Statehood and the Third Geneva Convention

ROBERT J. DELAHUNTY

JOHN YOO†

1

136

140

146

153

160

163

Statehood and its near relative sovereignty have come under increasing pressure, even erosion, in recent years. Globalization has raised questions about the ability of states to regulate activity within their borders. Ethnic or factional strife has led to the collapse of state authority, as witnessed in Somalia, Haiti, and Yugoslavia. Colonial efforts to impose a nation-state structure on non-Western parts of the world have seemingly failed to take root, as in parts of Africa and the Middle East. While perhaps not consistent everywhere, the decline of

* Associate Professor of Law, St. Thomas University School of Law.
† Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute. The authors wish to thank Professors John O. McGinnis and Antonio F. Perez for their helpful comments.

1. There have been many studies. See, e.g., GEORG SØRENSEN, CHANGES IN STATEHOOD: THE TRANSFORMATION OF INTERNATIONAL RELATIONS (2001).

2. Although we shall usually speak of the “failure” of a state (thus presupposing that a true state was formerly in existence), we also have in mind what may be called “quasi-states” or “pseudo-states”—that is, political entities that lay claim to, and are accorded, the juridical status of states in international law, despite lacking the institutional structures and other empirical characteristics traditionally associated with statehood. Such “quasi-states” or “pseudo-states” can pose many of the same problems for the international community as “failed” states. Typically, they are former European colonies that achieved independence in the post–World War II period. See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 21 (paperback ed. 1993):

The ex-colonial states have been internationally enfranchised and possess the same

the nation-state as the primary unit of governance is particularly acute in those areas of the world that have of late posed the most difficult challenges to the international community.

Erosion of the state has led to at least two types of problems. First, the disappearance of state authority in a territory has occurred alongside significant human rights disasters. We are not saying, of course, that the failure of a state is the sole or even the primary cause of human rights violations—certainly, as with the cases of Nazi Germany and North Korea, the presence of an overly powerful state also can create such disasters. Nonetheless, when the institutions of a state fade away, it seems that ethnic, religious, or factional rivalries can come to the fore in a way that can lead to chaos and mass killing. Second, failure of state authority can pose a direct threat to other nations. A territory without any effective government, such as Afghanistan under the Taliban, can become a safe haven for terrorists and transnational crime, and can offer opportunities for the proliferation of weapons of mass destruction.

The dangers posed by state failure have raised international legal difficulties for nations or organizations that have sought to remedy these problems. In the most well-known cases, the United Nations or other outside actors (NATO, the United States, France) have encountered the question of whether armed intervention would be consistent with contemporary international legal norms respecting the use of force and regard for national “sovereignty” (in the sense, guaranteed by Article 2(7) of the United Nations Charter, of freedom from external intervention in a state’s “essentially...domestic” affairs). The U.N. and

external rights and responsibilities as all other sovereign states: juridical statehood. At the same time, however, many have not yet been authorized and empowered domestically and consequently lack the institutional features of sovereign states as also defined by classical international law. They disclose limited empirical statehood: their populations do not enjoy many of the advantages traditionally associated with independent statehood. Their governments are often deficient in the political will, institutional authority, and organized power to protect human rights or provide socio-economic welfare. The concrete burdens which have historically justified the undeniable burdens of sovereign statehood are often limited to fairly narrow elites and not yet extended to the citizenry at large whose lives may be scarcely improved by independence or even adversely affected by it. These states are primarily juridical. They are still far from complete, so to speak, and empirical statehood in large measure still remains to be built. I therefore refer to them as “quasi-states.”

Id.


4. See, e.g., MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 3–35 (2001); FERNANDO R. TESÓN, A PHILOSOPHY OF
the United States are attempting to build state structures in places such as the Balkans and Afghanistan, where they have collapsed or had never successfully taken root, with unclear results. Uncertainty over the scope of "sovereignty" has also arisen from financial (rather than military) interventions in national economies, in circumstances in which aid from sources like the International Monetary Fund has been tied to conditions that may severely restrict a "sovereign" borrower's freedom to set its own domestic policy. Finally, in addition to provoking military and financial interventions, state failures have also triggered judicial interventions (in the form, e.g., of specially constituted courts such as the International Criminal Tribunals for Yugoslavia or Rwanda), again posing a conflict with traditional legal notions of "sovereignty."

Throughout, the international community seems generally to have clung to the fiction of statehood—despite these many cases in which it has permitted ostensible state sovereignty to be gravely abridged—because it has an interest in maintaining the nation-state as the organizing unit of international relations. Commentators associate the nation-state structure with the maintenance of international order. As Michael Howard has argued, if only the state makes war possible, so only the state makes peace possible:

It is not clear what alternative creators and guarantors of peaceful order could or would take the place of the state in a wholly globalized world. The state still remains the only effective mechanism through which people can govern themselves.... The erosion of state authority is thus likely not to strengthen world order but to weaken it, since states become incapable of fulfilling the international obligations on which that order depends.
The community of nations seems to have grasped that the conditions of good global governance depend on the existence of states capable of controlling their territories, policing their populations, and discharging their international obligations. In other words, states still remain the most effective means so far to control or prevent conduct that threatens international order, global welfare, and the security of other states. Accordingly, even when military, financial, or judicial interventions in the domestic affairs of a malfunctioning state seem to derogate from the principle of sovereignty, they may, on a closer view, be upholding it and advancing the broader interests behind the nation-state as an organizing principle in international affairs and law.

In this paper, we examine these issues through the lens of the Bush Administration’s legal views on the status of al Qaeda terrorists and Taliban fighters under the Geneva Convention (Third) Relative to the Treatment of Prisoners of War. While both of us participated in the government’s decision on that issue, this paper does not review or specifically defend the doctrinal elements that supported it. Rather, here we seek to place that decision within the context of these broader changes in the international system.

The Administration’s conclusions that the Convention protected neither al Qaeda nor Taliban prisoners captured in the war in Afghanistan reflected a determination to take statehood seriously, both by responding to the threat to global order posed by a novel kind of nonstate actor, and by insisting that a pseudo-state that could not discharge its treaty obligations should not expect unreciprocated treaty performance by the United States. In what follows, we outline various understandings of “statehood” that policymakers could reasonably employ in considering, e.g., questions of the legality of the use of force or the applicability of treaty obligations.

In particular, we examine alternative conceptions of “statehood” in two contexts of international law: the initial decision to recognize a state, and the decision to derecognize a purportedly existing “state.” The first context has been thoroughly explored by legal scholars, the second much less so. Partly because of the absence of such study, it has been

places); JOHN MUELLER, THE REMNANTS OF WAR 172 (2004) (“To a very substantial degree, the amount of warfare that persists in the world today—virtually all of it civil war—is a function of the extent to which inadequate [national] governments exist.”).


10. An important exception to the rule that derecognition is rarely examined is the work of Jeffrey Herbst. See, e.g., Jeffrey Herbst, Let Them Fail: State Failure in Theory and Practice, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 301–16 (Robert I. Rotberg ed., 2004). Herbst
assumed that the two kinds of decision are wholly asymmetrical: considerations that bear on the initial recognition decision have no place in making a state derecognition decision. We think that this assumption is false: although the contexts are not perfectly symmetrical, neither are they wholly asymmetrical. The initial decision to recognize a state may be, and characteristically is, a policy-laden or political one. Equally, we argue, the decision to derecognize a state may and should take account of policy objectives. In short, we argue that, due to changes in the international system, the doctrinal understanding of state recognition has lost its moorings and drifted apart from the purposes behind the nation-state system.

We begin in Part I by discussing the reasons behind the rise of the nation-states; the "purpose," if you will, behind its use as the basic organizing unit and system of governance in the international system. If we do not have some understanding of the benefits of the nation-state system, and the possible alternatives, we cannot evaluate whether the international community's current efforts to restore and impose that framework make sense. That requires us to describe what normative goals we seek in a system of governance and to define a yardstick for the measurement of various approaches to achieving them.

