimension makes an entity a state, and dependence in other dimensions is a permissible result of growing connections in international society. Dahm, Delbrück, and Wolfrum suggest this. The distinction among different dimensions of independence, however, raises questions of its own.

Schwarzenberger, in defining statehood, stresses that the putative state must have the "ability to stand by itself." This would seem to admit the political and military dimension of independence into the legal definition of statehood. If political and military elements are part of the legal definition of the state, then any number of entities widely agreed to be states might not be properly termed such. Jorri Duursma, in analyzing the statehood of five European micro-states, elaborately distinguishes between the legal and other dimensions of independence. Indeed, Duursma documents that the micro-states are dependent upon their larger neighbors in many respects. Such dependence does not in

134. See, e.g., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA, supra note 1, at 13; CAVARÉ, supra note 2, at 8, 38; OPPENHEIM, supra note 2, at 119-23 (distinguishing "full sovereign" from "non-full sovereign" states). Emphasis on independence is not new. See LISZT, supra note 22, at 65-66.
135. See O'CONNELL, supra note 2, at 284.
136. See DAHM ET AL., supra note 17, at 131 (distinguishing political and military autonomy from legal autonomy and identifying only the latter as a prerequisite to statehood).
137. SCHWARZENBERGER, supra note 35, at 249 (1976). Higgins writes that the state is "not simply an emanation of another state, lacking an essential core of independence." HIGGINS, supra note 3, at 41. It is not clear whether Higgins restricts this to legal aspects of independence or whether by "emanation" means something more general.
Duursma's estimation, however, derogate their statehood, for, in the legal dimension, the micro-states retain all the freedom of action incumbent upon a claimant to statehood. 138 Though Duursma shows that the micro-states retain in a formal sense every discretion necessary to support their claims to statehood, their subordination to states in multiple dimensions may well lead some to question their juridical status. 139

Though an entity may possess the attributes widely viewed as necessary to statehood, the entity may not necessarily claim to be a state. This observation led the American Law Institute (ALI) to add a criterion to the four enumerated by the Montevideo Convention. According to the Restatement (Third), an entity must claim to be a state for it to be a state. 140 This proposed criterion stems from state practice surrounding Taiwan. Though Taiwan has the attributes often thought to make a state, it does not claim to be Taiwan, but rather the Republic of China. Few states recognize it as the Republic of China, because there is a more plausible competing claimant to that title. No states recognize it as Taiwan, because it does not claim to be Taiwan. 141 Other instances reinforce the lesson drawn from Taiwan. A number of sub-units of federations would meet the Montevideo criteria, but do not claim to be states and are accordingly not viewed as states. It may well be that California or Bavaria could stand as independent states more effectively than any number of members of the United Nations General Assembly.

This, however, raises the possibility of a further requirement for statehood. Federal constituent territories, such as California or Bavaria, if asserting a claim to statehood, would face a competing claim from the ‘parent’ federation. In this sense, such territories would be limited in ways that many small and economically marginal states are not. No other power makes legal claims to Nauru, Tuvalu, or Malta (small island states). The United States and Germany, respectively, would vigorously protect their claims to constituent units of their federal systems. It has been noted that consent between the central government and the union republics of the USSR aspiring to statehood played a role in attainment of statehood by the union republics. Statehood was secure only when

138. See DUURSMA, supra note 5, at 122-26 (discussing ‘formal’ and ‘actual’ independence generally), 200-04 (independence of Liechtenstein), 257-59 (independence of San Marino), 305-10 (independence of Monaco), 367-70 (independence of Andorra), 413-16 (independence of the Vatican City).
140. See RESTATEMENT, supra note 39, § 201 cmt. f.
141. See id. reporter's note 8.
the prior claimant to those territorial units relinquished its claim.\textsuperscript{142} Moreover, recognition of a claimant to statehood before the ‘parent’ state has relinquished its claim may be a violation of the territorial integrity of the parent state. The view is a long-established one that ‘premature’ recognition is a delict against the state whose territory is derogated by secession.\textsuperscript{143} The absence of competing claims appears significant to statehood; yet it is a factor the Montevideo Convention does not expressly take into account.

If a claim to statehood and the absence of competing claims are long-established requirements of statehood, then international practice in recent years may be forming requirements as to how a claim to statehood is made. More specifically, it may be coming to pass that the claim must originate in popular processes. The European Community/European Union (EC/EU) established a conference at the end of summer 1991 to address the crisis then developing in Yugoslavia. An arbitration commission attached to the Conference for Peace in Yugoslavia (also known as the Carrington Conference, after its first chair, former British Foreign and Commonwealth Minister, Lord Carrington), known as the Badinter Commission, after its chair, the President of the French Constitutional Court, Robert Badinter, was formed. It issued a series of legal opinions at the request of the peace conference and of the parties to the conflict.

