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2012

### What Makes a States: Territory

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## WHAT MAKES A STATE? TERRITORY

*By Paul R. Williams\**

What makes a state? Under the Montevideo Convention, a prospective state must meet four criteria. It must have a territory, with a permanent population, subject to the control of a government, and the capacity to conduct international relations (sovereignty). Of these requirements, territory presents the major obstacle. Although the world has no shortage of groups seeking independence (who would gladly form governments and relations with other states), it does have a shortage of real estate. A new state necessarily takes territory from an existing state.

Since existing states make international law, it is no surprise that the law is designed to make it very difficult for a new state to form out of an existing state's territory. Territorial integrity, along with sovereignty and political independence, form the "triumvirate of rights" that states enjoy under international law. From these rights, the notion has emerged that new states can only be formed with the consent of the existing state where the territory lies.

The triumvirate of rights has long been the standard lens through which the international community views self-determination and the creation of new states. It has become increasingly clear, however, that rigid adherence to these principles can lengthen conflict and create negative incentives. If consent is required and not forthcoming from the state—and it usually is not— independence groups are forced onto the path of obtaining consent by force. States, meanwhile, feel secure in their territorial integrity, which more often than not puts them on the path of the violent suppression of independence movements.

This cycle feeds upon itself, with devastating consequences. Too often, states respond to independence movements with atrocities, as in Sri Lanka, in Sudan—first Darfur and now South Kordofan and Blue Nile States—in Burma, and now in Syria. In the former Yugoslavia, the international community's rigid adherence to traditional notions of state creation wasted precious time and allowed momentum for genocide to build.

In reality, international law's elaborate framework for self-determination and statehood provides independence-seeking groups with only two options. They can fight their way out, as South Sudan did, and obtain "consent" at gunpoint. Alternatively, they can suffer so many human rights violations that democratic states are forced by their constituents to intervene and essentially extract the new state from the predecessor state, as with the case of Kosovo. Either way, the likely result is more violence.

As scholars and practitioners of international law, our efforts to deal with this problem are clouded by a false notion of consent. Although genuine consent exists in some rare cases, as in Czechoslovakia, most of the time "consent" is a misnomer because it occurs at gunpoint. Consent for the independence of South Sudan cost millions of lives and decades of war. In Northern Ireland, consent was achieved only after a long, bloody terrorism campaign. In Bougainville, consent was extracted only after a decades-long conflict.

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Now for the good news: recent developments in international law are providing new pathways for the international community to conceptualize and manage self-determination and the creation of states.

First, under the responsibility to protect (R2P) doctrine, sovereignty is no longer absolute. Rather than only imparting rights, “sovereignty” imposes the duty on states to protect their populations. If states cannot or will not fulfill this duty, then the responsibility to protect the population shifts to the international community, which may respond by assisting failed states or confronting criminal ones.

Second, the International Criminal Court provides a legal framework for determining when states and their leaders have overstepped their legitimacy. The ICC makes it more difficult for the international community to accommodate and appease states that brutalize their citizens in an effort to deny them the right of self-determination. It also de-legitimizes the need for consent from the originating state. Should we really be asking Sudanese President Bashir, a man indicted for genocide against the people of Darfur, whether he consents to internal or external self-determination for Darfur?

This brings us to the remaining obstacle: international law’s rigid notion of consent. State leaders insist that under the principle of sovereignty, consent must come from the state. As lawyers, we have an obligation not to hold quite so tightly to sovereignty. Instead, our focus should be on creating a concept of consent that mirrors reality.

Earned sovereignty—the process by which an aspiring state is brought into full statehood in close cooperation with the international community—provides a more realistic picture of how consent emerges. Earned sovereignty gives aspiring states the opportunity to prove that they can become responsible members of the international community, protect their own minority populations, and govern in a democratic fashion. In its essence, earned sovereignty is achieved through a combination of the assessment of the will of the people, international engagement/supervision, conditionality, and the phased transfer of sovereign rights and responsibilities.

Under an earned sovereignty approach, international law focuses not on territorial integrity, but on a graduated version of sovereignty. Consent is no longer a function of a parent state’s acquiescence, but rather recognition from the international community. The requirement of consent is moved from the first criterion of territory to the fourth criterion of acquiescence of the international community. R2P, the ICC, and the approach of earned sovereignty open the path for a more peaceful resolution of self-determination-based conflicts, and should not be overlooked by the key democratic forces in the international community.