We then turn in Part II to examining why international law has traditionally (and now) restricted treaty-making competence to states (or state-like entities). We find close connections, both conceptual and empirical, between the traditional criteria of statehood employed in initial recognition decisions and the likelihood of reciprocal treaty performance. Next, we focus in Part III on one of the traditional tests of statehood, that of effective government; consider how that test plays out in the context of failing states; and offer an account of the almost inevitable reluctance of the international community to pronounce a "state" failed or extinguished. In Part IV, we survey state practice in the

notes that:

significant component of international relations theory has little to say about inward state failure...at the same time, there is strikingly little innovation among diplomats to try to revise current international legal practice to take account of the failed state phenomenon. The boundaries received at independence are still assumed to be the boundaries that a state should have even if those borders do not accurately describe how power is exercised.... [T]he international community has no way of withholding recognition from a state once it has received independence from its colonial power. For instance, the entire international community recognizes the political entity called the Democratic Republic of the Congo, although it is nothing more than a geographic expression.

Id. at 308–10.
context of initial state recognition and, finding it to be highly
discretionary, normative, and policy-laden, raise the question of why
derrecognition practice should not be similar. We offer alternative
accounts of statehood of increasing richness and depth that would
enable policymakers to weigh and consider a full range of relevant
factors in making a possible derecognition decision. Finally, in Part V,
we show how these alternative constructs would have applied in
deciding whether Afghanistan under the Taliban was a "state" party to
the Third Geneva Convention.

I.

One could accept nation-states simply because they are a historical
fact. A great deal of work has been done, of course, on why the state
emerged historically. The nation-state, by all accounts, appeared
relatively late on the world scene. Although states existed in some form
before the Peace of Westphalia, 1648 is generally acknowledged as the
moment in the Western World when the nation-state became the
primary actor in the international system. But for long before that, and
for several centuries afterwards, other forms of governance existed,
including multi-ethnic empires, sub-national units such as city-states,
and transnational institutions such as the Roman Catholic Church.
While the nation-state has been with us for about four centuries, the
Roman Empire alone was around for at least twice that period (and
more than four times that, if one includes the Byzantine Empire).
A purely historical approach, however, would have limited
explanatory value. History can provide us with a means for
understanding how the nation-state came into being and became
prevalent, but not whether it should remain so. Accepting the nation-
state solely because of history would be akin to requiring that all forms
of business activity must be organized along the lines of the modern
corporation, because the modern corporation happened to become the
most popular form. Rather, we want to ask what benefits the corporate

11. See, e.g., ROBERT GILPIN, WAR & CHANGE IN WORLD POLITICS 116-23 (1981); BRUCE
D. PORTER, WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN
POLITICS (1994); HENDRICK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS: AN
ANALYSIS OF SYSTEMS CHANGE (1996).
12. See, e.g., KALEVI J. HOLSTI, PEACE AND WAR: ARMED CONFLICTS AND INTERNATIONAL
ORDER 1648-1989 25-42 (1991) (analyzing strategic objectives that led to the Peace of
Westphalia and the consequences of that peace for the European system).
form provides, compared to other alternatives, such as sole proprietorships and partnerships, in the context of the environment within which it exists. So, for example, although neither of us are corporate lawyers, we understand (only dimly) that corporations are more effective within the market at raising capital and reducing certain transaction costs (such as producing components internally for a product rather than buying all of them on the open market). But the corporate form is not ideal for all types of business activity, which at times may be better served by a partnership (as with law firms).

Similarly, we should ask what advantages the state brings in the international system, just as Oliver Williamson has asked why corporations exist in the market. Here, rather than the market, the institutional context is the international system. Rather than efficiency and economic growth, we imagine the normative goal for the entire system is global welfare. We suggest that global welfare is based on some measurement of size of the world population and the quality of life enjoyed by that population. That is to be distinguished from the goal of any individual unit in the system, which may be limited to defending itself from attack by other nations or may also include a desire to expand its borders and exercise control over others. The competition of the individual and the firm for individual profit, through the invisible hand of the market, leads to social efficiency in the production and allocation of goods and services. Does the nation-state in some way, through its drive for power or its desire for security, also produce an international system that promotes global welfare in a more effective manner than alternate systems of government?

Here, history can provide some help. Nation-states, it seems, were more effective than competing models of government at organizing a population for internal security and national defense. We hypothesize that multi-ethnic empires became increasingly expensive to govern due to the scales involved, the lack of loyalty on the part of subject

15. Id.
16. Others have noted that, just as there are “public goods” within a domestic system, so there are “public goods” that are important to the international system, including collective security and monetary stability. See, e.g., LEA BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD 17 (1994). Indeed, the so-called “hegemonic theory” offers an explanation of how best to provide international public goods in a world of free riders.
17. This is the difference between “defensive” and “offensive” realism. See KENNETH WALTZ, A THEORY OF INTERNATIONAL POLITICS (1979) (defensive realism); JOHN MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS (2001) (offensive realism).
18. See, e.g., MARK ELVIN, THE PATTERN OF THE CHINESE PAST 17–22 (1973) (arguing that
populations, and the absence of technological innovation caused, e.g., by malformations of the social structure or the need to suppress dissent. Nation-states, by contrast, may have been better able to organize populations to defend against external threats in two ways—by using appeals to a common national origin to spur patriotic fervor, and by providing efficient means of organizing militaries and the means to pay for them. The idea of the nation-state assumed that the population of a state would consist primarily, if not solely, of a particular “people,” understood in terms of a common historical consciousness or remembered collective past, and likely also of commonalities in ethnicity, language, and perhaps religion. Max Weber explicitly linked the nation-state’s success in marrying security with the concept of a nation or people:

The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized corporate activity

empires tend to expand to an equilibrium point at which their military and technological superiority over their neighbors is approximately counterbalanced by the burdens of size, measured in terms of the time and cost of communications over vast distances; MICHAEL W. DOYLE, EMPIRES 136–37 (1986); GILPIN, supra note 11, at 147–52.

19. See GILPIN, supra note 11, at 117; DEEPAK LAL, IN PRAISE OF EMPIRES: GLOBALIZATION AND ORDER 74 (2004). One scholar has recently attributed the decline of empires to the loss of the collective capacity for action, owing in part to competition within the society for diminishing resources. See PETER TURCHIN, WAR AND PEACE AND WAR: LIFE CYCLES OF IMPERIAL NATIONS 9, 285–308 (2005).

20. See, e.g., F.W. WALBANK, THE AWFUL REVOLUTION: THE DECLINE OF THE ROMAN EMPIRE IN THE WEST 40–47 (1969) (finding that “the almost complete stagnation of technique” in the Roman Empire was largely due to the existence of slavery). More broadly, the economist Deepak Lal suggests that historical empires characteristically experienced an “economic climacteric” in which they found themselves in a “high level equilibrium trap” that precluded extensive economic growth. LAL, supra note 19, at 37. For a survey of such “stagnation” theories, see GILPIN, supra note 11, at 159–62.

21. Thus, the British historian of government Samuel Finer observed that the modern nation-state, unlike premodern states, is characterized by a community of feeling within the population, and mutual participation by the population in distributing and sharing duties and benefits. I S.E. FINER, THE HISTORY OF GOVERNMENT: ANCIENT MONARCHIES AND EMPIRES 2–3 (paperback ed. 1999).

22. See JOHN BREWER, SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE 1688–1783 (1990), for a striking analysis of the means by which Great Britain achieved primacy over France by quickly adopting the financial institutions of a modern state.

of the administrative staff, which is also regulated by legislation, is oriented. This system of order claims binding authority, not only over the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent, over all action taking place in the area of its jurisdiction. It is thus a compulsory association with a territorial basis. Furthermore, to-day, the use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it.... The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.24

Over time, the nation-state expanded beyond a role in guaranteeing negative liberties that allowed for law enforcement and defense to include the provision of public goods. As Philip Bobbitt has observed, the nation-state's chief functions are to ensure internal and external security, to expand material wealth, to uphold civil and political rights of popular sovereignty, to provide its people with economic security and a variety of public goods—in a word, with welfare—and to protect the state's cultural integrity.25 To be sure, the terrible wars of the 20th century may only have been made possible by the efficiencies of the modern nation-state in organizing large militaries supported by mass production industries. At the same time, however, nation-states seem to have outclassed empires and other forms of governance in guaranteeing domestic peace and providing public goods such as human rights, economic security, and so on. The wars of nation-states have led to high levels of death and destruction, but the nation-state may also have been the instrument that led to significant increases in population and economic growth,26 and longer stretches of international peace, than would have occurred under alternate forms of governance, such as the multi-ethnic empire.