Opinion 4, issued January 11, 1992, addressed whether Bosnia-Herzegovina was a proper object of recognition.\textsuperscript{144} The arbitrators determined that Bosnia met most requirements of statehood, including conditions set by the EC and widely viewed as supplemental to traditional criteria.\textsuperscript{145} The Commission reasoned that two flaws made recognition impossible. First, there had been no Serb participation in the declarations and undertakings of Bosnia, though these had been made in the name of the Presidency and the Government of Bosnia. Second, the Constitution of Bosnia required popular sovereignty to be exercised either through a representative assembly or through a referendum, and there had been neither. Thus, the Bosnian declaration of independence was adjudged imperfect. In reaching this decision, the


\textsuperscript{143} \textit{See generally} LAUTERPACHT, \textit{supra} note 5; DUGARD, \textit{supra} note 35; OPPENHEIM, \textit{supra} note 2.

\textsuperscript{144} Opinion 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States, 31 I.L.M. 1501 (Badinter Commission 1992).

\textsuperscript{145} \textit{See} discussion \textit{infra} this part.
Commission acknowledged that Bosnia was a multi-ethnic state, consisting of Muslims, Croats, and Serbs. It also acknowledged that the Serb element of Bosnia had taken steps to sever itself from Bosnia, in the event of Bosnian secession from Yugoslavia. In conclusion, Opinion 4 suggested that a referendum of all Bosnians, carried out under international supervision, could determine whether Bosnia was appropriate to recognize as a state.

The purport of Opinion 4 may well be that a claim to statehood cannot arise but through an exercise of popular will. Such a rule would build upon the rule, noted in connection with Taiwan, that an entity is not a state absent a claim to statehood. A number of writers have argued that referenda were essential in determining whether the peoples of the Soviet Union republics wished their territorial units to become independent states. Cassese notes that such referenda were held in each of the fifteen USSR republics, and that third states withheld recognition until referenda had been completed in favor of statehood. Other writers have described this process as one of self-determination, though such terminology, in light of the limited legal scope of self-determination, may confuse more than clarify. In any case, state practice surrounding the emergence of new states in Yugoslavia and the Soviet Union brought heightened attention to the processes through which claims to statehood originated.

Other aspects of internal order have also been linked to statehood in contemporary practice. For some time, writers have argued that legality is a prerequisite to statehood. This began in earnest when the League of Nations and the United States declined to recognize the putative state of Manchukuo created under the aegis of the Japanese armed forces in northwest Asia. It developed further in connection with Rhodesia, an entity that was state-like in all traditional respects, but that was based on a racial ideology that disenfranchised over ninety percent of its inhabitants. No third state recognized the so-called 'Homelands' created pursuant to apartheid by South Africa in the 1970s and 1980s, though at least one of these (the Transkei) probably met the Montevideo criteria. Some states indicated that recognition was

146. See CASSESE, supra note 124, at 266.
147. See MALANCIUK, supra note 17, at 80.
149. See DUGARD, supra note 35, at 100. See also DUGARD, supra note 126, at 94-97.
inappropriate because the Homelands lacked independence. However, a putative state that came into existence as a result of a violation of *jus cogens* norms may experience a disability distinct from that of subordination to outside authorities. Rhodesia was in fact independent of third states, yet it was never recognized. There again, however, it is not in all cases easy to distinguish among various criteria of statehood. As much as its illegality may have contributed to the consensus that Rhodesia was not a state, that consensus may well have been related also to the continuing United Kingdom claim to Rhodesia. A few writers indeed continue to doubt whether conformity with international legal rules is a prerequisite to statehood. 150

To propose that an entity conform with international norms in order to be a state, it is required that international norms be identified. This complicates the proposed criterion of international legality. One particular area of ambiguity is democracy.

State practice began addressing the criterion of democracy in the late twentieth century. Some writers argue that democracy has been added to the definition of statehood—or at least that it has become a criterion for recognition. Crawford noted the hesitation of the international community to recognize Guinea-Bissau after its unilateral declaration of independence from Portugal. This came, in part, from concern over the undemocratic character of the revolutionary regime. 151 International response to the break-up of the Soviet Union also showed that states attach some importance to democracy. In deciding whether to recognize the secessionist republics, the European Community and the United States required that they commit themselves to democratic institutions. 152 Non-recognition of the Noriega régime in Panama and

150. Among the early contestants to the view was Dermott J. Devine, who disputed J.E.S. Fawcett on the matter. See J.E.S. FAWCETT, THE LAW OF NATIONS 38 (1968); Dermott J. Devine, Requirements of Statehood Re-examined, 34 MOD. L. REV. 410, 415-16 (1971). Latterly, Dahm, Delbrück, and Wolfrum have declined to characterize legality as a criterion of statehood. See Dahm ET AL., supra note 17, at 133 ("Auch seine völkerrechtliche Legitimität ist keine Bedingung, von der seine Existenz abhängig wäre." ["Its [the state's] existence is not dependent upon any condition to legitimacy under public international law."]).

