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Extremely Loud and Incredibly Close (But Still So Far): Assessing Liberland’s Claim of Statehood

Gabriel Rossman*

Abstract

This Comment analyzes the statehood aspirations of Liberland, a self-proclaimed microstate nestled on a tract of disputed territory between Serbia and Croatia. Customary international law, the Montevideo Criteria, and alternative modalities of recognition are discussed as potential avenues for Liberland to gain recognition. The theoretical and practical merits of these theories are explored.

Ultimately, Liberland has two potential avenues for obtaining recognition. First, Liberland could convince the international community that the land it claims is terra nullius and satisfies the Montevideo Criteria. Second, Liberland could obtain constitutive recognition by the international community. It is unlikely that Liberland will be able to obtain recognition through either of these avenues.

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I. INTRODUCTION

On April 13, 2015, Vit Jedlicka, a Czech politician, announced the creation of Liberland, an autonomous micronation located on the Western bank of the Danube River.¹ Liberland is located on the Croatian side of the Danube, the natural boundary between Croatia and Serbia, on three square miles of uninhabited and disputed land that has been left unclaimed by both nations throughout a drawn-out border dispute.² Jedlicka founded Liberland with the intent of developing the uninhabited land into a libertarian utopia and international tax haven.³ Despite Jedlicka's efforts, no United Nations member country has recognized Liberland as a state.⁴



Liberland may be nothing more than a provocative experiment undertaken by a libertarian iconoclast in an attempt to antagonize Serbia, Croatia, and the rest of the international community. But there is every reason to think that Jedlicka seriously wants to found a microstate. Moreover, regardless of Jedlicka's true motives, Liberland's aspirations to attain statehood present interesting and important legal questions about self-determination, how states are created, and the role that international recognition has in the emergence of a new state as a legal entity. This Comment will explore these questions.

¹ Jedlicka made this proclamation by reading the declaration of independence, and earlier in 2015, had traveled down the Danube and planted a flag on the land in question. See Gideon Lewis-Kraus, *Welcome to Liberland, the World's Newest Country (Maybe)*, N.Y. TIMES (Aug. 11, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-making-of-a-president.html>.

² The Serbian government decided not to assert its right to the territory because it preferred to accept the new borders created by the changing contours of the Danube; the River's changing course left an area of Croatia ten times bigger than Liberland on the Serbian side. Rather than assert its claim to the land on which Liberland sits, Serbia decided to claim the formerly Croatian land now connected to Serbia proper. Croatia, for its part, has refused to assert a claim to Liberland; it fears that doing so will legitimize the new borders demarcated by the current course of the Danube and allow Serbia to legitimately claim the land that it now found on its side of the River. *Id.*

³ See Ryan Gorman, *This Newly Declared Microcountry Wants to Become the World's Foremost Tax Haven*, BUSINESS INSIDER (Apr. 22, 2015, 5:45 PM), <http://www.businessinsider.com/liberland-this-newly-declared-microcountry-wants-to-become-the-worlds-foremost-tax-haven-2015-4>; see also Claire Groden, *Welcome to Liberland! The European Country with No Taxes (Or Residents)*, FORTUNE (July 21, 2015, 11:56 AM), <http://fortune.com/2015/07/21/liberland-no-taxes/>.

⁴ See Luiz Romero, *Welcome to Liberland: Turns Out, Launching Your Own Country is Harder Than It Looks*, QUARTZ (Nov. 13, 2015), <http://qz.com/549116/welcome-to-liberland-turns-out-launching-your-own-country-is-harder-than-it-looks/>.

I have structured this Comment as follows. First, I provide a brief history of Liberland, including a discussion of the unique history that precipitated the current territorial dispute between Serbia and Croatia. I then discuss customary international law and argue that Liberland is unlikely to obtain statehood through the principle of self-determination because it is not solidly enshrined in custom. Third, I ask whether Liberland would be able to obtain independence in light of the territorial integrity of the parent state—for example Serbia or Croatia—if they were to assert their claims to Liberland in the future. Fourth, I evaluate Liberland’s statehood aspirations under the criteria enumerated in the Montevideo Convention, and posit that Liberland most likely does not meet a strict application of these criteria. I posit, however, that Liberland would likely satisfy a “relaxed” Montevideo standard and argue that a relaxed standard may be appropriate. I then discuss criticisms of the Montevideo Criteria, and ask whether Liberland meets the additional statehood requirements that some scholars have proposed.

II. A BRIEF HISTORY OF LIBERLAND

In the weeks following Liberland’s declaration of independence in April 2015, Jedlicka and his supporters—including a Czech member of the European Parliament who supports Liberland’s obtaining international recognition⁵—made repeated attempts to establish a permanent settlement in Liberland. However, the Croatian authorities foiled their efforts, and, on two occasions, arrested Jedlicka and his supporters when they tried to land on Liberland.⁶ Because of the Croatian government’s increased efforts to repel any would-be settlers, there are currently no permanent residents of Liberland.⁷ Furthermore, the tiny parcel has not had a permanent population in recent memory.⁸ However, the “Liberland Settlement Association” is actively recruiting new members and trying to establish a permanent settlement.⁹ In the meantime, would-be Liberland residents have set up their basecamp in Bezdan, a small town in Serbia close to the territory Liberland claims.¹⁰ Jedlicka’s post-independence efforts to colonize Liberland

⁵ See Lewis-Kraus, *supra* note 1.

⁶ See *Id.*; Eric J. Lyman, *New Micronation Faces Birthing Pains*, USA TODAY (May 20, 2015), <http://www.usatoday.com/story/news/world/2015/05/20/liberland-new-country-croatia-serbia-jedlicka/27551047/>.

⁷ See Lewis-Kraus, *supra* note 1.

⁸ See Alina Simone, *On the Danube, the World’s Newest Micro-nation. But Liberland Has a Problem*, PUBLIC RADIO INTERNATIONAL (June 30, 2015, 11:45 AM), <http://www.pri.org/stories/2015-06-29/danube-worlds-newest-micro-nation-liberland-has-problem>.

⁹ See *About Liberty Settlement Association*, LIBERLAND SETTLEMENT ASS’N, <http://liberlandsa.org/about/> (last visited Nov. 16, 2015).

¹⁰ See *Visit Liberland as a Tourist*, LIBERLAND SETTLEMENT ASS’N, <http://liberlandsa.org/contact/visit-liberland-as-tourist/> (last visited Nov. 16, 2015).

have not entirely been in vain. On one occasion Jedlicka and six supporters camped out for the night on an island in the Danube that is within Liberland's self-proclaimed border.¹¹

Liberland has many of the political and legal aspects of a modern state. Liberland has a constitution, complete with a bill of rights and provisions for democratic elections.¹² Liberland also has an intricate body of laws.¹³ Liberland claims to have fully functioning "diplomatic missions" in at least 13 countries, including the U.S., the U.K., France, Germany, and Georgia.¹⁴ Liberland invites applications for citizenship on its national website.¹⁵ As of September 2015, approximately 378,000 people had applied for citizenship.¹⁶

Since Liberland has yet to receive international recognition from any sovereign state, it is currently a micronation, not a microstate.¹⁷ The term "micronation" refers to a group that "claims sovereignty (generally unrecognized by other nations) over small territories for the purpose of self-determination."¹⁸ The Principality of Sealand, a remote settlement located on an abandoned naval platform seven nautical miles away from England's shores is, perhaps, the world's most (in)famous micronation.¹⁹ By contrast, microstates "enjoy full recognition by the international community."²⁰ Monaco, Vatican City, and San Marino are all famous microstates and, in contrast to micronations like Liberland and Sealand, enjoy full recognition by the international community.²¹

¹¹ See Lyman, *supra* note 6.

¹² See *Free Republic of Liberland Constitution Draft*, FREE REPUBLIC OF LIBERLAND, <https://liberland.org/en/constitution/> (last visited Nov. 16, 2015).

¹³ See *Free Republic of Liberland Laws*, FREE REPUBLIC OF LIBERLAND, <https://liberland.org/en/laws/> (last visited Nov. 16, 2015).

¹⁴ See *Press Release: Official Opening of a Diplomatic Mission to Georgia*, FREE REPUBLIC OF LIBERLAND, <https://liberland.org/en/news/press-release-official-opening-of-diplomatic-mission-to-georgia-79.htm> (last visited Nov. 16, 2015).

¹⁵ See LIBERLAND SETTLEMENT ASS'N, *supra* note 9.

¹⁶ See Adam Taylor, *Almost 10,000 Syrians Have Registered to Live in a Country that Might Not Exist*, WASHINGTON POST (Sept. 24, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/09/24/almost-10000-syrians-have-registered-to-live-in-a-country-that-might-not-exist/>.

¹⁷ See O. Shane Balloun, *The True Obstacle to the Autonomy of Seasteads: American Law Enforcement Jurisdiction over Homesteads on the High Seas*, 24 U.S.F. MAR. L.J. 409, 411 (2011–12).

¹⁸ *Id.*

¹⁹ See Rose Eveleth, *I Rule My Own Micronation*, BBC FUTURE (Apr. 15, 2015), <http://www.bbc.com/future/story/20150414-i-rule-my-own-ocean-micronation>.

²⁰ Balloun, *supra* note 17, at 411.

²¹ See Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. J. INT'L L. & POL'Y 629, 660 (1997).