Today, the nation-state and its sovereignty are often seen as the problem, rather than the solution. Human rights advocates, for example, are apt to criticize nation-state sovereignty, which can serve as a shield


26. See John O. McGinnis, The Decline of the Western Nation State and the Rise of the Regime of International Federalism, 18 CARDOZO L. REV. 903, 909 (1996) (noting that some nation-states may have been formed in order to further the exploitation of economic opportunities offered by declines in transportation and information costs in the 18th and 19th centuries).
for human rights abuses.\textsuperscript{27} Other efforts to solve global problems in the areas of the environment, development, and trade, among others, also are likely to view the nation-state and its sovereignty as an obstacle to international, cooperative solutions. But, as Jeremy Rabkin argues,\textsuperscript{28} it may also be the case that it is still the nation-state that remains as the primary means to solve these problems. Human rights abuses in the Balkans did not end, for example, because of the collective action of the international community, but because of the intervention of the United States and its NATO allies. Individual nations with historical or geographical ties to problem areas, such as the United States and Haiti or France and the Ivory Coast, have taken the lead to stop murderous civil wars. The U.N. proved miserably inadequate at stopping genocide in Rwanda, and it unfortunately appears to be repeating that performance in the Sudan. Regardless of one's opinion on the Iraq war, it is difficult to imagine a successful resolution to the challenge of rogue nations and the proliferation of weapons of mass destruction that does not involve economic, political, or military action on the part of nation-states. Nation-states are not just guarantors of their own security; they have ultimately become better protectors of international peace and security than any current existing alternatives.

II.

Having reviewed the rise of the nation-state as the primary form of governance in the international system and defended the irreplaceability of the nation-state in providing public goods within that system, we next ask whether the international legal system's formal approach to statehood comports with this analysis. Does the formal treatment of "statehood" in international law serve the needs of the international system in the world of the early 21st century—in particular, by maintaining the pivotal position of the nation-state within that system?

As a general matter, international law, both classically and in its current form, postulates that only "states" may be parties to treaties. Article 2(1)(a) of the Vienna Convention on the Law of Treaties defines a "treaty" as "an international agreement concluded between States in

\textsuperscript{27} See Rosa Ehrenreich Brooks, \textit{Failed States, or the State as Failure?}, 72 U. CHI. L. REV. 1159, 1173 (2005) (arguing that "the history of the state is a history of repression and war" and that even the United Nations Charter, the emergence of human rights law, and other sovereignty-limiting doctrines "have not ended state predation").

written form and governed by international law." True, international law recognizes the competence of certain nonstate entities, such as international organizations, to become parties to treaties, but international organizations are created by states and share some of the attributes of their makers. True also, insurgent authorities in control of particular territories have on occasion entered into agreements with governments, and could thus be argued to have treaty-making capacity: for example, the Geneva Agreement of 1954 on the cessation of hostilities in Cambodia and Laos was signed by insurgent forces in control of parts of the countries concerned. But even in that case, the agreements could be understood to be "treaties" only if the insurgent groups "represent[ed] [a] State power, emerging in the course of [a] people's insurrection, and which is now in the process of formation." A third exceptional category consists of states in statu nascendi, such as the state of Poland, which the Allied Governments had recognized as a belligerent before the Armistice with Germany in the First World War, but which the Central Powers did not recognize as a state. Outlier cases such as these aside, the standard formation rules for treaties require that the parties to such agreements be states.

34. Another type of outlier case can arise when a State has been conquered, occupied and (at least on an interim basis) partitioned among the victors. Such, of course, was the situation in Germany after the Allied victory in 1945. The question whether Germany survived as a "state" became pressing in those circumstances. Although Germany was plainly incapable of managing its own external affairs (the Allied Control Council assumed responsibility for Germany's foreign affairs and treaty performance), the United States political branches determined that Germany remained a "state" and continued to be bound by its treaty obligations. See Clark v. Allen, 331
What, then, is a "state"? The canonical definition, still current in international law, is found in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States. That article reads as follows: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."

The context of this definition suggests that it was drafted with a view to controlling decisions by states regarding whether or not to recognize another state in the first instance ("initial recognition"). At the same time, the Montevideo Convention rejects the "constitutive" theory of recognition, under which recognition by existing states establishes the existence of a new state. Article 3 of the Montevideo Convention makes clear that "[t]he political existence of the state is independent of recognition by the other states." The Montevideo Convention's tests of statehood seem designed to anchor the initial decision to recognize a state in objective realities—the "declaratory" theory of recognition.

There are close conceptual and empirical connections between the elements of statehood specified in the Montevideo Convention and the capacity to make treaties. Treaty observance rests, in general, on reciprocal performance: as Professors Goldsmith and Posner have

U.S. 503, 514 (1947).

35. Consistently with this view, the International Court of Justice in Anglo-Iranian Oil Co. (United Kingdom v. Iran), 1952 I.C.J. 93, 112 (July 22), ruled that a "treaty" could not be concluded between a state and a multinational corporation, including one half-owned by a government. By negative inference, only states (or entities sufficiently like them) may be treaty parties.


37. Id.

38. It bears emphasis here and throughout this Article that we are discussing recognition of states—not the related, but distinct, question of the recognition of governments. The questions are related, however, for at least two reasons: first, the initial recognition of a state nearly always coincides with the recognition of a government of that state; and, second, the tests for "statehood" specifically include the necessity of having a government.


40. See DAVID J. BENDERMAN, INTERNATIONAL LAW FRAMEWORKS 55 (2001) (arguing that the choice between constitutive and declaratory theories is "ultimately...one of politics"); PETER MALANZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 83 (7th rev. ed. 1997) (distinguishing constitutive and declaratory theories of recognition).

41. Not all treaties, however, are based on state interests narrowly conceived: human rights treaties, for instance, are often not so. See, e.g., Reservations to the Convention on Genocide, 1951 I.C.J. 15 (May 28) (noting that the contracting states did not have any interests of their own, but only a common interest).
recently argued, "coincidence of interest may explain why states often appear to comply with treaty regimes." If state A forms a bilateral treaty with state B, each state assumes an obligation to discharge certain burdens in the expectation that it will obtain certain benefits, chiefly from the other party's performance. If state B defaults on the performance of its obligations to state A, thus denying state A the benefits of the treaty, state A may no longer have an incentive to perform its part of the bargain, and may therefore withhold performance. Traditionally, international law has recognized the right of a state that has been injured by its treaty partner's material breach to suspend or even terminate its own obligation to perform.

Each of the four definitional elements of statehood is relevant to explaining why states have built-in incentives to reciprocate treaty performance, and more generally to respect other states' rights and interests. To begin with, as holders of territory, states have interests in seeing that their territories are not invaded, plundered, or seized—all possible consequences of treaty infractions. Second, as administrators of populations who are responsible for the security of those within their territories, states have powerful interests in seeing that their inhabitants are not killed or otherwise harmed by other states—again, possible consequences of treaty breaches. Third, because they have governments, states have identifiable power-holders, who can be induced by other states' offers of benefits, or intimidated by their threats of punishment or harm, to comply with the treaty obligations that they or their predecessors have assumed. Such inducements and threats, moreover, need not come only from another state seeking enforcement of its treaty rights; they may come from third-party states which have independent interests in securing treaty compliance. Further, governmental élites may also be subject to the influence of public opinion, both domestic and (in some cases) international, to the opinions of local, regional, or

43. See, e.g., Charlton v. Kelly, 229 U.S. 447 (1913) (holding that the United States had an international legal right to void an extradition treaty with Italy in view of Italy's default on its treaty obligations); Escobedo v. United States, 623 F.2d 1098, 1106 (5th Cir. 1980), cert. denied, 449 U.S. 1036 (1980); Taylor v. Morton, 23 F. Cas. 784, 787 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), aff'd, 67 U.S. (2 Black) 481 (1862). The Vienna Convention on the Law of Treaties, supra note 29, art. 60(1), permits a party to a bilateral treaty to invoke a material breach by the other party as a ground for "terminating or suspending" the treaty in whole or part. A material breach will not justify termination of a multilateral treaty. But see Advisory Opinion on Namibia, 1971 I.C.J. 16 (June 21) (holding that the right of termination on account of breach must be presumed with respect to all treaties).
international media, and to the opinions of nongovernmental organizations (NGOs) such as the International Committee of the Red Cross or the Vatican. (While such influences may be particularly strong in the case of elected governments, they may also be felt by unelected governments as well.) Public opinion, media views, and NGOs may monitor and support treaty compliance. Finally, a state’s capacity to enter into international relations is another factor that may encourage treaty performance. A state’s default on its obligations under a particular treaty may cause the injured state to retaliate by suspending performance not merely under that treaty, but also under other treaties with the offending state; it may lead to a rupture of diplomatic relations between the offending and the injured state; or it may cause third-party states to alter their policies towards the offending state, e.g., by declining to make new treaties with it.