151. See Crawford, supra note 20, at 260-261.

the Cedras junta in Haiti also support the emergence of a democracy requirement as a criteria for recognition.

Many states, in weighing whether and when to recognize Croatia, Slovenia, and the other successor states to Yugoslavia, expressed concern over democracy. In late 1991, the European Community debated recognition of the Yugoslavia republics of Croatia and Slovenia. (The debate also concerned Bosnia-Herzegovina and Macedonia, but before January 1992 it mostly concerned the first two). The European states expressed in a formal instrument that democracy was a condition for recognition. On December 16, 1991, the EC held an Extraordinary Ministerial Meeting at Brussels, and the Member States adopted a set of guidelines for recognition. The Declaration of 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' called for democracy: "[The Community and its Member States] affirm their readiness to recognize ... those new States which, following the historic changes in the region, have constituted themselves on a democratic basis."

The Guidelines indeed reached a broad audience of operative decision-makers—diplomats, politicians, and writers. The frequency of reference to them during the Yugoslav recognition crisis suggests that they might well have informed international practice. Professed commitment to the December 16 Guidelines, however, did not translate uniformly into practice. Recognition proceeded apace for Croatia despite some unanswered questions over its government. Bosnia received recognition several months later with doubts lingering over whether the polyglot state’s nascent institutions would function at all,

153. Bosnia-Herzegovina and Macedonia.
156. In Croatia, the problem was lack of protections for the Serbian minority. See Prince Tomislav of Yugoslav Calls on London Not to Recognize Croatia, AGENCE FRANCE-PRESSE, Jan. 14, 1992, available in 1992 WL 8439099; 1992 WL 8439390 (France protests that recognition of Croatia would harm efforts to get guarantees for the Serbian minority).
much less whether they would function democratically.\textsuperscript{157} Democracy was overtly declared a principle relevant to recognition but did not play a deciding role in all cases. Whether it was relevant to the statehood of the entities involved is a related, though quite distinct matter altogether.

A further matter that may condition recognition is the treatment of minorities by the claimant to statehood, though, again, like democracy, this criterion is not clearly a prerequisite to statehood itself. Observers expressed concern after the declarations of independence of Croatia and Slovenia in June 1991 that, as independent states, the republics might not safeguard the rights of their minorities. Croatia in particular, was a source of worry: a not insignificant minority of its inhabitants were ethnic Serbs, and a history of violence complicated relations between the majority and minority races. The European Community signaled that the successor states to Yugoslavia must not disregard the rights of minorities within their boundaries. In a Report to the European Parliament (issued May 26, 1992), the Committee on Foreign Affairs and Security stated the view of the Community toward minority rights: "None of the governments [in the space of the former Yugoslavia] must be permitted to subordinate the interests of others totally to its own. There are joint responsibilities that cannot be simply evaded, e.g., respect for human rights and the cultural and ethnic rights of minorities."\textsuperscript{158}

A number of conditions for recognition were explicitly expressed. Crucial among these was that the new states make constitutional provision for the protection of minorities.\textsuperscript{159} The constitutional requirements were consistent with the December 16, 1991 Declaration of ‘Guidelines on the Recognition of New States in European Europe and in the Soviet Union.’ The Guidelines required, among other things, "guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the Counsel for Security and Cooperation in Europe (CSCE)."\textsuperscript{160} The Community sufficiently conveyed the seriousness of this condition that the leaders of neither Croatia nor Slovenia believed it could be ignored: the new constitutions of both


\textsuperscript{159} Recognition of Slovenia and Croatia, Relations between the European Community and the Republics of the Former Yugoslavia, EUR. PARL. DOC. 14 (1992).

\textsuperscript{160} Guidelines, supra note 154.
states incorporated provisions guaranteeing the rights of minorities.\textsuperscript{161} Again, however, it is not obvious that minority rights is a criterion for statehood. This problem—the blurring of distinctions between what it takes to be a state and what it takes to get other states to recognize a state as such—has recurred in recent practice, and it is common to all proposed criteria that assess the legality of a putative state under international rules.

A definition of statehood that takes internal matters into account need not however relate to legality. Some writers emphasize what might be termed ‘organic’ aspects of statehood. These may include historical links; linguistic, ethnic, or religious affinity; national mythology; shared sentiments; or, more generally, a common sense of ‘nationhood.’ Though such analysis may seem more at home in disciplines such as sociology, anthropology, and history than in the law, some distinguished legal writers have applied it to defining statehood.\textsuperscript{162} Though it may be that most states possess these internal attributes, it is not entirely clear how entities would be tested for such attributes in practice.\textsuperscript{163} Nor is it clear how such attributes help distinguish states from other entities in international society. For example, ethnic groups that inhabit a state may display ‘organic’ criteria yet lack statehood. Indeed, some ethnic groups (e.g., the Québécois of Canada, Kurds of Iraq) display them more than some states’ populations taken as a whole. A criterion of shared organic characteristics may not be workable in practice and may not help distinguish the thing for which a definition is sought. It is nonetheless found, at least on the peripheries of discussion.