Importantly, Liberland may fall under the category of *terra nullius*.²² Liberland is located on the west Bank of the Danube, on one of the small slivers of formerly Serbian land that Croatia gained title to after they codified the Badinter Commission's findings as the international border between them.²³ Before the breakup of the former Yugoslavia, a sizable Serbian minority lived on the Croatian (Western) side of the Danube, while a small Croatian population lived on the Serbian (Eastern) side.²⁴ The Badinter Commission's report assigned ten times more historically Croatian land to Serbia than historically Serbian land to Croatia.²⁵ Therefore, Serbia has refused to claim title to Liberland, and even issued a statement saying that Liberland would "not theoretically impinge on its border."²⁶ Croatia, for its part, has not recognized Liberland, even though the land Liberland claims is within the internationally recognized border of Croatia.²⁷ If Croatia were to claim title to Liberland, this claim could be equated with Croatia tacitly accepting the current international border. However, Croatia is unwilling to acknowledge the validity of the current border because the border assigns large amounts of formerly Croatian land to Serbia.²⁸ Nonetheless, Croatia recently issued a statement in which it asserted that, while the precise boundary between Croatia and Serbia is disputed and while Croatia does not claim Liberland for itself, Liberland is not *terra nullius*.²⁹ It is unclear whether Croatia's statement effectively forecloses the possibility that Liberland is *terra nullius* because of the simple fact that neither Croatia nor Serbia is willing to assert title to Liberland. A historical overview of the border dispute is required at this juncture. If Liberland is really *terra nullius*,³⁰ Liberland's claim to it may be legitimate under international law. If the territory that Liberland claims as its own is rightfully Croatia's under international law, it might now be *terra nullius*; Croatia's insistence that Liberland

²² While a more in-depth discussion of this possibility is provided later in this Comment, I want to introduce this crucial issue here.

²³ Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 52 (2000).

²⁴ Mladen Klemenčić & Clive Schofield, *War and Peace on the Danube: The Evolution of the Croatia-Serbia Boundary*, 3 BOUNDARY & TERRITORY BRIEFING 1, 16–25 (2001).

²⁵ See Lewis-Kraus, *supra* note 1.

²⁶ See Euan McKirdy, *Liberland: Could the World's Newest Micronation Get off the Ground?* CNN WORLD (Apr. 29, 2015), <http://www.cnn.com/2015/04/25/europe/liberland-worlds-newest-micronation/>.

²⁷ See generally, *On Virtual Narratives at Croatia's Borders*, MINISTRY OF FOREIGN AND EUROPEAN AFFAIRS OF THE REPUBLIC OF CROATIA (June 29, 2015), <http://uk.mvep.hr/en/news/on-virtual-narratives-at-croatia-s-borders,30115.html>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Defined as territory "not formerly under the sovereignty of any state." N. A. MARYAN GREEN, *INTERNATIONAL LAW* 195 (3d. ed. 1987).

is part of Serbia could constitute a renunciation of Croatia's legal rights to Liberland. Conversely, if the territory that Liberland claims as its own is Serbian, the Serbian government's renunciation of its title to that land could also be a quitclaim that would transform the legal status of the land to *terra nullius*. In both instances, the territory would belong to the first entity—in this case Liberland—to claim it.³¹ However, because of the complicated history of the Croatian-Serbian border region, it may be difficult to ascertain who the land belongs to under international law.

A. The Serbian-Croatian Border Dispute

The border dispute that rages today has its origins in the internal borders that were drawn in Yugoslavia after World War II.³² In 1945, the Communist Party of Yugoslavia established a commission that would definitively determine the border between Serbia and Croatia.³³ The Politburo³⁴ mandated that the border be drawn based on ethnic boundaries; thus, the Commission traveled along the border region to determine which ethnic group had a majority in any given town.³⁵ The non-Danube portion of the border was thus drawn according to ethnic distributions of Serbs and Croats³⁶ and is not disputed today.³⁷

What was problematic then, and what continues to be problematic today, is the 87-mile portion of the Serbia-Croatia border that corresponds to the Danube River.³⁸ Rather than drawing this portion of Yugoslavia's internal border to conform to ethnic population distributions, which would have been a time-consuming and difficult endeavor due to the serpentine ethnic border between Serb and Croat populations in the region, the Soviet Commission decided that the Danube would serve as the border between Serbia and Croatia.³⁹

While adhering to the contours of the Danube was certainly the most obvious way to draw a border between Serbia and Croatia, it was clearly, by 1945, not the most accurate way to delineate the two states.⁴⁰ While the Danube had

³¹ See, for example, L. Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263, 274–98 (1997).

³² Klemenčić & Schofield, *supra* note 24, at 12.

³³ *Id.*

³⁴ The Politburo was the policy-making arm of the Communist Party in the Soviet Union.

³⁵ Klemenčić & Schofield, *supra* note 24, at 12.

³⁶ *Id.* at 11.

³⁷ *Id.* at 17.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

once served as the boundary between the Serb and Croat communities, it had long ceased to be the marker that separated the different ethnic groups inhabiting the border region. Due to major hydraulic projects undertaken in the late 19th century to straighten out the snake-like curvatures of the Danube and allow for better regulation of its flow, the Danube's course was altered, causing "differences between the new river-bed and the cadastral boundary which conform[ed] to the former course of the river."⁴¹

Thus, small slivers of Serbia were left on the Croatian side of the altered Danube, while considerably larger pockets of Croatia were left on the Serbian side of the river.⁴² A report from then International Boundaries Research Unit states that the ratio in the area between the Croatian pockets left on the Eastern bank to the Serbian pockets left on the Western bank is approximately 10:1.⁴³

Until the breakup of Yugoslavia, the disputed border between Serbia and Croatia was of little significance. However, in 1991–1992, when Yugoslavia dissolved into its constituent states, the border dispute assumed the utmost importance.⁴⁴ The European Community appointed the Badinter Commission to determine the international borders of the states that had made up the former Yugoslavia.⁴⁵ The Badinter Commission concluded that the international boundaries of the former Yugoslavian states would be governed by "(1) respect for the territorial status quo and (2) *uti possidetis*."⁴⁶ Thus, "the former internal boundaries bec[a]me external boundaries, protected under international law."⁴⁷ In other words, "the existing internal federal border . . . [was] transformed into international borders of the new state[s]."⁴⁸

While the Badinter Commission purported to do nothing more than to codify the pre-existing internal borders as international borders, it is far from apparent that the internal border between Serbia and Croatia, as it existed in 1991, was the true border between the former Yugoslav states.⁴⁹

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 19.

⁴⁴ See, generally, John Yoo, *Fixing Failed States*, 99 CAL. L. REV. 95, 135 (2011) (noting that "Croatia went to war with Serbia after the 1991 dissolution of Yugoslavia" because of the border dispute).

⁴⁵ Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 INT'L LEGAL MATERIALS 1488, 1489 (1992).

⁴⁶ *Id.* at 1499; under *uti possidetis*, "states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence." Steven R. Ratner, *Drawing A Better Line: Uti Possidetis and the Border of New States*, 90 AM. J. INT'L L. 590, 590 (1996).

⁴⁷ *Id.*

⁴⁸ Radan, *supra* note 23, at 52.

⁴⁹ I say the "true" border (rather than the "legal border") because I neither challenge the notion that international law is consent based, nor have any doubt that, in a legal sense, Croatia and Serbia

1. International principles of border disputes involving rivers.

When rivers form the international borders between states the boundary line is formed by the “thalweg,” the deepest part of “the main channel or strongest current downstream.”⁵⁰ International law has developed clear rules for when a river changes course. When a river’s thalweg gradually shifts to one side or another because of “imperceptible erosion” of the river’s banks, a process known as “accretion,” the boundary that the thalweg constitutes moves “to a corresponding degree.”⁵¹ By contrast, when a river shifts suddenly and carves a new channel, a process known as “avulsion,” the international border does not change, but rather stays where it was before the river’s abrupt departure from its former course.⁵² These principles are so strongly established that the U.S. Supreme Court, in *Nebraska v. Iowa*,⁵³ noted these rules are “universally recognized as correct . . . where the boundaries between states or nations are, by prescription or treaty, found in running water.”⁵⁴

The same principles apply when manmade projects change a river’s course; “artificial changes caused to rivers resulting in accretion consequently causing the thalweg, median line, or banks of a river to shift, do not result in the alteration of the river boundary under state practice.”⁵⁵ Of course, sometimes both naturally occurring and manmade factors cause a river to shift. In these situations, “it [is] extremely difficult to distinguish between causes . . . for the purposes of resolving the dispute.”⁵⁶

The Badinter Commission disregarded these codified principles of river boundaries. Manmade water projects in the late 19th century caused the changes

“consented” to the border that was drawn by the Badinter Commission. Croatia and Serbia voluntarily accepted the European Community’s invitation for recognition, an invitation that was expressly conditioned on the old internal federal borders of the former Yugoslavia becoming the international borders between the newly recognized states. *See id.* at 51. However, as described *infra*, the border codified by the Badinter Commission would not have been the border had Croatia and Serbia been separate states, rather than internal federal units of the former Yugoslavia, because of the widely accepted legal rules that govern international river borders. This tension, I believe, explains the current state of affairs between Croatia and Serbia, neither of which has consistently asserted title to the land on which Liberland rests.

⁵⁰ CHARLES G. FENWICK, INTERNATIONAL LAW, 438 (4th. ed. 1965).

⁵¹ *Id.* at 440.

⁵² *Id.*

⁵³ 143 U.S. 359 (1892).

⁵⁴ *Id.* at 361.

⁵⁵ Sikander Ahmed Shah, River Boundary Delimitation and the Resolution of the Sir Creek Dispute Between Pakistan and India, 34 VT. L. REV. 357, 372 (2009).

⁵⁶ *Id.* at 372–73.

to the Danube's course.⁵⁷ Thus, these changes were instances of avulsion, not accretion. Therefore, the course of the Danube, as it existed at the time of the Badinter Commission's report in 1992, was not the true border between Serbia and Croatia—or at least that it would not have been had the Yugoslav republics been independent sovereign states. Rather, the Danube's old border was the appropriate legal border; the border between them did not change when the river shifted course.