It is not difficult to see how these incentives would support compliance with a treaty-based régime for the treatment of prisoners of war. A (normal) state would have strong incentives to care for captured prisoners, because any ill-treatment it meted out to them could in turn trigger retaliation against its own soldiers in enemy hands. Moreover, a state (even if undemocratic) could be concerned with both domestic and international public opinion, if only to maintain support at home for its war effort, keep its alliances intact, and avoid offending neutrals. Further, a state’s political leadership is likely to be aware that it could be held accountable, whether legally or politically, for its treatment of enemy prisoners after a war is over. Finally, a state may have a military and civilian bureaucracy, including legal corps, that is capable of interpreting and executing treaty obligations with respect to prisoners and that, perhaps, is motivated to do so.

44. Thus, Article 6(b) of the Constitution of the International Military Tribunal ("IMT") at Nuremberg conferred jurisdiction on the IMT over "War Crimes," including "murder or ill-treatment of prisoners of war." See Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Triubunal, available at http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm. One of the Nuremberg Trial defendants, General Wilhelm Keitel, was convicted on that charge. In its judgment, the IMT stated:

The Tribunal is of course bound by the Charter, in the definition which it gives...of war crimes....With respect to war crimes...the crimes defined by Article 6, section (b), of the Charter were already recognized as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

On the other hand, the absence of a state structure will make treaty compliance unlikely or even impossible, thus corroborating the usual view that nonstate actors lack the capacity to make treaties. This claim is readily demonstrated with respect to the multinational terrorist groups that, of late, have engaged states in international armed conflict. A multinational terrorist organization (or network) like al Qaeda is without territories or populations of its own to defend. Further, al Qaeda’s apocalyptic vision and practices leave it wholly unsusceptible to the ordinary pressures and incentives that characterize state-to-state dealings. Instead, al Qaeda is motivated by apocalyptic religious doctrines that permit or even encourage both the suicide of its own members and the mass murder of civilians. Finally, al Qaeda engages in an asymmetric form of warfare that makes a state’s military forces far less useful either offensively or defensively against it than they would be against a more traditional enemy. Given these characteristics, it would be absurd to expect al Qaeda to show respect for treaty obligations, and therefore pointless to attribute treaty-making capacity to it.

45. See OLIVIER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 56 (2004) (“Al Qaeda terrorism is totally different from that of the ‘usual’ terrorists in the Middle East and elsewhere.... With Bin Laden there is no room for negotiation. His aim is simply to destroy Babylon.”).

46. See PAUL BERMAN, TERROR AND LIBERALISM (paperback ed. 2004); ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 122 (paperback (3d) ed. 2002) (“Martyrdom is assigned the highest priority by Al Qaeda’s volunteers, who have succumbed to the psychological and spiritual influences of Islamist ideologues. Killing and dying for Allah are viewed as the highest form of sacrifice. Although other terrorist groups driven by Islamist ideology, such as Hamas, prepare its fighters to die for the cause, no other group has invested so much time and effort as Al Qaeda in programming its fighters for death.”). See generally DAVID COOK, UNDERSTANDING JIHAD 151-61 (2005); FARHAD KHOSROKHavar, SUICIDE BOMBERS: ALLAH’S NEW MARTYRS (David Macey trans., 2005).

47. “To send an army, one needs a territory and a visible target. But borders and frontiers are no longer territorial. There is no wall defending the enemy, an enemy that is more often than not too elusive to be named and targeted, an enemy who if he is shadowy is sometimes merely our shadow.” ROY, supra note 45, at 327–28.

48. Al Qaeda’s treatment of its own captives, barbaric by any standard, demonstrates how unlikely it would be to treat prisoners of war in accordance with treaty obligations, were it competent to assume them. Militants loyal to Al Qaeda leader Abu Musab al-Zarqawi abducted Nicholas Berg, a twenty-six-year-old American looking for work in Iraq, and beheaded him on video. A Saudi-based al Qaeda cell took Paul Johnson, a forty-nine-year-old American working for Lockheed Martin in Saudi Arabia, as a hostage, and beheaded him. Al Qaeda militants in Pakistan abducted and beheaded Daniel Pearl, a thirty-eight-year-old American reporter for the Wall Street Journal, who was attempting to interview them. Doug Saunders, Reviving a Symbol of Terror, GLOBE & Mail (Toronto), June 22, 2004, at A15. After Johnson’s beheading, the Al Qaeda group that claimed responsibility for his death issued a statement saying:

This act is to heal the hearts of believers in Palestine, Afghanistan, Iraq and the
These considerations underscore the critical importance of statehood (as traditionally conceived in international law) for securing the reciprocity of performance that is at the heart of any treaty-based system, including any international legal regime for the treatment of prisoners of war. Most of all, they indicate that having a government—indeed, having a functioning government—is a key factor in securing treaty performance. Because having a government is an acknowledged test of statehood, it is critical to see exactly what that test imports. As discussed in Part III below, the test is a demanding one. Indeed it is so demanding that, if strictly and neutrally applied, it would reveal many purported "states" to be states only on paper—pseudo-states rather than true states. That consequence, as we shall see, is one that, for a variety of reasons, established governments are highly reluctant to accept. But the policy considerations that underlie such reluctance, as we shall also see, should not always be determinative.

III.

On the face of it, there is little reason to think that wherever a "territory" and "population" are found, a "state" will be found also. International law undoubtedly recognizes the possibility of populated areas that are not parts of states. To begin with, the very definition of "statehood" in the Montevideo Convention explicitly allows for the possibility that the elements of statehood will be disjoined: the four tests are separate and distinct. The case law confirms that textual understanding. In Western Sahara, the United Nations General Assembly sought an advisory opinion from the International Court of Justice on the question of whether the Western Sahara at the time of Spanish colonization was a territory belonging to no one, terra nullius. The question would have had no meaning unless the Court could have

Arabian peninsula. We, by the will of God, will continue to fight the enemies of God ....This act is revenge against them and will be a lesson so that they can be sure of the fate of those who come to our country.

Paul Nussbaum, Beheadings Are a Carefully Chosen Tactic: Killers Know Americans Sensitive to Common Arab Execution, Professor Says, ACRON BEACON J., June 24, 2004, at 1.

49. Further, the problem is exacerbated with respect to jihadist individuals or cells that, while emulating al Qaeda's techniques, are not associated with al Qaeda. See generally DANIEL BENJAMIN & STEVEN SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT (2005).


found that there was a territory without a “state.” Similarly, in Legal Status of Eastern Greenland (Denmark v. Norway), 52 the Permanent Court of International Justice entertained the claim that, when Norway purported to place parts of Eastern Greenland under its sovereignty by proclamation in 1931, the relevant territory was terra nullius, rather than under Danish sovereignty. Again, the very formulation of the question presupposes that there might be a territory without a state.