Though not a criterion of statehood, membership in the United Nations is clearly related to statehood. The UN Charter provides that membership in the UN be open to “all . . . peace-loving States which

\begin{itemize}
  \item \textsuperscript{161} Articles 5 through 25 of the Croatian Constitutional Law of Human Rights and Freedoms and the Rights of National And Ethnic Communities or Minorities in the Republic of Croatia address the rights of minorities. These Articles, among other provisions, guarantee “full observance of the principles of nondiscrimination”; “the right to identify, culture, religion, public and private use of a language and alphabet and education”; in areas where a majority of inhabitants speak a different tongue or use a different alphabet, official adoption of that tongue and alphabet; use of ethnic symbols and songs; freedom of association for ethnic purposes; education in minority tongues; a minimum representation in the national parliament; and self-government in areas where a minority people in the republic possess a local majority. \textit{Croatia}, arts. 5-25 (Dec. 4, 1991), translated in \textit{S Constitutions of the Countries of the World} 140-148 (Albert P. Blaustein & Gisbert H. Flanz eds., Marta Kiszely trans., 1992); \textit{Slovenia} (Dec. 23, 1991), translated in \textit{17 id.} at xx.
  \item \textsuperscript{162} See, e.g., \textit{DAHM ET AL., supra} note 17, at 125-29; \textit{DINH ET AL., supra} note 42, at 398; \textit{HENKIN, supra} note 2, at 7.
  \item \textsuperscript{163} Duursma approaches this problem in \textit{Micro-states}, see \textit{supra} note 5, but it would have to be developed further to address doubts about its applicability in practice. \textit{See} Grant, \textit{supra} note 139, at 655-56.
\end{itemize}
accept the obligations contained in the [UN] Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.\footnote{164} From this requirement, it can be concluded that any entity that is a member of the United Nations is a state. It does not follow, however, the UN membership is a prerequisite to statehood. Today, Switzerland and the Vatican City do not belong to the UN, although they are recognized as states. Kiribati, Nauru, Tonga, and Tuvalu are states but have not sought admission.\footnote{165} A number of writers, without positing an identity between the two, have stressed nonetheless the association between UN membership and statehood.\footnote{166} The definition of statehood may never require UN membership, but the association is too close to ignore, since UN membership is conclusive as to an entity's statehood.

Recognition, the subject that raises questions in connection with several of the proposed criteria above, has itself been proposed as a criterion for statehood. The role of recognition was once debated, with some writers arguing that recognition merely reflects or \textit{declares} statehood already achieved,\footnote{167} and others contending that recognition constitutes the state.\footnote{168} Most writers today assume that recognition itself does not create statehood.\footnote{169} State practice continues to suggest,
however, that recognition in certain situations can be important in the process of state creation. Recognition of Bosnia-Herzegovina and of the European micro-states are possible cases. A number of writers lean in the same direction. In seeking to define 'state,' recognition is a matter that will necessarily arise in discussion, even if it is rejected as an element of statehood.

Writers have proposed a number of criteria for statehood that are not reflected by the Montevideo Convention. It is difficult to distill from contemporary opinion one set of universally accepted addenda to the Convention; but opinion exists that the traditional definition is incomplete, and the extent of that opinion is noteworthy.

C. Why Codify Statehood?

Despite the widely held view that further criteria are necessary to make a satisfactory definition of the state, no proposals codifying statehood have been accepted since the Montevideo Convention. Crawford attributes this problem in part to a political reluctance by states to announce a clear definition of statehood.

If the community of states today hesitates to announce what constitutes a state, a preliminary question arises. Why in 1933 did the Pan-American powers do it? For one thing, as noted earlier, notions of effectiveness and territoriality—the cornerstones of the Montevideo definition of the state—prevailed at the time of the framing of the Convention. The ideas were in the air. Several additional factors appear to have made the time ripe for such an exercise as well, however. First, the Latin American states that constituted the majority of signatories to the Convention had codified international norms before. It may fairly be said that the readiness of Latin America, as a regional international law system, to commit law to code was distinct. Consider,
for example, the Estrada and Tobar Doctrines. After all, the tendency to codify was consistent with the Roman law roots of the municipal or 'domestic' legal system of the Latin American countries. Second, the United States, politically the most influential party to the Convention, was in the early stages of the Restatements movement.

The American Law Institute was established in 1923 to promote the "clarification and simplification of the law and its better adaptation to social needs." The Restatements, the ALI's principal work product, are formulated by committees of judges, scholars, and practitioners selected for their eminence in different fields of law. Perhaps the same quasi-legislative, quasi-academic inspiration to organize the common law into code-like compilations which had moved the ALI had also moved United States State Department lawyers. Finally, the internationalism prevalent in much of the interwar world made for a milieu conducive to the Montevideo exercise. Other manifestations of interwar internationalism included the Kellogg-Briand Pact (General Treaty for the Renunciation of War of 1928); the Washington Treaty of 1922 for the Limitation of Naval Armament; the London Treaty for the Limitation and Reduction of Naval Armament; and American participation in the Permanent Court of International Justice. The time was ripe for bringing legal order to international society.