True, Serbia and Croatia nominally “consented” to the Badinter Commission's findings—and thus to using the Danube's new course as the international boundary—by accepting the European Community's invitation to break away from the former Yugoslavia on the condition that the Badinter Commission's report be codified as the new international boundaries.⁵⁸ However, there are two compelling reasons to believe that Serbia and Croatia never truly “consented” to the Danube's new course being the international border. First, less than one month after Serbia and Croatia broke away from the former Yugoslavia, Serbia disregarded the international boundary, declared war on Croatia over the contested borderlands, and immediately invaded parts of Croatia that had significant Serbian minorities.⁵⁹ Second, shortly after its independence, Croatia publically contended that numerous pockets of territory that ended up on the Danube's Western Bank—i.e., in what is now recognized as Serbia—were actually Croatian territory.⁶⁰ Thus, even if Serbia and Croatia nominally “consented” to the Badinter Commission's opinion that the Danube's new course was the international boundary by virtue of joining the European Community, each side withdrew its consent almost immediately after the European Community formally adopted the Badinter Commission's report in June 1991.

However, while Croatia certainly had a strong argument that the internal Yugoslav border between Serbia and Croatia—i.e., the Danube's shifted course, which is now the international border between the two states—was inaccurate, any claim that Croatia had to challenge the legal status of the Danube's acting as the border likely expired in 1992, when the European Community adopted the Badinter Commission's report. First, the Badinter Commission cemented the internal borders as the official international ones.⁶¹ Second, the Badinter Commission reaffirmed Article 5 of the Socialist Federal Republic of Yugoslavia (SFRY) Constitution, which stated, “the republics' boundaries cannot be changed

⁵⁷ Klemenčić & Schofield, *supra* note 24, at 17.

⁵⁸ See, for example, Radan, *supra* note 23, at 52.

⁵⁹ Klemenčić & Schofield, *supra* note 24, at 26–27.

⁶⁰ *Id.* at 25.

⁶¹ Ragazzi, *supra* note 45, at 1491.

without their consent.”⁶² Thus, “[t]he Badinter Commission consequently renounced any investigation into the genesis of the intra-Yugoslav boundaries.”⁶³

III. SELF-DETERMINATION: CUSTOMARY INTERNATIONAL LAW?

As a starting point, it is important to note that the principle of self-determination is clearly recognized by international law.⁶⁴ Article 1 of the United Nations Charter states that the very purpose of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”⁶⁵ Furthermore, General Assembly Resolution 1514, enacted in 1960 and aimed at eradicating colonialist domination of peoples around the world, unequivocally states that “[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”⁶⁶ As one commentator noted, the declaration announces that *all* peoples, not just colonial ones, have a fundamental right to self-determination.⁶⁷

Despite the fact that the right to self-determination of peoples is clearly recognized in international law, neither customary international law nor consistent state practice has evolved to encompass a right to secession.⁶⁸ Why, despite clear direction from the most powerful source of international law—the United Nations—have states failed to recognize peoples’ efforts to exercise their right to self-determination? Why has customary international law failed to evolve to encompass a fundamental right of peoples that is clearly expressed multiple times in the United Nations’ founding document?

Statehood scholar Jori Duursma posits that the lack of customary international law recognizing people’s right to self-determination is due to an inevitable and intractable conflict between the right to self-determination and another important principle in international law—“the principle of respect for the territorial integrity of a State.”⁶⁹ Duursma’s insight must be accurate. Existing

⁶² *Id.*

⁶³ Hubert Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Praxis*, 15 B.U. INT’L L.J. 71, 120 (1997).

⁶⁴ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 127 (2d ed. 2006).

⁶⁵ U.N. Charter art. 1, ¶ 2.

⁶⁶ G.A. Res. 1514 (XV) (Dec. 14, 1960), *cited in* Jori Duursma, *Fragmentation and the International Relations of Micro-States* 17 (1996).

⁶⁷ *Id.* at 18.

⁶⁸ *Id.* at 92.

⁶⁹ *Id.* at 96.

States, the major players in the international arena, the very bodies whose acts can constitute customary international law, are loathe to promulgate, much less follow, any body of rules that would allow for the recognition of new States. The emergence of new States, by definition, threatens the territorial integrity, viability, and existence of old ones. Crawford echoes this sentiment, and observes that “[s]elf determination, as a legal right or principle, threaten[s] to bring about significant changes in the political geography of the world.”⁷⁰

What follows from Duursma’s observation about the tension between the right to self-determination and the principle of territorial integrity is counterintuitive and ethically problematic. People living under effective and oppressive governments have a much lower chance of having their attempts at self-determination recognized by the international community; secession would violate the territorial integrity of the parent State.⁷¹ By contrast, people who live in a State that has failed and no longer exists as an effective entity have a greater chance of being recognized because recognizing a new, autonomous State in these circumstances does not threaten the territorial integrity of the parent State as it has already ceased to exist.⁷² This means that the people who are least likely to have their right of self-determination recognized by the international community are those who need it the most—people living under oppressive regimes that are solidly entrenched and not at risk of dissolving. In other words, the regimes that are least likely to have breakaway regions recognized by the international community are the ones that can most effectively oppress marginalized groups.

If recognition of secessionist micronations is to be anything other than an *ad hoc* political decision subject to the capricious winds of the geopolitical climate, the tension that Duursma observes between the right to self-determination and the principle of territorial integrity must be resolved. While it will be difficult, resolving this tension is imperative for an international legal order that claims to espouse liberal values such as the principle of self-determination.

As a starting point, I propose that when a group of people—such as Jedlicka and his fellow Liberlanders—makes a genuine and legitimate claim of self-determination, the inquiry into whether that group should be recognized should begin with the presumption that people have a right to self-determination. This would be a fundamental shift from international practice, which, as described *infra*, presumes that the territorial integrity of existing states should be preserved above all else and only entertains claims of self-determination against a backdrop that is

⁷⁰ CRAWFORD, *supra* note 64, at 108.

⁷¹ DUURSMAN, *supra* note 66, at 96.

⁷² *Id.*

heavily prejudiced against recognizing new states.⁷³ In other words, when a group of people satisfies certain predetermined criteria for statehood (such as the Montevideo criteria described in Section V), the international community should generally recognize the new state as declaratory theory requires. If the aspiring state satisfies these predetermined criteria, the burden should shift to the existing parent state to refute the presumption that the aspiring state should be granted statehood status.

Presuming that the statehood claims of aspiring states are valid, and accordingly should be taken seriously and analyzed under specific criteria, promotes the rule of law and adds to the credibility and legitimacy of international law.

IV. RECOGNITION THEORY: IS STATEHOOD A DECLARATORY OR CONSTITUTIVE ACT?

Examining the two main theories of recognition—declaratory theory and constitutive theory—is needed to contextualize and assess the merits of Liberland’s statehood claim. I discuss these theories in turn.

A. The Declaratory Approach

According to declaratory theory, the “political existence of the State is independent of recognition by other States.”⁷⁴ Existing states do not “create” a new state through recognition.⁷⁵ However, existing states have a positive obligation to recognize—or “declare”—new states as such once they satisfy the Montevideo Criteria.⁷⁶ The Montevideo Convention is widely considered to be the first codification of declaratory theory.⁷⁷ This theory is, by all accounts, “the

⁷³ I am assuming, for this part of the argument, that Croatia’s unwillingness to recognize its own title to the territory that Liberland claims is not an effective quitclaim by Croatia. Therefore, I posit that the international community will consider Liberland’s claim of independence against the backdrop of Croatia’s territorial claim to Liberland, rather than viewing Liberland as occupying *terra nullius*.

⁷⁴ See The Montevideo Convention on the Rights and Duties of States art. 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

⁷⁵ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 202 (1987).

⁷⁶ The Restatement explains that “[u]nder the ‘declaratory’ theory, an entity that satisfies the requirements of § 201 is a state with all the corresponding capacities, rights, and duties, and other states have the duty to treat it as such. Recognition by other states is merely ‘declaratory,’ confirming that the entity is a state, and expressing the intent to treat it as a state.” *Id.*

⁷⁷ Jessica L. Noto, *Creating a Modern Atlantis: Recognizing Submerging States and Their People*, 62 BUFF. L. REV. 747, 754 (2014).

most widely applied, recognized, and cited source in international law for determining statehood.”⁷⁸

Declaratory recognition theory, which distinguishes statehood from recognition by other states, is appealing for both practical and philosophical reasons. Declaratory theory offers a clear test that is easy to use and to objectively apply to new situations.⁷⁹ The requirements for statehood under declaratory theory are relatively clear, and do not rely on recognition from other states; declaratory theory thus produces predictable results and promotes the rule of law.⁸⁰ Moreover, declaratory theory is more inclusive in the sense that it does not condition the emergence of new states on the recognition by existing ones.⁸¹ For this reason, aspiring states—such as Liberland—prefer the declaratory theory to the constitutive theory (discussed below).⁸² In addition, by insulating statehood from the vicissitudes of international politics, the declaratory model is more satisfying from a purely theoretical perspective.

While the declaratory theory’s ostensible objectivity is advantageous, the declaratory theory is not as objective as it appears at first glance. There are two fundamental respects in which declaratory theory’s statehood criteria are subjective.⁸³ First, the selection of criteria is inherently suspect. Since interested parties determine the criteria on which statehood is based, the criteria are skewed towards certain interests, such as the interest of existing states to maintain the geopolitical status quo by making it difficult for aspiring states to obtain statehood.⁸⁴ Second, applying the declaratory criteria in a given situation is an inherently subjective undertaking. Since it is based on “the inherent, institutional biases held by different actors in the evaluative process,” applying the criteria neutrally is simply impossible.⁸⁵

Another problem with declaratory theory is that it cannot explain why states only obtain rights in the international sphere once they are recognized.⁸⁶ State

⁷⁸ *Id.*

⁷⁹ Matthew Bathon, Note, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT’L L. 597, 609 (2001).