If there can be populated areas without states, they will presumably be areas without governments. What, then, is a “government,” in the sense of the traditional formal tests for statehood? Some formulations have raised the bar high. A Commission of Jurists appointed by the League of Nations in 1920 to examine a dispute over the Aaland Islands considered the question of when Finland attained statehood after its civil war of 1917-1918. The Commission reported:

[F]or a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was [sic] disorganized; the authorities were not strong enough to assert themselves; civil war was rife.... It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. 53

More recently, an ad hoc Arbitration Commission (consisting of the Presidents of the Constitutional Courts of Belgium, France, Germany, Italy, and Spain), established by the European Community-sponsored Conference on Yugoslavia, opined that the Socialist Federation of the Republic of Yugoslavia (SFRY) had dissolved as a state on the grounds that “in the case of a federal-type State...the existence of the State implies that the federal organs represent the components of the

Federation and wield effective power,”54 and that the essential organs of the SFRY “no longer meet th[os]e criteria.”55

Judged by the test used in these opinions, many territories throughout the world might well be considered “stateless.” Yet the international community has generally been highly reluctant to acknowledge that states have dissolved and that territories have passed into, or returned to, a condition of statelessness. The issue has arisen with some frequency in connection with the legality of the use of outside force, e.g., in Haiti, the Ivory Coast, Liberia, Yugoslavia, and Somalia. Thus, the United Nations apparently was unsure how exactly to characterize the situation created by clan and factional strife in Somalia in the early 1990s.56 Faced with desperate humanitarian conditions in that country, the Secretary-General urged a military intervention pursuant to Article 39 of the United Nations Charter to assist the previously authorized United Nations humanitarian relief effort in Somalia (UNOSOM),57 stating in a November 29, 1992, letter that “no government exist[ed] in Somalia that could request and allow such use of force.”58 In Security Council Resolution 794, paragraphs 7–8 (1992), the Security Council endorsed the Secretary-General’s recommendation and welcomed the United States’ offer to lead an armed intervention. The Council’s action might well have been problematic under Article 2(7) of the Charter, which states that the Charter does not authorize the United Nations “to intervene in matters which are essentially within the domestic jurisdiction of any state”—that is, it might have seemed problematic if Somalia had still been considered to be a state.59 The Secretary-General’s letter would have afforded the Council a solid basis on which to conclude that Somalia was not, at least for the time being, a state, thus obviating the legal difficulty. Yet Resolution 794 did not venture to recognize the actual condition of affairs in Somalia: the Council referred cryptically to “the unique character of the present situation in Somalia” and “its deteriorating, complex and extraordinary nature, requiring an immediate and exceptional response.”

Why should the international community be reluctant to acknowledge such facts as that no government existed in 1992 in Somalia, that there was no immediate prospect of the restoration of government there, that

55. Id. at 1496.
the territory called Somalia was therefore (empirically) stateless, and
that the usual legal inhibitions against outside military intervention did
not apply? What accounts for such conservatism? Why maintain the
fiction of statehood in the face of facts that obviously contradict it? Or
(to borrow Stephen Krasner’s illuminating distinctions), why do
"Westphalian sovereignty" (i.e., the right to be free from external
intervention) and—more frequently—"international legal sovereignty"
(the international recognition of formal juridical independence) attach to
states so tenaciously (once they have attached at all), even when
"domestic sovereignty" (the effective exercise of power within a
territory by an established structure of authority) is obviously
disappearing or has disappeared?

At least five reasons can be given. First, the logic of state
derecognition might carry terrifying consequences: it could threaten to
disestablish too many existing states—or what commonly pass for states—and thus undermine the international order that depends on
statehood as its organizing principle. If Somalia is deemed to be
stateless, then why not also Afghanistan, Angola, Burundi, the
Democratic Republic of the Congo, Liberia, Sierra Leone, or the
Sudan? In effect, the international community may fear that the
derecognition of a particular failed state—i.e., the withdrawal of the
recognition of its international legal sovereignty—risks "domino"
effects, leading to the derecognition of other states, and thus weakening

60. Jeffrey Herbst presses the question:
The tendency [of states] to fail within the straitjacket of existing boundaries poses
extraordinary problems for a world still concerned with the sovereign rights of states....
For instance, even though it was obvious to all concerned that Somalia had collapsed by
December 1992 when the U.S./UN intervention force was being planned, no one
seriously considered trusteeship or other legal concepts other than continuing the fiction
that Somalia was still a sovereign nation-state.

61. “Political leaders have neglected the collapse of the state across the world. Yet it is a fact
that hundreds of millions of people are living in conditions of semi-anarchy. In much of Africa,
parts of post-communist Russia, in Afghanistan and Pakistan, in Latin American countries such as
Colombia and Haiti and in regions of Europe such as Bosnia and Kosovo, Chechnya and Albania,
there is nothing resembling an effective modern state.” JOHN GRAY, AL QAEDA AND WHAT IT
MEANS TO BE MODERN 73 (2003).

62. See KRASNER, supra note 3, at 4. Krasner notes that violations of Westphalian
sovereignty are more frequent than are those of international legal sovereignty. See id. at 7, 25,
70–71, 220, 229.

63. These, together with Somalia, can be considered the paradigmatic “failed states” of the
1990s. See Robert I. Rotberg, The Failure and Collapse of Nation-States: Breakdown,
Prevention, and Repair, in WHEN STATES FAIL, supra note 10, at 11.
the (fictitious, but arguably salutory) conception that the entire globe is and should be divided up into nation-states.  

Second, as a practical matter, derecognition would force the issue of what is to be done with a now-stateless territory and population. Here the problem of providing international public goods resurfaces. Rich and powerful states simply may not want to take responsibility for intervening in impoverished, conflict-torn areas like Somalia (especially when those areas lie outside regions of greatest strategic importance to them); still less may want to assume thereafter the burdens of pacifying and administering those areas.  

“Humanitarian intervention” and “nation-building” will often be (or appear to be) non-cost-justified. Preserving the legal fiction of statehood can serve to justify a policy of nonintervention that was arrived at for other, less readily avowable, reasons.  

Third, international derecognition of states on the grounds that they are without functioning governments (and show no prospect of having one in the near future) may make internal conditions in those territories even worse. So long as a pretense of statehood can reasonably be kept up, there might be hope that functioning government can be restored. Moreover, if a state has disappeared, it is arguable that the obligations it

64. Robert Jackson has pointed out the potential consequences of eliminating the fiction of statehood. Observing that the international boundaries of many of the “states” that emerged from decolonization do not reflect the distribution of indigenous peoples, he argues that if the international community were to support the claims of those peoples to self-determination:  

[M]ost existing Third World states would crumble into far smaller particularisms. These entities might be more coherent domestically than existing quasi-states and there probably would be fewer civil conflicts. However, they would fragment existing international society into a far greater number of jurisdictions than exist now. Instead of fifty states, Africa would contain more than ten or twenty times as many.... This would be an unmanageable number and would expose the continent to far greater risks of external control than it faces at present.  

JACKSON, supra note 2, at 42.  


has incurred under human rights treaties will have lapsed. That, in turn, may worsen conditions for the local population, in that the power-holders who persecute or oppress them may no longer be subject to international legal liability for their acts.

Fourth, the legal concept of statehood, and the canonical tests for applying it, are by no means clear-cut or hard-edged. There may be substantial and legitimate reasons to disagree whether statehood in a given territory has in fact disappeared. Such disputes could engender conflicts between strong states, especially if the territories in question were situated in regions of "Great State" strategic rivalry. Rather than multiplying the occasions for such inter-state conflict, the international legal system may seek to suppress them.

Fifth, if a state is deemed to no longer exist, treaty relationships with that state will be disrupted, perhaps without possibility of repair. It might be wiser to espouse the conservative legal policy of maintaining stable treaty relationships—even if they are purely fictitious—in the hope that they may be resumed at a later time. There is no doubt that the international community places a premium on the continuity of treaty relationships, even in circumstances in which a state has undergone revolutionary constitutional changes. Moreover, maintaining the fiction of state continuity would avoid (or at least postpone) other complicated legal and diplomatic questions, such as the status of embassies, the ownership of state assets, liability for debts and other claims, and so on.

The State Department Legal Adviser during George W. Bush’s first term, William H. Taft IV, relied on several of these policy

67. Similar reasons of conflict-avoidance led the Great Powers of the 19th century to maintain the increasingly threadbare fictions of the statehood of the Ottoman and Chinese empires.