Despite opinion that Montevideo may now suffer deficiencies in view of evolving conceptions of international legal personality, the Convention in its day was arguably a progressive project in a number of respects. As mentioned already, it belonged to a general trend favoring codified statements of law, both municipal and international. This, in turn, produced a potentially progressive result. Statehood under nineteenth century conceptions was governed by existing states. Under the then-prevailing constitutive view of recognition, existing states

172. See Declaration of Sr. Don Genaro Estrada, Secretary of Foreign Relations of Mexico, in 25 AM. J. INT'L L. 203 (Supp. 1930) (formal statement explaining that Mexico will no longer recognize governments and takes the view that such recognition is contrary to international law, or at least to Latin American regional practice); see also 44 AM. J. INT'L L 617, 621 (1950) (statement by Dr. Tobar, former Minister of Foreign Affairs of Ecuador, holding that non-recognition of governments created contrary to their national constitutions is legal and desirable). The so-called Estrada and Tobar doctrines, though opposite in their treatment of recognition, exemplified a willingness in Latin America to make official declarations as to international law.

173. See Foreword to RESTATEMENT, supra note 39.


175. 16 AM. J. INT'L L. 41 (Supp. 1922).


177. See Speech by President Warren G. Harding, June 21, 1923, reported in 17 AM. J. INT'L L. 533 (1923).
brought new states into being by the voluntary act of recognizing them. A withholding of recognition was a denial of statehood. This principle had profoundly negative impact on non-European claims to statehood. The exclusive and subjective view of statehood fostered by nineteenth century theory allowed European states to deny statehood to peoples not part of the predominantly European 'club' of established states. This, especially in tandem with theories like contiguity doctrine, facilitated European acquisition of legal title to territories in the Far East, Australasia, Africa, and the New World. Legal idealism by the early twentieth century, and moreover after World War I, reacted against the nineteenth century climate. Establishing objective standards for statehood diminished the capacity of European states to negate the legal personality of non-European peoples. Codification made it difficult, if not legally impossible, to exclude communities from statehood for subjective reasons unrelated to their character as independent actors in international society. In this way, though it surely reflected prevailing and in some ways conservative views about effectiveness and territoriality, the Convention was a progressive development.

Conditions conducive to a latter-day effort at codifying statehood have, however, proved elusive. The most comprehensive discussion of attempts to overhaul the Montevideo criteria is provided by Duursma in her monograph on micro-states. According to Duursma, the codification of a definition of statehood was debated during drafting sessions for Declaration of the Rights and Duties of States in 1949; for the Vienna Convention on the Law of Treaties in 1956 and 1966; and for proposed Articles on Succession of States in Respect of Treaties in 1974. Duursma attributes the difficulty in codifying a definition of statehood to political concerns, as did an International Law Commission (ILC) commentator in 1973 discussions. Whatever the case, the conditions have been lacking for the framing of an authoritative instrument to define statehood.

Though no multilateral instrument has replaced or supplemented the Montevideo Convention as a definition of statehood, publicists like Crawford have proposed revisions of the criteria. While formal efforts to re-codify the term 'state' have failed to get off the ground (probably for political reasons), it would appear that new criteria have at least tentatively taken places alongside those enunciated in 1933. A number of the new criteria recur in the writings of publicists and may have

begun to gain force in state practice as well. If the international community, or a segment thereof, were to attempt again to draft an instrument to define statehood, a number of proposed new criteria would, in all likelihood, be candidates for inclusion. Whether a drafting body such as the ILC or the United Nations Sixth Committee adopted or declined to adopt any one proposed new criterion would depend upon a complex interaction of political and legal factors. It is possible at this point to summarize the elements that a drafting body might debate:

(1) Independence. This may be variably described as self-containment, impermeability, or self-determination.

(2) A claim to statehood.

(3) Popular process as the source of a claim to statehood. This element might be grouped under (2). It merits separate attention because of its separate genesis.

(4) Legality (external). Compliance with *jus cogens* norms on the international plane would include disclaiming territorial ambitions against neighbors\(^{180}\) and reaffirming commitments under disarmament treaties.\(^{181}\)

(5) Legality (internal). More controversial than external legality, this would encompass criteria such as democracy and minority rights. (Minority rights might also be termed ‘internal self-determination.’)\(^{182}\) Internal legality encompasses (3), which could be described as a special case of internal legality.

(6) Organic bonds within the community claiming statehood. This reference to common historical, cultural, religious, or ethnic ties would probably be difficult to incorporate into a definition but has nonetheless been remarked upon as an element of statehood.

(7) United Nations membership. Though related to statehood, this is not a requirement of statehood. It is often addressed, however, in connection with defining statehood.