⁸⁰ *See generally* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 451 (1999).

⁸¹ Andrew H. E. Lyon, Note, *The Principality of Sealand, and Its Case for Sovereign Recognition*, 29 EMORY INT’L L. REV. 637, 665 (2015).

⁸² M. J. PETERSON, RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815–995 26 (1997).

⁸³ William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L.J. 115, 158 (2009).

⁸⁴ *Id.* at 159.

⁸⁵ *Id.* at 161.

⁸⁶ *Id.* at 119.

practice proves that satisfying the Montevideo Convention does not guarantee recognition.⁸⁷ Many entities fulfill the Montevideo Convention yet are not recognized as states. For example, Cyprus,⁸⁸ Sealand,⁸⁹ and Somaliland⁹⁰ all arguably satisfy the Montevideo Criteria, but are not recognized as states. Declaratory theory cannot account for the international community's failure to recognize states that meet the supposedly objective criteria for statehood.⁹¹

Furthermore, declaratory theory may suffer from an internal contradiction. Its main virtue is that it is objective, yet, as discussed above, it arguably conditions statehood on the capacity to enter into relations with other states.⁹² Thus, even in a declaratory model such as the Montevideo Convention, it is difficult to comprehend how statehood could be separate from recognition.⁹³ Finally, to the extent that the declaratory model is applied strictly—in other words, is actually applied objectively and actually allows states to obtain statehood in the absence of recognition—it “undermine[s] the principle that law is made by states.”⁹⁴

B. The Constitutive Approach

The second leading theory of recognition takes a fundamentally different approach. Under the constitutive theory, “statehood can only be achieved when other states recognize the entity which seeks to become a state.”⁹⁵ Existing states are “gatekeepers” whose approval is required to justify their having legal obligations towards the aspiring state.⁹⁶ Thus, constitutive theory adheres to the principle, central to international law, that only sovereigns can bind themselves.⁹⁷ Sovereign states only have legal obligations to states that they have recognized.⁹⁸

⁸⁷ See generally Grant, *supra* note 80, at 439; Worster, *supra* note 83, at 124–28; K. William Watson, *When in the Course of Human Events: Kosovo's Independence and the Law of Secession*, 17 TUL. J. INT'L & COMP. L. 267, 288 (2008).

⁸⁸ Noto, *supra* note 77, at 769.

⁸⁹ Lyon, *supra* note 81, at 665.

⁹⁰ Aaron Kreuter, Note, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT'L L. 363, 381 (2010).

⁹¹ Worster, *supra* note 83, at 129.

⁹² Bathon, *supra* note 79, at 621.

⁹³ Upendra D. Acharya, *ICJ's Kosovo Decision: Economical Reasoning of Law and Questions of Legitimacy of the Court*, 12 CHI.-KENT J. INT'L & COMP. L. 1, 26 (2012).

⁹⁴ Worster, *supra* note 83, at 119.

⁹⁵ Noto, *supra* note 77, at 763.

⁹⁶ Watson, *supra* note 87, at 288.

⁹⁷ See Edward McWhinney, *New International Law and International Law-Making: New Thinking on Recognition and State Succession*, 16 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 33, 42–43 (1998).

⁹⁸ *Id.*

Constitutive theory also gives politics a central role in recognition because the political act of recognition and the legal act of statehood are inseparable.⁹⁹

The main criticisms of the constitutive theory are that by reducing statehood to recognition, it makes statehood relative¹⁰⁰ and subjugates international law to international politics,¹⁰¹ therefore, depriving international law of much of its power and relevance. Moreover, in a constitutive framework, existing states can abuse the power they have to recognize other states, and can “ignore the facts, i.e. the existence of a state”¹⁰² to prevent that entity from gaining statehood and receiving the legal protections states are guaranteed under international law. For a legal system to be credible, law must reflect facts. Thus, the constitutive approach, by enabling powerful states to ignore the facts on the ground and make *ad hoc* political decisions about when an aspiring state achieves statehood, can threaten the integrity and weaken the credibility of the international legal order.¹⁰³

A related criticism of constitutive theory is that it undermines sovereign equality.¹⁰⁴ Article 1 of the United Nations’ Charter, discussed *supra*, states that the goal of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”¹⁰⁵ No distinction is made between peoples of Member States and Non-Member States, or between peoples of recognized states and non-recognized states.¹⁰⁶ Therefore, allowing some states to deny peoples of aspiring states self-determination, and the political rights that are associated with statehood, seems to violate the fundamental principle of sovereign equality.¹⁰⁷

Inherent in the constitutive theory is the irreconcilable problem of who decides when an entity has obtained statehood.¹⁰⁸ As one scholar has observed, “it is unclear how many and whose recognitions are necessary for a State to be constituted through recognition.”¹⁰⁹ There is also a *meta* problem: who decides who decides?

⁹⁹ Worster, *supra* note 83, at 118.

¹⁰⁰ See generally CRAWFORD, *supra* note 64, at 22.

¹⁰¹ Worster, *supra* note 83, at 120.

¹⁰² *Id.*

¹⁰³ See generally *id.*

¹⁰⁴ *Id.* at 148.

¹⁰⁵ U.N. Charter art. 1, ¶ 4.

¹⁰⁶ See generally Worster, *supra* note 83, at 148.

¹⁰⁷ See generally *id.*

¹⁰⁸ See CRAWFORD, *supra* note 64, at 27.

¹⁰⁹ Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT’L L. REV. 697, 734 (2012).

For the above-stated reasons, many prominent theorists, most notably Crawford, have vehemently rejected constitutive theory's validity as both a descriptive and a normative framework for recognition.¹¹⁰ Indeed, while constitutive theory may describe how recognition works in practice more accurately than declarative theory does, constitutive theory, by subjugating international law to political powers and political decisions, is both unsatisfying from a theoretical level and troubling from a moral perspective. If constitutive theory is right, and international law is all about political might, then states' moral claims in any aspect of international law are illegitimate, and the moral claims that are persuasive on the international level are nothing more than the most powerful states imposing their idiosyncratic moral framework onto other, weaker peoples. This status quo may appeal to a moral relativist, but it is fundamentally incompatible with how states justify the moral appeals they make to the international community.

Aware of the fundamental deficiencies of both the declaratory and constitutive theories, some scholars have proposed synthesizing the two approaches. Lauterpacht famously proposed that, once a territory satisfies the declaratory requirements promulgated by the Montevideo Convention, other nations have a duty to recognize that state, thus satisfying the recognition requirement inherent in constitutive theory.¹¹¹ Lauterpacht's theory represents "a balance between . . . acknowledging the role of politics in . . . recognition, and . . . maintaining the premise that recognition is . . . not solely a political . . . act."¹¹² This synthesis has gained some favor lately. One scholar, echoing Lauterpacht, asserts that "the international community should use the foundations of the four Declarative Theory factors and expand them to include the Constitutive Theory as the fifth, and most important, of those factors."¹¹³

While these attempts to reconcile the flaws in the declaratory and constitutive theories are laudable, the resulting synthesis does not advance the ball. The main effect of Lauterpacht's prescription is to require that constitutive recognition necessarily follow whenever an aspiring state satisfies the Montevideo Convention's criteria. In other words, constitutive recognition is essentially a formal duty that follows from satisfying the declaratory criteria.¹¹⁴ Lauterpacht's

¹¹⁰ See CRAWFORD, *supra* note 64, at 27; Vidmar, *supra* note 109, at 734; Worster, *supra* note 83, at 148.

¹¹¹ See generally H. Lauterpacht, *Recognition of States in International Law*, 53 *YALE L.J.* 385 (1944).

¹¹² Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 *EMORY INT'L L. REV.* 107, 118 (2002).

¹¹³ Noto, *supra* note 77, at 768.

¹¹⁴ According to Lauterpacht, "[t]o recognize a community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, existing States are under the duty to grant recognition." Lauterpacht, *supra* note 111, at 385.

theory of the “duty” to recognize is essentially a fifth criteria in the declarative model. It requires states to do what they are supposed to do when an aspiring state satisfies the Montevideo Criteria—recognize the entity as a state. Thus, it is unclear exactly what Lauterpacht’s theory adds to the picture.

Moreover, Lauterpacht’s synthesis has all the flaws of both distinct approaches. The problems inherent in determining the moment when individual declaratory criteria are satisfied are still present in Lauterpacht’s theory. Furthermore, Lauterpacht has not resolved the constitutive problem—and the *meta* problem—of determining who decides, and who decides who decides, which state(s)’ recognition is required for an entity to become a sovereign state.¹¹⁵

V. COMPETING CLAIMS AND TERRITORIAL INTEGRITY: DEFINING CHARACTERISTICS OF THE POST- COLONIAL WORLD?

Liberland may face a high hurdle on its path to recognition—the territorial claims of Croatia and possibly Serbia.¹¹⁶ The traditional theories of state recognition—declarative and constitutive—are ill-equipped to deal with the realities of the post-colonial geopolitical realm, one in which nearly all inhabitable territories are under the control of a parent state.¹¹⁷ Even in the very rare case where an aspiring state, like Liberland, claims a piece of land that is arguably *terra nullius*, the territorial integrity of the prior parent state(s) must be reckoned with before statehood may be granted to the new entity.¹¹⁸ As one prominent recognition scholar observes, it “is . . . impossible to make a claim for independence in the contemporary world without there being a competing claim of territorial integrity.”¹¹⁹

Respecting the territorial integrity of existing states is a fundamental principle of international law and is codified in the United Nations’ Charter.¹²⁰ Therefore, while the declaratory method of obtaining statehood—i.e., satisfying

¹¹⁵ See generally Vidmar, *supra* note 109, at 703.