68. Of course, treaty relations may (and usually do) survive a change of government. See, e.g., J.L. Briery, The Law of Nations 144-45 (6th ed. 1963); 2 Marjorie M. Whiteman, Digest of International Law 771–73 (1963); Eleanor C. McDowell, Contemporary Practice of the United States Relating to International Law, 71 AM. J. INT’L L. 337 (1977). Moreover, maintaining the fiction of state continuity would avoid (or at least postpone) other complicated legal and diplomatic questions, such as the status of embassies, the ownership of state assets, liability for debts and other claims, and so on.

considerations in his January 11, 2002, memorandum to one of the authors, which was recently published (after, apparently, being leaked) on the website of the New Yorker magazine. The former Legal Adviser argued that if Afghanistan were determined to be a “failed state”—so that it was no longer to be considered a party to the Third Geneva Convention—then it would follow that:

Afghanistan would also not be a party to any other treaty that was open only to States. It would have no obligations vis-à-vis the United States under the Nuclear Non-Proliferation Treaty; it would not be a member of the IMF or World Bank for purposes of finance or assistance; it would ceased [sic] to be a member of the United Nations and no longer have obligations under the Charter....

Numerous other questions would arise...e.g., diplomatic relations and the status of our Embassy, ownership of assets, liability for claims, loans and debts, and so forth....

If the United States is precluded from maintaining mutual treaty obligations with a “failed State,” this would have far-reaching implications for the conduct of U.S. foreign policy toward other States with questionable governing regimes....

Far from arguing that “failed States” should no longer be participants in treaty regimes, the literature views the continued application of treaty regimes as particularly important with respect to failed States, to ensure protection of the population.

Some, but not all, of the reasons we have identified for maintaining the fiction of statehood can be found here. The first two of the Legal Adviser’s arguments rely on the policy of maintaining the fiction of statehood for the sake of preserving treaty relationships and avoiding various legal or diplomatic complications. The Legal Adviser’s third argument reflects the State Department’s concern not to disturb relations with what it calls “questionable governing regimes.” This appears to be a form of the “domino theory” mentioned above. The

70. See Memorandum from William H. Taft IV, Legal Adviser, to John C. Yoo, Deputy Assistant Attorney General, Office of the Legal Counsel, United States Department of Justice, Re: Your Draft Memorandum of January 9 (Jan. 11, 2002). Mr. Taft’s two-page letter is accompanied by a memorandum, stamped “Draft,” prepared by him or his Office. We shall refer to the attachment as the “Taft Draft.”

71. Id. at 5 n.3.
fourth argument, in effect, makes the claim that derecognition of statehood may make internal conditions worse.

The Legal Adviser's memorandum serves to reveal, if imperfectly, the characteristic motives of foreign ministries in refusing to apply, in a realistic way, the tests of statehood ordinarily applied in the context of initial recognition—especially the test of effective power—to determine the continuity of putative "states." We consider next whether the policy of maintaining the fiction of statehood is always justified.

IV.

When one surveys the practice of the United States in recognizing, not recognizing, or derecognizing states, it is obvious that our Government does not apply the Montevideo Convention tests of statehood in a value-neutral manner. On the contrary, our governmental practice reveals that the decision whether or not to recognize or derecognize a state is highly policy-laden. Consider the following examples of U.S. recognition/nonrecognition/derecognition practice.

Instances of refusal to derecognize a nonexistent state. The United States refused to recognize the disappearance of the state of Kuwait, despite its occupation and purported annexation by Iraq in 1990. Likewise, the United States did not recognize the extinction of the Baltic states—Estonia, Latvia, and Lithuania—after their occupation by and incorporation into the Soviet Union in 1939.

Instances of recognition of false states. The United States recognized the statehood of Guinea-Bissau, despite the fact that it was unable to satisfy all the normal tests of statehood. As a consequence of concessions made at the Yalta Conference, the United States recognized the statehood of two Soviet "republics," Ukraine and Byelorussia, despite their indisputable lack of independence in foreign affairs.

Instances of nonrecognition of "de facto" states. Under the "Stimson Doctrine," the United States refused to recognize the statehood of Manchukuo after the Japanese conquest of Manchuria from 1931 to 1932. Following Security Council Resolution 217, the United States also refused to recognize the statehood of Southern Rhodesia. Again

73. See MALANCZUK, supra note 40, at 79.
74. See CRAWFORD, supra note 33, at 132-33.
75. See WHITEMAN, supra note 69, at 1145.
following the Security Council, the United States refuses to recognize the statehood of the Turkish Republic of Northern Cyprus.

If the Montevideo Convention tests of legal "statehood" had been applied in a purely neutral, factual manner, most or all of these outcomes would likely have been reversed. Kuwait (arguably), Estonia, Latvia, Lithuania, Guinea-Bissau, the Ukraine, and Byelorussia did not, in fact, meet the tests of statehood at the relevant times. On the other hand, Manchukuo (arguably), Southern Rhodesia, and Turkish Cyprus did, in fact, meet those tests.

Factual application of the canonical tests for legal "statehood" was also subordinated to policy considerations in the case of the emergence of new claimants to statehood from the former Socialist Federal Republic of Yugoslavia. In a September 1991 speech before the Conference on Security and Cooperation in Europe, Secretary of State James Baker outlined five principles, in addition to the standard criteria for statehood, that the claimants would have to meet before being recognized as states by the United States. The Ministers of the European Community Member States also issued a Declaration in December, 1991, outlining "guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union." Like the United States' criteria for recognition, these guidelines too departed from the canonical tests for "statehood."

In each of these instances, valid policy reasons supported the United States' decision whether or not to recognize a putative state. The United States' normal policy is to reject illegal conquests of territory and to support the self-determination of peoples: hence recognition was denied to the Iraqi annexation of Kuwait or the Soviet annexation of the Baltic states. For similar reasons, we refused to recognize the statehood of

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78. The temporary ineffectiveness of a government owing to civil war or belligerent occupation "is not inconsistent with the continued existence of the state." 1 OPPENHEIM'S INTERNATIONAL LAW 120, 122 (Sir Robert Jennings et al. eds., 9th ed. 1992). Hence, the hiatus marked by the Iraqi occupation did not necessarily entail the disappearance of the Kuwaiti state. It would be much harder to argue that the Soviet occupation of the Baltic states from 1939 onwards fell into that exception, however.
79. See Yugoslavia: Trying to End the Violence, 2 FOREIGN POL'Y BULL., Nov.-Dec. 1991, at 39, 42. The principles were: (1) peaceful and democratic determination of the country's future; (2) respect for existing borders; (3) support for democracy and the rule of law; (4) safeguarding of human and minority rights; (5) respect for international law and obligations.
Manchukuo, the offspring of Japan’s conquest of Manchuria, or that of the Turkish Republic of Cyprus, the offspring of Turkey’s armed intervention in Cyprus. We also oppose illegal revolutions by minority settler groups: hence, no recognition was given to the statehood of Southern Rhodesia. We needed the Soviet Union’s support in the war against the Axis: hence we agreed to recognize the statehood of Ukraine and Byelorussia. And we hope and expect that the Balkans will not revert to ethnic conflict and undemocratic rule: hence the conditions for recognizing new claims to statehood in that region.

If, however, initial recognition of statehood is policy-laden and frequently rests on normative or even political considerations, why should the same not be true when the United States confronts the question of whether one of its treaty partners is highly likely to be unable or unwilling to perform its treaty obligations because of the nonfunctioning, or malfunctioning, of its nominal government? To be sure, as we have seen, even in such cases there may be significant policy reasons for the conservative policy of maintaining that statehood (and international legal sovereignty along with it) survives. But there may also be countervailing policy interests or conflicting values and norms. Derecognition of statehood is as much a policy question as recognition.

Here it is important to underscore the distinction between initial recognition of a state and derecognition of a purportedly continuing state. The Montevideo Convention’s tests for statehood are framed in general terms, and could readily apply to both situations. Nevertheless, it is usually taken for granted that the tests for initial recognition of statehood do not carry over, or in any case should not carry over, into the context of state derecognition. But the question can hardly be regarded as settled.8

8. See MAREK, supra note 69, at 7 (“Customary international law does not supply any definite criterion for determining when States cease to exist....While there is a large measure of agreement among writers concerning the birth of a State, this is not so with regard to its extinction, which is not even examined at any great length.”).

82. See CRAWFORD, supra note 33, at 415.
It did not arise in a world which had seen massive decolonization after the Second World War and, with that, the emergence of a "new sovereignty game" that attributes juridical independence to highly fragile quasi-states. Nor did the presumption arise in a world in which internal implosion, rather than external conquest, was the most frequent cause of state disintegration.