(8) Recognition. Prolonging an old debate over recognition would in all likelihood contribute little to understandings of statehood. However, questions of what makes a state tend

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180. This was required under the December 16, 1991 EC Guidelines before Montenegro received recognition. Like other new putative requirements, it was arguably, however, a condition for recognition rather than a criterion of statehood.

181. Reaffirmation of such commitments was also required under the Guidelines and was a matter of concern in connection with Ukraine, Belarus, and Kazakhstan.

to arise in connection with questions of when to recognize putative states. Therefore, recognition and statehood will not be separated readily in a discussion over how to define 'state.'

These elements are not equally likely candidates for inclusion in a new definition of the state. Some, such as independence, are widely viewed as prerequisites for statehood, while others, such as UN membership, are not. All would have to be addressed, however, in any formal process aiming to codify anew a definition of statehood.

**D. A Systemic Problem with New Criteria**

The advent of possible new criteria for statehood is not without its problems. I have already noted complications associated with certain specific proposed criteria. In addition to these, however, systemic problems may complicate any proposed addition to the criteria of statehood. This may further explain in part why a new codification effort has not come to pass.

If strengthening the rule of law in international relations is taken to be desirable, then ‘good’ definitions are arguably those that facilitate the rule of law. Defining legal status often involves enumerating criteria. Such has been the case with defining statehood. Where it is necessary to enumerate criteria to define certain statuses, it is widely assumed that criteria that are comparatively concrete and objectively ascertainable are preferable to those that are vague. If a criterion is vague, it leaves room for discretion. Discretion, though necessary in legal processes, cannot be tolerated if its extent is so broad as to free the decision-maker from rules. Introducing multiple new criteria into the definition of the state does not necessarily render identification of new states a more subjective process, but it does open new avenues for disagreement in the process of fact finding.

Even assuming, for the moment, that the putative new elements of statehood are, like the traditional Montevideo criteria, more or less rooted in facts (rather than in ideological or other judgments), the mere multiplication of criteria broadens the scope for variable outcomes in decision process. Making one factual determination is, all else being equal, easier than making multiple factual determinations. Many of the new criteria for statehood proposed by contemporary writers and suggested by state practice do, however, contain subjective elements. These elements might also be termed "political," as opposed to legal. As such, some of the new criteria complicate the operation of identifying new states—in particular, by increasing the political
dimension of that operation. The problem has come to a head during the recognition of new states, and it has been described as blurring the distinction between the legal criteria that make a state and the political criteria that condition recognition.

A number of writers have cautioned against this blurring of distinction. Crawford includes “willingness and ability to observe international law” on his list of criteria for recognition. This criterion he distinguishes from “capacity to enter into relations with other states.” Crawford advises against characterizing the former as a requisite of statehood:

[I]t is particularly necessary to distinguish recognition from statehood in this context. Unwillingness or refusal to observe international law may well constitute grounds for refusal of recognition, or for such other sanctions as the law allows, just as unwillingness to observe [UN] Charter obligations is a ground for non-admission to the United Nations. Both are, however, distinct from statehood. 183

Colin Warbrick also notes the difficulty in separating recognition from statehood once supplementary criteria are admitted to the traditional definition. Remarking on a statement by the EC and its member states on January 15, 1992, in which they recognized Croatia and Slovenia, Warbrick draws attention to “a tendency to blur the questions of statehood and recognition.” He cites the January 15 statement, “with its reference to republics ‘which wish to become independent’ but then making reference to factors which do not touch the traditional criteria for statehood,” as a signal of contemporary confusion on the issue. 184 Criteria such as minority rights and the holding of democratic referenda on independence appear to raise particular problems in this regard.

Crawford and Warbrick draw attention to a valid concern. Correcting deficiencies in the Montevideo criteria can raise new problems of definition. The process of recognition, which is probably a hybrid one of law and politics, can blur confusingly with the definition of ‘state.’ Entities claiming to be states have been denied recognition on grounds that in the past had little to do with statehood, for new criteria are now advanced as prerequisites to statehood. Such criteria

183. Crawford, supra note 20, at 72-73.
184. Colin Warbrick, Recognition of States, 41 INT’L & COMP. L.Q. 480 (1993). Warbrick discusses this problem further in Recognition of States: Recent European Practice, in Aspects of Statehood and Institutionalism in Contemporary Europe, supra note 1, at 9, 16-17 (“Even if one were to concede that these criteria have achieved a degree of legal status, it is not resolved whether they represent obligations of States or criteria of statehood.”).
furnish apparently legal grounds to decline recognition of new states, but non-recognition may well be inspired by political, not juridical, considerations. Discretionary or political conduct in international relations does not promote the rule of law.

Notwithstanding the pitfalls of elaborating upon the definition of the state, proposals for criteria supplemental to those of the Montevideo Convention have accumulated over time. The prevalence of some of these proposals in the writings of publicists further highlights the incompleteness of the Convention and adds weight to its critics.