¹¹⁶ While Croatia has not officially claimed the land that Liberland claims, this author believes that it will likely do so if it becomes clear to Croatia that its attempts to renegotiate the international boundary between Croatia and Serbia—the Danube’s new course—will be in vain. In this scenario, it would be advantageous for Croatia to assert title to Liberland, because Croatia would have nothing to lose, and would stand to gain the title to the land Liberland claims.

¹¹⁷ See generally Vidmar, *supra* note 109, at 707.

¹¹⁸ Because, in the contemporary world, the only way that an inhabitable tract of land would be *terra nullius* is if the parent state(s) renounced its claim to the land, as is arguably the case with Liberland.

¹¹⁹ *Id.*

¹²⁰ *Id.*; see also U.N. Charter art. 2, ¶ 4, which reads “[m]embers shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

the Montevideo Convention's objective criteria for independence—still remains the “official” means by which statehood can be achieved,¹²¹ merely satisfying Montevideo's objective criteria is not sufficient to achieve statehood.¹²² Rather, “the most challenging hurdle an entity needs to overcome on its path to statehood”¹²³ is overcoming the competing claim of territorial integrity made by the parent state.¹²⁴

International law has not evolved in the face of the indubitable phenomenon of competing claims of territorial integrity.¹²⁵ Rather, “[i]nternational law has adopted a position of neutrality in regard to unilateral secession.”¹²⁶ International law offers no clear way of mediating claims of independence by entities that claim land also claimed by a parent state.¹²⁷ In effect, this means that an aspiring state that claims independence is able to become a state, but that something more than a “mere declaration” is required because, in the context of the parent state's competing claim of territorial integrity, “[d]eclaring independence does not create a new state, *even if* the entity exhibits the attributes of statehood.”¹²⁸

Given the parent state's claims of territorial integrity, buttressed by the U.N. Charter, it is extremely difficult for an entity to attain statehood.¹²⁹ Moreover, the burden of proof is on the party seeking to shift the territorial arrangement, i.e., the aspiring state.¹³⁰ In other words, the aspiring state must show why the territorial status quo should be upset before it can gain statehood status.

However, all hope is not lost for aspiring states. Vidmar identifies four means by which an aspiring state can overcome the parent state's assertion of territorial integrity: a waiver by the parent state,¹³¹ consensual extinction of the parent state,¹³² multilateral international involvement,¹³³ or constitutive recognition/unilateral succession.¹³⁴ However, if Liberia is unable to convince

¹²¹ For instance, as noted *supra*, the Restatement (Third) of Foreign Relations Law's test for statehood is identical to the Montevideo Convention.

¹²² Vidmar, *supra* note 109, at 744.

¹²³ *Id.* at 747.

¹²⁴ *Id.* at 707.

¹²⁵ *Id.* at 701.

¹²⁶ *Id.* at 709.

¹²⁷ *Id.* at 700.

¹²⁸ *Id.* at 709.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 710.

¹³² *Id.* at 719.

¹³³ *Id.* at 722.

¹³⁴ *Id.* at 734.

the international community that the land it claims is in fact *terra nullius*, it is unlikely to overcome Croatia and Serbia's potential claims of territorial integrity through any of the means proposed by Vidmar.

The first method of overcoming the parent state's claim of territorial integrity—through waiver by the parent state—does not apply to Liberland. While neither country wants to claim the land on which Liberland rests, neither has, as of yet, explicitly waived its right to the territory. Neither is likely to do so in the future, either.¹³⁵ If Croatia were to formally waive its right to Liberland, it would lose the only significant piece of land it has gained title to due to the shifting course of the Danube.¹³⁶ While Croatia would, ideally, like to have title to the large tracts of formerly Croatian lands now located in Serbia, its second-best option is to gain title to the land on which Liberland sits. If Croatia lost its claim to the land now in Serbia *and* waived its title to Liberland, Croatia would get nothing. Similarly, Serbia is extremely unlikely to waive its title to Liberland. Doing so would be a tacit acceptance that the title to Liberland is Serbia's to waive, which would be an acknowledgement on the part of Serbia that the old border—not the new one—is correct.¹³⁷ Thus, waiving title to Liberland could result in Serbia losing title to the large area of land now located on its side of the Danube.¹³⁸

The second and third methods for succession—consensual extinction of the parent state and multilateral international involvement—also do not apply to Liberland. Serbia and Croatia are not about to become failed states or disintegrate. Moreover, the international community is almost certainly not going to form a coalition and actively intervene in the situation to enforce Liberland's claim of statehood. There is no allegation that the nations are engaging in mass human rights violations or genocidal practices—the sort of atrocities by a parent state that might inspire multilateral international involvement.¹³⁹

Thus, if Liberland cannot persuade the international community that the land it claims is *terra nullius*, Liberland's only remaining option for obtaining statehood is through constitutive recognition. This would, of course, run into the problems common to constitutive recognition, as discussed above.

If Vidmar is right (that the four ways he identifies are an exhaustive list of how contemporary entities with aspirations of statehood can gain independence),

¹³⁵ See generally Klemenčić & Schofield, *supra* note 24, at 50.

¹³⁶ See Lewis-Kraus, *supra* note 1.

¹³⁷ See generally Simone, *supra* note 8.

¹³⁸ See generally Lewis-Kraus, *supra* note 1.

¹³⁹ See generally William R. Slomanson & Nagorno Karabakh, *An Alternative Legal Approach to Its Quest for Legitimacy*, 35 T. JEFFERSON L. REV. 29, 43–44 (2012); David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761, 789–92 (1994); Helen Quane, *Rights in Conflict? The Rationale and Implications of Using Human Rights in Conflict Prevention Strategies*, 47 VA. J. INT'L L. 463, 473–74 (2007).

the natural extension of his theory elucidates a serious gap between black letter international law and contemporary state practice. Namely, the restatements of international law, and U.N. precedent itself, continue to expound declaratory theory—embodied in the Montevideo Convention—as the “official” way for entities to obtain statehood. However, in the absence of a waiver by the parent state (which, in all cases, is extremely unlikely), consensual extinction of the parent state (also extremely unlikely, as in the case of Syria), or multilateral international involvement (which occurs primarily when genocide or serious suppression of ethnic groups is taking place), the emergence of new states is contingent on constitutive recognition. In other words, outside of these very rare circumstances, aspiring entities will, *de facto*, be unable to obtain statehood, regardless of how meritorious their claims of statehood are.

VI. ANALYZING LIBERLAND’S CLAIM OF STATEHOOD UNDER THE MONTEVIDEO CRITERIA

For Liberland to obtain statehood, it will likely need to satisfy the four criteria articulated at the Montevideo Convention for the Rights and Duties of States in 1933. The Montevideo Criteria, comprise “the commonly agreed definition of what is a State.”¹⁴⁰ In fact, the criteria for statehood that are listed in the Restatement (Third) of the Foreign Relations Law of the United States are identical to those set forth in the Montevideo Convention.¹⁴¹ The Montevideo Criteria are the closest thing to customary international law¹⁴² that exists for determining when an entity is a state.¹⁴³

As Crawford observes, the Montevideo criteria are “based on the principle of effectiveness among territorial units.”¹⁴⁴ Under the Montevideo Criteria, a state exists by virtue of its being able to effectively govern over a defined territory.¹⁴⁵ But Montevideo’s requirement that a state have the capacity to effectively manage a territorial unit is not uniformly applied in practice. The international community

¹⁴⁰ CHIARA GIORGETTI, *A PRINCIPLED APPROACH TO STATE FAILURE* 53 (2010); *see also, generally* Grant, *supra* note 80.

¹⁴¹ RESTATEMENT § 201 *supra* note 75; *see also* Bathon, *supra* note 79, at 608.

¹⁴² While often said to be a codification of customary international law, the Montevideo Criteria cannot truly be said to be customary international law, because, as described *infra*, they are not followed in practice. If the Montevideo Criteria were customary international law, recognition would follow for states that satisfied the four requirements for statehood.

¹⁴³ While the Montevideo criteria are the commonly agreed upon requisite elements that must exist for an entity to become a state, this method of determining statehood is not without its faults. Criticisms of the Montevideo Criteria will be discussed in Part. V.

¹⁴⁴ CRAWFORD, *supra* note 64, at 46.

¹⁴⁵ *See generally id.*

has recognized states that, at the time of inception, lacked one or more of these criteria.¹⁴⁶

According to the Montevideo Criteria, a state becomes a state when it possesses four characteristics. First, it must have a permanent population.¹⁴⁷ Second, it must have a defined territory.¹⁴⁸ Third, it must have an effective government.¹⁴⁹ Fourth, it must have the capacity to enter into relations with other states.¹⁵⁰

Using a strict application of the Montevideo Criteria for statehood, Liberland is unlikely to be recognized as a sovereign state. However, as described below, Liberland might satisfy a “relaxed” Montevideo standard.

A. Permanent Population

While the Montevideo Convention requires that a state have a permanent population, “there is no minimum requirement for the number of people in the territory . . . or their permanency in the territory for that territory to qualify as a state.”¹⁵¹ This vague requirement for some minimum permanent population is easy for aspiring states to achieve.¹⁵² The population does not even need to be of any particular nationality to satisfy the permanent population requirement.¹⁵³ Moreover, a textualist approach to the rule allows aspiring states to grant nationality to their population under their own municipal law.¹⁵⁴ However,

¹⁴⁶ See, for example, Charles F. Whitman, *Palestine’s Statehood and Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT’L L. J. 73, 113 (2013) (noting that “entities have gained or retained statehood and UN membership in the absence of an effective government”); Justus R. Weiner & Diane Morrison, *Legal Implications of ‘Safe Passage’ Reconciling A Viable Palestinian State with Israel’s Security Requirements*, 22 CONN. J. INT’L L. 233, 249 (2007) (observing that “Finland was recognized as a state in 1917, despite a lack of effective government”).