It might be argued (as, we think, the former Legal Adviser’s memorandum does) that the concept of sovereignty bars treating state derecognition as a matter of governmental change, even when the change does not consist in a political revolution but in the general collapse of a functioning government of any kind. On this view, the canonical tests for statehood apply only in the context of initial recognition of new states, but not in the context of state continuity or state derecognition.

From this approach there emerges an extraordinarily thin account of continuing statehood. In order to remain a "state," an entity must, perhaps, continue to have a territory and a population (although even those minimal tests were not satisfied by the Cold War-era Baltic "states"). But the entity need not any longer have an effective or functioning government; it seems to suffice merely that it has had one. Even the complete or near-complete collapse of governmental functions, as in Somalia, will not spell the end of "statehood." Nor must the entity have, or even be capable of having, relationships with other states. In effect, the criteria for remaining a "state" (except where the state has been merged or dismembered) come down to one: once having

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83. See Jackson, supra note 2, at 39–49 (discussing the differences between the pre-War "old sovereignty game" and the "new sovereignty game" of the post-colonial period); id. at 74–78 (discussing the post-War "eclipse" of "empirical statehood" as the basis for ascribing sovereignty to "states" of the Third World).

84. Of course, the argument presupposes (as we do also) a distinction between "states" and "governments." At least one eminent scholar, however, has queried that distinction. According to D.P. O'Connell, the question of government identity and state identity were assimilated until the middle of the 19th century when, with the emergence of the "post-Hegelian" concept of sovereignty, "a conceptual chasm was opened between change of sovereignty and change of government." D.P. O'Connell, State Succession in Municipal Law and International Law 5–6 (1967). O'Connell himself sought to "maximize the extent to which treaty obligations and the like are legally transmitted from one State to its successor," Crawford, supra note 33, at 29, and accordingly argued for a return to the 18th-century practice of conflating governments and states. Crawford, albeit having a similar objective, argued to the contrary that it was better secured by maintaining the later practice of distinguishing the two entities. Id. As we shall see, however, the stability of legal relationships between states is only one policy objective among several that may be relevant to the issue of state derecognition.
been a state. It appears that, in operation, mere possession of a seat in the United Nations General Assembly suffices to establish the legal and diplomatic claims to continuing statehood. If the recognition of international legal sovereignty is like "a ticket of general admission to the international arena," then once the ticket is granted, the ticket-holder cannot be ejected from the arena, no matter how badly he behaves.

Apart from its extreme formalism and its indifference to the realities of the international environment, this "thin" theory of statehood discounts any policy or normative concerns other than those on which it rests. Of particular relevance here, it precludes any assessment of the likelihood that the "state" whose current status is in question can not and will not reciprocate performance of treaties. For example, in considering whether Afghanistan under the Taliban remained a "state" for purposes of treaty relationships, the President might not consider it important that if he concluded that Afghanistan was no longer a party to the Third Geneva Convention, his decision would imply that Afghanistan should no longer be regarded as a party to the Nuclear Non-Proliferation Treaty (to use the State Department's example). What likelihood, after all, was there that the Taliban would fulfill their obligations under the Non-Proliferation Treaty, whether or not the United States held Afghanistan bound to it? (Indeed, what likelihood was there that the Taliban would meet Geneva standards in its treatment of U.S. prisoners?) Balancing the policy consequences, the President would perhaps consider it more significant that if the United States were no longer bound to observe the Third Geneva Convention towards Afghanistan, the United States military would not labor under that Convention's extremely narrow restrictions when interrogating captured Taliban militia.

Alternative accounts of continuing (or lapsed) statehood would be considerably richer, as well as more realistic, than the formalistic theory


86. Even Crawford, a supporter of a very formalistic account of state continuity, acknowledges that "in many of the marginal cases, as well as in cases of States re-established after illegal occupation, notions of continuity contain a distinct element of legal fiction." Crawford, supra note 33, at 400. Nonetheless, he maintains that "there has been no general tendency to deal with the problems in a functional way." Id. at 401. This Article is an attempt to explore functionalist alternatives.

just outlined. Moreover, they can be framed to take account of the full range of normative and other considerations that should figure in the context of a derecognition decision—as they do in initial recognition decisions, or in other foreign policy contexts. Apart from anything else, the threat of derecognition could provide a useful diplomatic tool. “Rulers have almost universally desired international legal sovereignty,” as Krasner points out.\(^8\) There are many reasons for that desire: recognition can bring with it a greater ability to provide for the welfare of the population that \textit{de facto} rulers govern; a reduction of the risk of external intervention; the possibility of entering into treaty relationships with other states; more settled borders; expanded opportunities for trade; enhanced domestic legitimacy; legal protections for members of the population abroad; and other benefits. Policymakers in strong, established states can play on the desire of power-holders in pseudo-states or failed or failing states to retain their “state’s” international legal sovereignty and the benefits that it brings. Raising the threat of state derecognition may enable these policy makers to promote a variety of diplomatic objectives in their dealings with pseudo-states and failed or failing states—including, e.g., greater protection of the human rights of women, ethnic minorities or prisoners in such “states.” The possibility of state derecognition should therefore not be ruled out on questionable legal grounds; rather, it should be considered a possible, if risky, element of a strong state’s diplomatic repertoire.

To that end, a variety of alternative legal tests for establishing statehood can be imagined. We shall outline three such alternatives, of increasing thickness and depth.

(1) One very modest account might simply apply the same four canonical tests of statehood—including the demanding “effective power” test for having a government—in the context of derecognition of statehood as well as in that of initial recognition.\(^9\)

(2) A somewhat richer account would permit outside states to evaluate, from a legal and normative perspective, conditions within a purported “state” in determining whether the latter should still be

\(^{88}\) Krasner, supra note 3, at 25.

\(^{89}\) Marek criticizes this approach on the ground that it “leads nowhere. A State—it is said—ceases to exist when its legal order (or ‘government’ as is sometimes said) ceases to exist. But this is precisely the question: \textit{when} does the legal order cease to exist?” Marek, supra note 69, at 7. This criticism has force if the “legal order” upon whose existence that of the state is contingent is equated with \textit{sovereignty}. But on a functionalist approach, a government ceases to exist if it ceases to have effective control over its territory and has no prospect of regaining such control. There is no conceptual impossibility (although there are empirical issues) in applying such a test.
deemed a "state." Under such an approach, it could be relevant to a determination of continuing statehood whether conditions of anarchy, civil war, or prolonged and intensely violent factional strife (with no end in sight) prevailed in the "state’s" territory; whether the nominal "government" was in a position to provide basic services to the population, including police and courts; or how severe and widespread human rights violations were within the "state’s" territory.

(3) A still more overtly normative or policy-laden account of statehood would focus primarily on whether the impersonal, nationwide political institutions characteristic of a modern state were found, in functioning order, in the putative "state." In many existing "states," local populations are subject to personal, clan, or tribal rule. Such populations may be held down by a personal leader supported by a small, closely linked clique (like Saddam Hussein and his associates from Tikrit) or by a tribal or ethnic faction (like the Pashtuns in Taliban Afghanistan). Territory-wide political institutions are weak or nonexistent. Loyalties run on a personal basis to tribal chiefs, sheiks, or warlords, rather than to impersonal governmental institutions. If there is anything here akin to "national" governmental power, it is not exercised by the state as a corporate legal personality, but by para-political bodies such as the Iraqi Ba’athist Party, the Taliban, or the Saudi royal family. The defeat or overthrow of the “national” leader or clique would typically result in the complete disintegration of the régime; but it would also call into question whether the territory and population subject to that leader or clique would remain unified.

"States" such as these will, we predict, be highly unlikely to perform their treaty obligations (at least as far as they concern the conduct of war). For example, the rulers of such “states” have little reason to care about the fates of their own captured soldiers. (Still less do they have reason to care about the humane treatment of captured American or other foreign soldiers.) Such rulers also will be unresponsive to

90. See Yoram Dinstein, The Thirteenth Waldemar A. Solf Lecture in International Law, 166 MIL. L. REV. 93, 103 (2000) (identifying the disappearance of a "central government" as a key determinant of state failure: "All that remains is a multiplicity of groups of irregular combatants fighting each other.").