VIII. CONCLUSION

That writers continue to rely upon the Montevideo Convention is, then, a source of puzzlement. The Convention includes elements that are not clearly prerequisite to statehood, and it excludes elements that writers now widely regard as indispensable to a definition of the state. The Convention is essentially a snapshot from a particular epoch. It addresses a concept that had been in flux over the century leading up to its framing and that continued to change thereafter. It posits a definition of statehood highly contingent upon the history, politics, and legal thought of its moment. It is over-inclusive, under-inclusive, and outdated. Yet, adding to the paradox, even writers who have drawn attention to its deficiencies still quote it. What accounts for the persistence of the Montevideo Convention?

A possible answer is that the Convention furnishes a “least worst” solution. An analogy from government is illustrative. Legislators often vote in favor of bills that do not comport precisely with their notions of ideal law. Given control over every detail, one legislator might amend a proposed statute considerably. The reality of the legislative process, however, does not allow every legislator complete satisfaction. Indeed, it is doubtful that very many laws are enacted that look exactly like what any one legislator wanted. The chance to codify a rule that looks something like what a legislator wants is a chance the legislator cannot frequently pass up. Consequently, a proposed enactment may, to a particular legislator, be deficient, yet the legislator votes in favor of it. The legislator afterward may note its deficiencies.

185. See, e.g., INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA, supra note 1, at 11-13 (calling the Convention the “best-known formula” but noting that supplemental criteria are now required); see also MALANČUK, supra note 17, at 75-80 (citing and quoting Montevideo Convention but rejecting capacity as a prerequisite of statehood and suggesting that recognition might be a prerequisite); RESTATEMENT, supra note 39, § 201 cmts. a-e (relying on Montevideo criteria but adding criterion that entity make a claim to statehood.).
deficiencies and complain about them. Other legislators may share the belief that the enactment is deficient, and the enactment may stand without amendment for a very long time. The enactment remains on the books because the moment when any enactment could be passed on the subject in question has come and gone.

Writers are not, of course, the legislators of public international law, however much they may contribute to its interpretation and dissemination. The legal reasoning that accounts for continued reliance on the Montevideo criteria may nonetheless be similar to that which impels the municipal legislator to cast a vote in favor of a deficient bill: there is little prospect of another chance to codify the matter in question. International law is widely understood to be less developed in its institutions than municipal law.  

8 No international organs exist that possess the scope of legislative competence that lawyers accept as residing in national legislatures. Accordingly, the process of lawmaking on the international plane seems to be frustratingly vague to many lawyers. Any rules resulting from that process seem difficult to discern.

A concise definition of statehood, given an apparent status of law by a process with domestic analogies, therefore, is attractive. The Montevideo Convention is just a definition. On its face, it is simple: four succinct elements. Moreover, it arose from a convention. The principle underlying international agreements—*pacta sunt servanda*—is probably the oldest rule of international law.  

87 Writers have counted treaties and conventions as a source of international law from the beginning of modern treatment of the subject. The statute of the International Court of Justice identifies treaties and conventions as a favored source of international law.  

88 In short, lawmaking by international agreement is probably the most developed mode of international legislation, and it is the one that most writers believe, because of its analogies to the municipal law of contract, is the easiest to understand.

Customary international law lacks the apparent definiteness of international law made by treaty. Its substance is not voiced in text. The process of its formation lacks the similarities to contract that


187. *Pacta sunt servanda* is the doctrine that "states have the general duty of performing honestly and in good faith the obligations contracted by virtue of treaties." FiORE, supra note 4 at 264. However, on changes in the principle of *pacta sunt servanda* since the Vienna Convention on the Law of Treaties of 1969, see Gerardo E. Do Nascimento E. Sliva, The Widening Scope of International Law, in THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 235, 238-40 (Jerzy Makarzyk ed., 1997).

reassure lawyers when they examine treaties. To lawyers uncomfortable with law made by a coincidence of practice and opinio juris sive necessitatis,189 treaty law is an attractive reference point. The Montevideo Convention commends itself to lawyers because: (1) it presents a readily digested definition; and (2) it has hallmarks of law readily discernible as such to observers accustomed to clear signals that a particular statement is authoritative. It has not been updated, because the moments are rare in international politics when a statement can be codified on a matter as sensitive as the definition of the state. The Convention is, in short, reassuringly “law-like,” and, since its framing, there have been no chances to commit to international text a revision of its subject.

This reasoning is not, however, entirely sound. It is rooted in modes of ascertaining law appropriate to a municipal context. Those modes are applicable to the international context, but when they are employed in isolation they cannot always render a complete picture of international law. If text accompanied by a clear signal of authority is the only source of law, then the Convention is indeed the best indication of what, under international law, constitutes a state. There is, however, more. The practice of states, as much as, or more than, treaties and conventions, shapes international legal rules. The reflexive reliance on the Montevideo Convention that I noted earlier is symptomatic of a hesitation to grapple with those sources of international law that do not closely resemble sources of municipal law. A codified definition of the state, in text, is reassuring and convenient. It may even promote the development of international law. However, in a view that takes into consideration the varied sources of international law, a codified definition is not necessary.