¹⁴⁷ Convention Between the United States of America & Other American Republics on Rights & Duties of States, 49 Stat 3097 (Jan. 18, 1935).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ GIORGETTI, *supra* note 140, at 54. Moreover, state practice evinces that the lack of a large population is not a barrier to recognition. The population of Vatican City is somewhere in the low 800s. See THE CIA WORLD FACTBOOK, *Holy See (Vatican City)* (Feb. 25, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/vt.html>. Tuvalu has a population of approximately 10,000. See THE CIA WORLD FACTBOOK, *Tuvalu* (Feb. 25, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/tv.html>.

¹⁵² GIORGETTI, *supra* note 140, at 54.

¹⁵³ Trevor A. Dennis, Comment, *The Principality of Sealand: Nation Building by Individuals*, 10 TULSA J. COMP. & INT’L L. 261, 283 (2002).

¹⁵⁴ CRAWFORD, *supra* note 64, at 52.

scholars greatly disagree about exactly how stringently to apply the “permanent population” criterion.¹⁵⁵

Currently, the permanent population in Liberland is zero.¹⁵⁶ While the Montevideo Convention requires only that the population be permanent—and does not prescribe a requirement that the population *remain in the territory for a specific amount of time*¹⁵⁷—the fact that Liberland does not have any current residents living in the territory casts serious doubt on its permanent population claim.¹⁵⁸

Liberland may satisfy the permanent population requirement. Liberland’s government has granted citizenship to 130 people.¹⁵⁹ This number will almost certainly grow. Liberland has received nearly 400,000 “registrations” for citizenship, and approximately 75,000 of the applicants have been declared eligible for citizenship.¹⁶⁰ Moreover, Liberland has established a clear path to citizenship: eligible applicants accumulate “merits” by donating their money and time to help Liberland become a state, and when they accumulate 10,000 “merits,” they are granted citizenship.¹⁶¹

Should it matter to the Montevideo analysis that the reason why Liberland is yet to have a permanent resident population is because Croatia has prevented Liberland settlers from entering Liberland and arrested those that have been able to temporarily evade the authorities and actually reach Liberland? More generally, should an existing state be able to thwart the statehood aspirations of a non-violent secessionist group by repressing that group and preventing its members from even accessing the territory that the secessionist group claims as its own? This dynamic is, to the author’s knowledge, a completely novel situation. Therefore, it is important to resolve this issue, both to determine the validity of Liberland’s statehood claim and to create international precedent for how to consider the permanent population requirement when an existing state forcibly prevents all citizens of the aspiring state from entering the territory they claim.

¹⁵⁵ See, for example, Worster, *supra* note 83, at 161.

¹⁵⁶ See Daniel Nolan, *Liberland: Hundreds of Thousands Apply to Live in the World’s Newest ‘Country’*, THE GUARDIAN (Apr. 24, 2015), <http://www.theguardian.com/world/2015/apr/24/liberland-hundreds-of-thousands-apply-to-live-in-worlds-newest-country>.

¹⁵⁷ Pamela Epstein, *Behind Closed Doors: “Autonomous Colonization” in Post United Nations Era—the Case for Western Sahara*, 15 ANN. SURV. INT’L & COMP. L. 107, 120 (2009).

¹⁵⁸ It should be noted that some sources of international law posit that the “permanent population” requirement is “significant and permanent.” RESTATEMENT § 201, *supra* note 75. However, this does not advance the ball much. What is “significant”? What is “permanent”? Who decides? And who decides who decides?

¹⁵⁹ See Paul Bradbury, *A Progress Update From Liberland President Vit Jedlicka*, TOTAL CROATIA NEWS (Dec. 12, 2015), <http://www.total-croatia-news.com/politics/1756-a-progress-update-from-liberland-president-vit-jedlicka>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Liberland's lack of permanent resident population certainly is a strike against its statehood claim. However, the international community must consider the incentives created by a strict permanent population test. If the permanent population criterion requires a permanent *resident* population or a permanent population of citizens *within* the territory claimed by the aspiring state, the existing state has a perverse incentive to prevent the would-be permanent residents of the aspiring state to enter the territory they claim. This incentive structure could embolden repressive regimes to exacerbate the abuses and injustices that motivated the aspiring state to attempt to secede from the parent state in the first place.

This question notwithstanding, Liberland's lack of permanent resident population weakens its statehood claim.

B. Defined Territory

The defined territory criterion is just as vague as the permanent population requirement. In fact, "there is no requirement of a minimum area for a territorial community to claim statehood."¹⁶² Liberland claims an area of 7 km².¹⁶³ Vatican City, by contrast, has an area of a mere .44 km².¹⁶⁴ And Monaco, also a sovereign state and U.N. member, has an area of merely 2 km².¹⁶⁵ Clearly, Liberland's diminutive area is not, in itself, a barrier to satisfying the Montevideo Conventions' defined territory requirement.

If Liberland's size is an insufficient justification for meeting the defined territory requirement, what about the fact that there may be competing claims to Liberland itself?

While competing claims to a given piece of land might make recognition more difficult to achieve, the fact that multiple parties claim ownership of a territory does not prevent a state from coming into existence.¹⁶⁶ In fact, the territories of several recognized States—such as Israel, Kuwait, Mauritania, and Belize—were entirely claimed by other States when these States achieved statehood.¹⁶⁷ According to Crawford, "boundary disputes . . . do not affect statehood."¹⁶⁸ State practice from Eastern Europe—where Liberland sits—

¹⁶² GIORGETTI, *supra* note 140, at 57.

¹⁶³ See Liberland Settlement Ass'n, *supra* note 9.

¹⁶⁴ See THE CIA WORLD FACTBOOK, *Holy See (Vatican City)*, *supra* note 151.

¹⁶⁵ See THE CIA WORLD FACTBOOK, *Monaco* (Mar. 1, 2016), <https://www.cia.gov/library/publications/the-world-factbook/geos/mn.html> (last visited Nov. 16, 2015).

¹⁶⁶ CRAWFORD, *supra* note 64, at 48.

¹⁶⁷ *Id.* at 49.

¹⁶⁸ *Id.*

confirms Crawford's hypothesis. For example, Croatia achieved statehood in 1991, despite the Yugoslav National Army's occupying parts of Eastern Slavonia.¹⁶⁹ Moreover, Poland achieved statehood in 1918 despite the fact that its Western border was not ascertained until a later peace settlement.¹⁷⁰ The fact that border disputes do not prevent an aspiring state from obtaining statehood both originates and follows from another interesting aspect of state practice: states do not cease to exist when another asserts a claim to parts, or the whole, of their territories.¹⁷¹

1. Application of the border dispute to Liberland's statehood claim.

As described *supra*, Croatia and Serbia are immersed in a protracted dispute about their international border, and neither nation presently claims the land upon which Liberland sits.¹⁷² Serbia is content with the status quo, as it gained huge swaths of land on the right side of the new Danube that were ethnically Croatian prior to the dissolution of the former Yugoslavia.¹⁷³ For this reason, Serbia has not asserted title to Liberland and is unlikely to do so in the future.¹⁷⁴ Croatia's currently objects to the Badinter Commission's findings. It wants the border to return to the Danube's old course because, at present, large swaths of land traditionally inhabited by Croats are on the right side of the Danube.¹⁷⁵ Thus, Liberland might very well be *terra nullius*, as Jedlicka asserts.¹⁷⁶ Moreover, Croatia's unwillingness to assert title to Liberland also means that Liberland clearly has defined borders; Liberland is bordered by the Danube to the East, and Croatia on the West. Because Liberland has defined boundaries, and because contending claims to territory do not prevent a state from coming into existence (as discussed *supra*), Liberland may satisfy the Montevideo Convention's "defined territory" requirement.

¹⁶⁹ *Id.* at 50.

¹⁷⁰ *Id.*

¹⁷¹ GIORGETTI, *supra* note 143, at 140.

¹⁷² *See supra* Section II.

¹⁷³ Klemenčić & Schofield, *supra* note 24, at 50.

¹⁷⁴ *See generally id.* at 50.

¹⁷⁵ *See generally id.*

¹⁷⁶ While most often mentioned in discussions about the legal effects of colonization of native lands, *terra nullius* also describes the legal status of a territory when, "due to lapse of authority or abandonment" and with a "showing of definite renunciation on the part of then abandoning state," the parent state quitclaims any title it has to that territory. Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L L. 98, 111 (2013).

C. Effective Government

An effective government is the most important of the four Montevideo Criteria.¹⁷⁷ Government is said to be “the central requirement of statehood on which all other criteria depend.”¹⁷⁸ The importance of the government requirement lends support to Crawford’s hypothesis that the Montevideo Criteria are really testing for territorial effectiveness, or an entity’s ability to govern a given territory effectively.¹⁷⁹ The emphasis on effective governance is also supported by scholars such as Duursma, who posits “an organization of individuals inhabiting a certain territory has its *raison-d’être* in the display of authority to bring order and stability to the community.”¹⁸⁰

Despite the uncontested salience of this third factor in determining statehood, there is no definite requirement or predetermined set of attributes that a government must possess in order to satisfy the effective government criterion.¹⁸¹ However, where an entity claims sovereignty, the structure, or lack thereof, of that self-proclaimed state is relevant to a determination of the legitimacy of that entity’s statehood aspirations.¹⁸²

Despite effective government’s prominence in the Montevideo analysis, state practice indicates that an entity need not actually have an effective government to gain recognition as a state.¹⁸³ For example, many former colonies, such as the Congo and Guinea-Bissau, gained independence and U.N. recognition, despite the fact that at the respective times these entities gained statehood, no single government could legitimately claim control over even a majority of the territories or their populations.¹⁸⁴ Similarly, existing states do not automatically revert back to aspiring states when the government loses control over portions of domestic territory.¹⁸⁵

¹⁷⁷ See, for example, CRAWFORD, *supra* note 64, at 55.