93. To illustrate: during the 1980–1988 war between Iran and Iraq—both parties to the Third Geneva Convention—the International Committee of the Red Cross (ICRC) encountered repeated obstacles to monitoring the belligerents’ compliance with that treaty. So severe were these
domestic public opinion because they seek to terrorize rather than persuade their subjects. And even if they are aware of foreign public opinion, they will give it little weight. Their interest in participating lawfully in the comity of nations is, effectively, nil. If they had a will to carry out treaty terms or other international legal norms, they would often be unable to overcome local or tribal resistance to doing so.

We are not advocating here the adoption of any one of these approaches to the issue of determining continuing statehood; they answer our purpose if they provide useful and illuminating analytical constructs. They are intended to shed light on the possibility of a fuller, deeper, better-informed policy evaluation of the choice between recognition and derecognition of the continuing statehood of a treaty party.

In any event, the policy bases for the older, traditional presumption need to be resurfaced and tested; they may no longer be valid, at least in all cases. A more functionalist account of state continuity would serve substantial policy goals. In particular, we suggest that there may be a close relationship between the presence/absence of statehood, as determined by these accounts, and the willingness/unwillingness to reciprocate treaty performance.

V.

We conclude by examining how the status of a putative state party to the Third Geneva Convention—Afghanistan under the Taliban—might have been determined using the alternative accounts of continuing "statehood" that we have just categorized. We shall assume that United States policymakers would have a particular interest in the likelihood of reciprocal performance of that treaty by that enemy.

At the outbreak of the conflict between the United States and Afghanistan, the Taliban régime had consolidated its control over
approximately 90% of the country. Although civil war was still raging, the Taliban government was not faced with ouster from power by its domestic enemies. After seizing control of Qandahar city and province in late 1994, the Taliban—a religious group of ethnic Pashtuns whose leaders were drawn from the rigorous Deobandi movement—captured Kabul in September 1996, and extended its control over virtually all of the country by 1998. With substantial assistance from Pakistan, the Taliban sought to "reconstruct a centralized state" in Afghanistan over the ruins of war and factional strife going back to the Soviet invasion of 1979. The Taliban attempted to transform its movement into a state structure, the Islamic Emirate of Afghanistan (the IEA). The IEA appointed provincial governors and administrators and established a nationwide judiciary of shari'a courts. Although the object of general opprobrium internationally (the State Department described it as "a pariah in the international community"), the Taliban government was recognized by three other governments: Pakistan, Saudi Arabia, and the United Arab Emirates. On a favorable view of these facts, Afghanistan could probably have been counted as a "state" under the first of the three approaches considered above.

Other aspects of the Afghan situation, however, would have pointed to a different conclusion. One scholar, Ahmed Rashid, wrote that Afghanistan had:

[c]eased to exist as a viable state.... Complex relationships of power and authority built up over centuries have broken down completely. No single group or leader has the legitimacy to reunite the country. Rather than a national identity or kinship-tribal-based identities, territorial regional identities have become paramount.... [T]he Taliban refuse to define the Afghan state they want to constitute and rule over, largely because they have no idea what they want. The lack of a central authority, state organizations, a methodology for command and control and mechanisms which can reflect some level of popular participation...make it impossible for many Afghans to accept

95. Dep't of State, The Taliban's Betrayal of the Afghan People (Oct. 17, 2001), http://usinfo.state.gov/is/Archive_Index/The_Talibans_Betrayal_of_the_Afghan_People.html.
the Taliban or for the outside world to recognize a Taliban government. 97

Other informed observers painted similar pictures. 98 Francis Fukuyama, for instance, writes:

Afghanistan never had a modern state. Under the monarchy that existed up to the beginning of its political troubles in the 1970s, it largely remained a tribal confederation with minimal state penetration outside of the capital Kabul. The subsequent years of communist misrule and civil war eliminated everything that was left of that already weak state. State-building after the ouster of the Taliban had to begin from the ground up.... 99

Moreover, even if the Taliban "brought some order and stability to the areas under their control which had been ravaged by warlords and bandits," 100 the movement also brought about:

the virtual enslavement and sequestration of women and crushing of all opposition to the Taliban's super-rigorous, pretended Sunni Muslim, laws and protocols of conduct. Transgressors suffered the harshest punishments systematically inflicted since the Europe of the Middle Ages and the Inquisition. There were: beatings or floggings for violations of dress codes for men or women or of prescribed beard lengths or shapes for men; amputations of hands and feet for theft; stoning to death for adultery; burial alive for sodomy—punishments carried out in public. 101

Based on these and other sources, it would have been reasonable to conclude, at least under the second and third approaches identified in the last section (and arguably under the first), that Afghanistan was no longer a nation-state, and was neither willing nor, perhaps, able to perform its Geneva Convention obligations.

Afghanistan's record of atrocities in violation of the laws of war in prior conflicts, coupled with its general disregard for international legal

97. AHMED RASHID, TALIBAN: MILITANT ISLAM, OIL & FUNDAMENTALISM IN CENTRAL ASIA 207-08, 212-13 (2001).
98. See, e.g., GOODSON, supra note 92, at 103-04, 115; RUBIN, supra note 94, at xi.
101. Id. at 171 (quoting JOHN K. COOLEY, UNHOLY WARS: AFGHANISTAN, AMERICA AND INTERNATIONAL TERRORISM 3-5 (1999)).
obligations, would have bolstered the conclusion that as a nonstate actor it was unlikely to respect the Geneva rights of any U.S. captives it took. For example, the State Department reported that in August 2000 the Taliban had "execute[d] POWs in the streets of [Herat] as a lesson to the local population."102 The Taliban had also consistently refused to comply with Security Council resolutions, including Security Resolution 1333103 and Security Resolution 1267,104 which had called on it to surrender Osama bin Laden.

Based on this brief analysis, we offer three conclusions. First, we think that it would have been reasonable for the United States (through the President) to have found at the start of the Afghan campaign that Afghanistan no longer satisfied the necessary conditions for continuing statehood (on at least two plausible approaches to that question), and was unlikely to satisfy those conditions in the foreseeable future; second, that on that basis, the President could have concluded that the Third Geneva Convention was no longer in effect as between the United States and Afghanistan; and third, based on both its lack of statehood and its past record in armed conflicts, Afghanistan under the Taliban was also unlikely to reciprocate U.S. performance of Geneva standards.

CONCLUSION

The nation-state remains, and for the foreseeable future should remain, the organizational unit of the international system. It alone seems capable, at this point in human history, of providing for the welfare of the world's population, of establishing human rights, and of maintaining peace and security both internally and externally. No viable alternative appears on the horizon.

While substitutes for the nation-state (e.g., protectorates, trusteeships, colonies) might eventually prove to be appropriate for some parts of the world, the general policy of attempting to maintain nation-states where they exist, and of restoring them where they are failing or have failed, seems to be sound. Ultimately the test is whether that policy best secures the provision of international public goods such as peace, order, trade, and the enforcement of human rights. The United States under the Bush Administration has pursued that policy in places such as

102. Dep't of State, Al Qaeda and Taliban Atrocities (Nov. 22, 2001), available at http://usinfo.state.gov/is/Archive_Index/Al_Qaeda_and_Taliban_Atrocities.html.
Afghanistan, Iraq, and the Balkans. In specific circumstances, however, the broad strategic objective of upholding the nation-state can be advanced by methods that may initially appear inimical to the idea of statehood.

The Bush Administration did not base its final decision regarding the treatment of Taliban captives in the Afghan War on the grounds that Afghanistan had lost its statehood and juridical independence under international law, but on narrower, more specific, grounds. Nonetheless, the internal debate within the Administration reflected a preoccupation, common to all participants, with upholding the centrality of the nation-state in the international system. There can be, and there in fact was, a reasonable disagreement over the consequences of state derecognition for the international system. One side drew attention to the potentially disruptive consequences of derecognition for the global system of nation-states; the other side focused on the power and utility of this admittedly unusual diplomatic tool.

Whatever the merits of that particular debate, the legal and diplomatic problems that failed states and pseudo-states cause for the international system remain and seem likely to grow worse. In those circumstances, we believe that the possibility of derecognizing a state must be considered a viable policy option. A more functionalist and less tradition-bound approach to state derecognition might, for all its novelty, best serve the emerging needs of the international order.