A further problem with reliance on the Convention for its “law-like” properties that it is simply not a law-making document. A pitfall is presented by the tendency of lawyers schooled in ascertaining law in a municipal context to seize too readily upon texts. Many texts formulated at the international level have no binding force. Many instruments fashioned as “conventions” are hortatory only. They may

189. These are the ingredients of customary international law. See BRIEFLY, supra note 5, at 59-62 (“Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one.”); OPPENHEIM, supra note 2, at 25-26 (“International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right.”); SHAW, supra note 21, at 60-76; RESTATEMENT, supra note 39, § 102(2) n.4 (defining customary international law as deriving “from general and consistent practice of states followed by them from sense of legal obligation”); BROWNLIE, supra note 5, at 7-11 (discussing opinio juris sive necessitatis, its formation, and modes of proof thereof).
express an aspiration that the law develop in a particular way. They may tell what enlightened jurists and political leaders believe states should do, but without more they are not law. It is widely, though not universally, believed that there exist statements intermediate between law and the merely hortatory. So-called “soft law” consists of international norms still in the process of formation. Such rules in statu nascendi\(^{190}\) may be advanced by their commitment to paper and endorsement by states. Texts often cited as examples of soft law include the various General Assembly resolutions and, especially, international conventions drafted under UN authority.\(^{191}\) Over time, if endorsed by further instruments and by practice, such statements can become binding \(\text{erga omnes}\).\(^{192}\) The binding effect does not, however, result from the single original text.

The Montevideo definition of statehood was at best “soft law.” It may well be that it never achieved even that status. If it was binding at all, it was binding only on the small number of Western Hemisphere states that were party to it. Though signed at Montevideo by nineteen states, the Convention was ratified by only five, as of the middle of 1936. Broms notes correctly that the Montevideo Convention “of course does not bind states other than those parties to [it].”\(^{193}\) In any case, subsequent practice and treaty-making did not promote the definition that is its core. Legislative ambition in the 1933 text, if there was any to start, may well have withered for want of further sustenance.

A review of the history of the Montevideo criteria suggests that the notion of statehood and sovereignty is, at least in part, historically contingent. What may be counted as a source of sovereignty or as a basis to a claim to statehood at a particular time may not be counted as such at a later date. The historical contingencies surrounding the idea of statehood indeed suggest that any codification such as the Montevideo Convention will eventually require overhaul or

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190. “In process of birth.”

191. Mohammed Bedjaoui and Hubert Thierry elaborate: “The codification of international law, begun unsuccessfully under the auspices of the League of Nations, received a major boost under the authority of the United Nations Charter. In this way, a group of major standard-setting conventions was born, and adopted by diplomatic conferences meeting under the auspices of the United Nations.” Bedjaoui & Thierry, Future of International Law, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, supra note 6, at 1237-38.

192. A right or obligation \(\text{erga omnes}\) is opposable against all. Such a right or obligation contrasts with ones from which states may opt to exclude themselves. For example, a convention may set forth substantive rules but is binding only on parties to it. The same convention may, however, also purport to promote the growth of its substantive rules into general international law—that is, growth of rules originally tied to the contractual undertaking of a limited number of parties into rules opposable \(\text{erga omnes}\).

193. Bengt Broms, States, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS, supra note 6, at 44.
replacement. The definition of statehood has been fluid and controversial.\textsuperscript{194} Whether political constraints on efforts to codify international law will permit a latter-day version of the Montevideo Convention remains to be seen.\textsuperscript{195} In any event, the development of international law will require that any such definitional enterprise be an ongoing one, always open to revision and reassessment.

\textsuperscript{194} Higgins observes that the term 'state' is fluid, changing "depending on the circumstances and the context in which the claim of statehood is made." Compare, however, with Higgins's advocacy of the Montevideo criteria, which seem to cast statehood in more static terms. \textit{See} Higgins, \textit{supra} note 3, at 39.

\textsuperscript{195} One context in which international legal authority might be developed on the definition of 'state' is the putative independence of Chechnya. Though the Russian federal government has lost effective control over the territory of Chechnya, no state has yet recognized Chechnya as independent. Moreover, states and multilateral organizations calling for a resolution to the Chechen crisis have made clear that any solution must respect the territorial integrity of Russia and that the territory of Russia includes Chechnya. \textit{See} Crawford, \textit{supra} note 164, para 57. Chechen leaders, however, have claimed that Chechnya was never part of Russia and therefore territorial integrity is not at issue. Putting aside whether such a claim is sustainable, this may well equate Chechnya to the Baltic States—entities that in some writers' opinion did not appear in 1991 as new states but as states restored. The republic president, Aslan Maskhadov, has proposed that a panel of legal and historical experts be set up to address the status of Chechnya. If such a panel does in fact convene, it may well have to grapple with the definition of the state.