¹⁷⁸ Duursma, *supra* note 66, at 118.

¹⁷⁹ CRAWFORD, *supra* note 64, at 46.

¹⁸⁰ DUURSMA, *supra* note 66, at 118.

¹⁸¹ “No rule of international law, in the view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today.” *W. Sahara*, advisory opinion, 1975 I.C.J. 12, 43–44 (Oct. 16).

¹⁸² “At the same time, where sovereignty over territory is claimed, the particular structure of a State may be a relevant element in appreciating the reality or otherwise of a display of State activity adduced as evidence of that sovereignty.” *Id.*

¹⁸³ See, for example, Benjamin R. Farley, *Calling A State A State: Somaliland and International Recognition*, 24 EMORY INT’L L. REV. 777, 791 (2010).

¹⁸⁴ GIORGETTI, *supra* note 140, at 59–60.

¹⁸⁵ See Hannah Woolaver, *State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States*, 32 WIS. INT’L L.J. 595, 598 (2014) (noting that “a failure of government to

The government of Liberland lacks the ability to physically occupy and govern its own territory because Croatian police are stationed in Liberland around the clock, preventing citizens of Liberland from entering and setting up a permanent settlement.¹⁸⁶ This, by itself, should not disqualify Liberland from being deemed a sovereign State. First, the Montevideo criterion of “effective government” does not require that a government be physically present within the state’s borders, as described *supra*.¹⁸⁷ Second, if existing states were able to prevent aspiring states from achieving statehood simply by forcibly preventing the government of those aspiring states from accessing the territory they claimed, existing states could prevent the emergence of new states simply by military oppression. This would create perverse incentives for existing states, and would make the attainment of statehood practically impossible for aspiring states that are oppressed by existing ones.

One can argue that preventing aspiring states from obtaining statehood—even by force—is an overall good because it encourages order and stability in the international realm.¹⁸⁸ Under this view, relaxing the strict Montevideo Criteria would lead to international chaos, and threaten existing states’ continued existence.¹⁸⁹ Moreover, recognizing an increased number of small states would necessarily entail a heightened risk that larger nations would react to claims of independence by military action, in hopes of subsuming the breakaway states.¹⁹⁰

It is, of course, crucial that international order and stability be maintained. However, states should not be able to engage in *ad hoc* military campaigns to violently suppress peaceful peoples from congregating in areas of a country where they hope to establish their own state. This is particularly true in the case of Liberland. Croatia does not even claim the land that Liberland hopes to colonize. Croatia is preventing Jedlicka and his followers from accessing uninhabited land that Croatia has not claimed.

assert control over the state’s territory is just that—a failure of government, and not a failure of the state”).

¹⁸⁶ See Lan Anh Vu, *Liberland: An Interview With Founder Vit Jedlicka*, HUFFINGTON POST (Oct. 21, 2015), http://www.huffingtonpost.com/lan-anh-vu/liberland-an-interview-with-president-vit-jedlicka_b_8322846.html.

¹⁸⁷ See, for example, W. Sahara, *supra* note 181, at 43-44.

¹⁸⁸ See, for example, The Aaland Islands Question, Report presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7/21/68/106 (1921), at 27–31.

¹⁸⁹ See, for example, Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT’L L. 423, 475 (2004).

¹⁹⁰ For an in-depth analysis of how this dynamic played out after Crimea declared independence from Ukraine, see Stefan Kirchner, *Crimea’s Declaration of Independence and the Subsequent Annexation by Russia Under International Law*, 18 GONZ. J. INT’L L. (2015).

Moreover, the fact that Liberland's government cannot currently enter Liberland does not necessarily mean that the government is incapable of governing Liberland effectively. In fact, Liberland arguably possesses the ability to effectively govern its territory, even if the government is not currently located within Liberland's borders.¹⁹¹ Liberland has a draft constitution, a domestic court system, a currency, a (very active) president, a cabinet, and a sophisticated process for granting citizenship.¹⁹² At least on paper, if not yet in practice, Liberland has all the necessary components of a modern liberal democratic state and may be able to effectively govern its territory.

D. Capacity to Enter into Relations with Foreign States

The final Montevideo requirement—the capacity to enter into relations with foreign states—may be more a consequence of statehood than a necessary criterion for a state to come into existence.¹⁹³ Since only a sovereign government can bind a State, Crawford argues that “[t]he existence of a government in a territory is thus a precondition for the normal conduct of international relations.”¹⁹⁴ However, state practice confirms the fact that an essential aspect of a state for recognition purposes is its ability to enter into relations with other states.¹⁹⁵

Liberland may have the capacity to enter into relations with other states. Jedlicka has the support of several members of the European Parliament. As noted above, one European Parliament member, Tomas Zdechovsky, accompanied Jedlicka on a failed attempt to make a landing in Liberland in June of 2015.¹⁹⁶ Furthermore, Jedlicka recently met with members of the Swiss Parliament.¹⁹⁷ Moreover, Liberland has established permanent diplomatic missions in numerous states, such as the United Kingdom, France, Germany, the United States, Hungary, Croatia, and Serbia.¹⁹⁸

¹⁹¹ Requiring an effective government inside the territory claimed by an aspiring state would create the same perverse incentives that, as discussed *supra*, would exist were the permanent population requirement read to require a permanent resident population. In other words, parent state could take illegal measures to repress any nascent opposition government in the territory that was aiming to secede, and thus, through illegal repression, prevent that aspiring state from achieving the capacity to effectively govern its territory and therefore from obtaining statehood in the eyes of international law.

¹⁹² See LIBERLAND SETTLEMENT ASS'N, *supra* note 9.

¹⁹³ Grant, *supra* note 80, at 435.

¹⁹⁴ CRAWFORD, *supra* note 64, at 60.

¹⁹⁵ James Grimmelman, *Sealand, Havenco, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 472 (2012).

¹⁹⁶ See Lewis-Kraus, *supra* note 1.

¹⁹⁷ See Anh Vu, *supra* note 186.

¹⁹⁸ See FREE REPUBLIC OF LIBERLAND, *supra* note 14.

However, the states in which Liberland has established diplomatic missions have not recognized Liberland as an independent sovereign. In fact, no U.N.-recognized country has recognized Liberland.¹⁹⁹ While Liberland has all the formal capacities needed to engage in relations with other states, the simple fact is that Liberland has not been recognized by any sovereign nation.²⁰⁰ This cuts against its claim of statehood.

E. Liberland Likely Does Not Satisfy a Strict Application of the Montevideo Criteria for Statehood

Under a strict application of the Montevideo Criteria, Liberland would likely not be recognized as a state. Liberland has a permanent population, but none of its citizens are currently residing in the territory Liberland claims. Moreover, it is doubtful that Liberland truly has the capacity to enter into relations with other states, as none have recognized Liberland yet. Additionally, while Liberland has a potentially effective government; this government is not currently functioning within the territory Liberland claims.

However, under a more expansive view of Montevideo, Liberland has a possible claim for statehood. Liberland has a defined territory. Moreover, while Liberland has neither a permanent resident population, nor an effective government within the territory it claims, this is because Croatia is forcibly preventing Liberland's citizens from settling in Liberland and is prohibiting Jedlicka and his cabinet from setting up the physical apparatus of a functioning state. It is evident that Liberland would have both a permanent resident population, and an effective government, if Croatia stopped preventing would-be Liberlanders from setting up a permanent settlement. Moreover, Liberland might be able to govern *in absentia*, as it already possesses many of the legal and bureaucratic aspects of a modern democratic state.

As the above-discussion of the Montevideo Criteria illustrates, the Montevideo Criteria are extremely vague, lack clear definitions, and fail to provide a clear, workable framework for evaluating statehood claims. Moreover, as noted *supra*, a strict application of the Montevideo Criteria creates perverse incentives for existing states to repress entities that aspire to secede.

Therefore, a detailed analysis of the major criticisms of the Montevideo Criteria is warranted. A critical examination of the Montevideo Criteria is needed to assess whether these factors should be the basis upon which statehood rests. Moreover, this discussion is necessary to evaluate Liberland's statehood claim. If

¹⁹⁹ See Lyman, *supra* note 6.

²⁰⁰ Only other micronations (i.e. non-recognized states that aspire to statehood), such as Sealand, have recognized Liberland.

the Montevideo Criteria are normatively or descriptively deficient, Liberland's statehood aspirations may not hinge on the Montevideo analysis discussed above.

VII. CRITICISMS OF THE MONTEVIDEO CRITERIA

There are two major criticisms of the Montevideo Criteria. First, one can criticize the Montevideo Criteria for being over-inclusive—state practice indicates that additional requirements must be satisfied before an entity gains statehood.²⁰¹ Second, the Montevideo Criteria may conflate statehood with recognition.²⁰² In this way, the Montevideo Criteria may promote the very subjectivity and ambiguity that a rule of law is meant to guard against.

A. Additional Requirements for Statehood

Despite the fact that Liberland arguably satisfies the Montevideo Criteria, not a single sovereign state has recognized Liberland. Could this discrepancy between law and state practice be because the Montevideo Criteria are outdated, and no longer encapsulate the requirements for statehood? Indeed, some scholars, such as Crawford, posit that there are additional requirements to those mandated by Montevideo that an entity must fulfill to gain statehood.²⁰³ Two criteria not encapsulated in the Montevideo Convention that are often said to be required for statehood are (1) independence and (2) the entity's own claim to be a state.²⁰⁴

Crawford posits that independence, while not required under Montevideo, is a crucial element of statehood.²⁰⁵ According to Crawford, an aspiring state “will have to demonstrate substantial independence, both formal and real, from the State of which it formed a part before it will be regarded as definitively created.”²⁰⁶ Crawford recommends that, when a state is “formally independent and its creation was not attended by serious illegality,” independence should be presumed.²⁰⁷

²⁰¹ See, for example, Alison K. Eggers, *When Is A State A State?, The Case for Recognition of Somaliland*, 30 B.C. INT'L & COMP. L. REV. 211, 222 (2007); Grant, *supra* note 80, at 403; Bathon, *supra* note 79, at 620 n.221.

²⁰² See Grant, *supra* note 80, at 451–52.

²⁰³ See generally CRAWFORD, *supra* note 64, at 63.

²⁰⁴ See, for example, *id.*; Grant, *supra* note 80, at 437–39; RESTATEMENT § 201, *supra* note 75. Thus, the Montevideo Criteria may be over inclusive. In other words, because the Montevideo Criteria do not include independence and the entity's own claim of statehood, a strict application of the Montevideo Criteria may result in an inappropriately high number of entities being classified as independent states. However, this does not undermine Liberland's claim of statehood, because Liberland satisfies these two additional criteria.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 89.

Under Crawford's test, Liberia's independence should be presumed for statehood purposes. Liberia is formally independent; it declared independence, and has its own constitution and government. Moreover, its independence was not the result of, or achieved through, serious illegality. There was no violent insurrection or legally questionable overthrow of an existing state. Finally, Liberia is independent because both Croatia and Serbia have, for over two decades, renounced ownership of the territory that Liberia claims.

According to the Restatement (Third) of Foreign Relations Law, "[w]hile the traditional definition does not formally require it, an entity is not a state if it does not claim to be a state."²⁰⁸ This requirement for statehood arose as part of state practice regarding recognition of Taiwan, which meets all of the Montevideo Criteria but does not claim to be an independent state.²⁰⁹ Moreover, while many entities, such as California, satisfy the Montevideo requirements and would be more effective independent states than many United Nations member states if they chose to claim independence, these entities are not recognized as states because they do not claim statehood.²¹⁰ This requirement is certainly central, and it is astounding that the Committee at the Montevideo Conference omitted it from the official requisites for independence. Liberia satisfies this crucial additional criterion to obtaining statehood, because it claims to be a sovereign state. Thus, even if Crawford is correct that the Montevideo Criteria are over-inclusive, Liberia's statehood claim is not doomed. Liberia clearly satisfies the additional criteria that Crawford identifies as requisite to statehood.

B. Subjectivity and Conflating Statehood with Recognition

Some scholars, such as Thomas Grant, lambast the addition of new requirements to the Montevideo Criteria for statehood, and assert that additional criteria only leads to more subjectivity, which is contrary to the rule of law.²¹¹ Grant posits that adding "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."²¹² When more criteria must be satisfied, there is more room for disagreement and greater ability to exercise discretion.²¹³ Furthermore, Grant observes that some of the additional requirements for statehood—for example, the requirement that the

²⁰⁸ RESTATEMENT § 201, *supra* note 75.

²⁰⁹ Grant, *supra* note 80, at 439.

²¹⁰ *Id.*

²¹¹ *Id.* at 451.

²¹² *Id.* at 451-52.

²¹³ *Id.*

state be “independent” and its independence not be “attended by serious illegality”²¹⁴—contain a “political dimension” that “blur[s] the distinction between the legal criteria that make a state and the political criteria that condition recognition.”²¹⁵ Under pure declaratory theory, for example, the existence of a state proceeds, and is independent of, recognition by other states.²¹⁶ The act of recognition does not create a state that did not exist before.²¹⁷ The additional Montevideo Criteria violate this declaratory principle by conditioning the existence of a state on political factors that arise after the state comes into existence.²¹⁸ To Grant, adding additional criteria to the Montevideo requirements diminishes the distinction between politics and law and conflates recognition in the eyes of other states—a political, not legal, phenomenon—with statehood.²¹⁹

Grant’s criticisms are certainly valid. What concerns Grant is the conflation of recognition with statehood, which is problematic from a practical and theoretical perspective.²²⁰ However, what Grant fails to appreciate is that the addition of new criteria to the requirements for statehood is not the cause of this problem. The existing Montevideo Criteria themselves contain subjective and politically charged language, and applying the four existing Montevideo Criteria necessarily entails discretion and often conflates recognition with statehood.

The Montevideo Criteria are vague standards, rather than bright line rules. Given the fact that many of the criteria—such as “capacity to enter into relations with other states”—are open-ended and amorphous, discretion and subjectivity will always be exercised when these terms are applied to a given entity’s statehood claim.²²¹ Moreover, the fourth Montevideo requirement—“capacity to enter into relations with other states”—is inherently political.²²² Requiring that other states recognize an entity for it to obtain statehood makes statehood dependent on recognition, itself a political act.²²³ Thus, while Grant’s criticisms are warranted, he fails to see that the Montevideo Criteria themselves are highly political, and

²¹⁴ CRAWFORD, *supra* note 64, at 89.

²¹⁵ Grant, *supra* note 80, at 451–52.

²¹⁶ Worster, *supra* note 83, at 124 (noting that under a strict declaratory theory “recognition has no effect on whether the state exists”).

²¹⁷ *Id.*

²¹⁸ Grant, *supra* note 80, at 452–53.

²¹⁹ *Id.* at 451–52.

²²⁰ *See supra*, Section VI.

²²¹ Sophie Clavier, Book Review, 15 ANN. SURV. INT’L & COMP. L. 145, 150 (2009) (reviewing CONTEMPORARY ISSUES ON PUBLIC INTERNATIONAL AND COMPARATIVE LAW: ESSAYS IN HONOR OF PROFESSOR CHRISTIAN NWACHUKWU OKEKE (Chima Centus Nweze ed., 2009)).

²²² *See* Convention Between the United States of America & Other American Republics on Rights & Duties of States, *supra* note 147.

²²³ Acharya, *supra* note 93, at 26.

that applying them already subjugates statehood to the capricious winds of international politics.

Conceptualizing the Montevideo Criteria as vague standards, the application of which necessarily entails subjective determinations and political judgments, elucidates why Liberland has failed to obtain statehood. Liberland has likely satisfied the relaxed version of Montevideo's statehood criteria. However, Liberland has not obtained statehood because existing sovereign states have refused to recognize Liberland as a state. Statehood has been conflated with recognition, and the international community's failure to recognize Liberland has, *de facto*, prevented Liberland from satisfying the Montevideo Criteria in the eyes of the states whose recognition is necessary in order for Liberland to obtain statehood.

VIII. CONCLUSION

In light of the above analysis, there are two potential pathways by which Liberland might gain recognition. First, Liberland could convince the international community that the land it claims is *terra nullius* because of Serbia and Croatia's informal renunciations of title to the territory. Liberland would then need to satisfy the Montevideo Criteria. However, Liberland could not satisfy a strict application of the Montevideo Criteria, because it lacks a permanent resident population, a functioning government within its borders, and arguably the capacity to enter into relations with other states.

Liberland could satisfy the more lenient version of the Montevideo Criteria. To achieve this, Liberland would need to convince the international community of the flaws in the traditional Montevideo analysis, discussed *supra*, and make an equitable argument that recognition—and a relaxation of the strict test—is appropriate. However, the international community has viewed Liberland's statehood claim with great skepticism. It is unlikely that the international community would choose to apply the less stringent version of the Montevideo Criteria and allow Liberland to obtain the recognition it seeks. Liberland is unlikely to achieve recognition if it must satisfy the Montevideo Criteria because of the element of constitutive recognition that is inherent in the Montevideo Criteria's application.

If Liberland were unable to convince the international community that the territory it claims is *terra nullius*, or if Serbia or Croatia changed their position and reasserted title to the land on which Liberland sits, the equation would change dramatically. Liberland would need to compete with, and overcome, the title asserted by the parent state(s). Only one of the four ways of overcoming the parent state's competing title, discussed *supra*, would be available to Liberland—constitutive recognition. However, Liberland's chances of persuading the

international community to recognize it are slim, not a single nation has recognized Liberland.

Liberland is unlikely to gain the independence it seeks. It could be argued that this is the appropriate outcome because Liberland cannot satisfy the strict Montevideo test. However, Liberland's failure to satisfy the strict test is largely due to forceful actions by Croatia that are thwarting attempts by Liberland's citizens to establish a permanent resident population and erect the physical apparatus of a functioning state. In these circumstances, it is inequitable to apply the strict test. Moreover, the strict test creates perverse incentives that will lead to the political repression that groups seeking independence often are attempting to flee.

Even if Liberland were to satisfy the strict version of the Montevideo Criteria, it is unlikely it would achieve independence because constitutive theory accurately describes the state of the world. A state cannot achieve statehood absent recognition of a sufficient percentage of existing states. This reality repudiates the validity, power, and force of international law, subjugates established legal rules, and replaces them with politics. This is simply how the world works. However, since international politics has replaced international law as state practice, international governing bodies and scholars need to acknowledge this reality and should greatly reduce the weight they claim to give to international law when making decisions about whether to recognize an entity that aspires to be a state.