Ships of State and Empty Vessels: Critical Reflections on ‘Territorial Status in International Law’†

Alex Green*†

Abstract—In his recent monograph, *Territorial Status in International Law*, Jure Vidmar offers ‘a new theory of statehood’ that consolidates his existing work and departs in important ways from legal orthodoxy. As a work of doctrinal law, the text is rigorous; however, its theoretical contribution is somewhat unclear. Vidmar’s central theoretical claim—that the status of individual states is established by discrete norms of customary international law—adds very little to his doctrinal argument. By examining his position, this review article examines what it might mean to provide helpful ‘theories of statehood’. It begins by framing the theoretical challenge posed by such work before setting out some desiderata for theoretical success in this area. Finally, it sketches out a general approach, grounded in Hannah Arendt’s conception of power, which offers a promising means for moving beyond doctrinal description within ‘reconstructive’ international legal theory.

Keywords: statehood, territory, state creation, legal philosophy, political theory

1. Introduction

States are among the most powerful subjects of international law, not only in terms of their economic, military, political and social capacities, but also insofar as that legal order characteristically grants them a broad range of important immunities, liberties, powers and rights.¹ These include, for example, the right to political independence,² permanent sovereignty over natural resources³ and immunity from compulsory jurisdiction before international courts and tribunals.⁴

© The Author(s) 2024. Published by Oxford University Press. This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial License (https://creativecommons.org/licenses/by-nc/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited. For commercial re-use, please contact reprints@oup.com for reprints and translation rights for reprints. All other permissions can be obtained through our RightsLink service via the Permissions link on the article page on our site—for further information please contact journals.permissions@oup.com.

Moreover, for those who consider states to be necessarily territorial entities, their existence is intertwined with the presence of legally delineated physical spaces, in terms of which that existence must be identified and explained. Despite the centrality of both statehood and territory within doctrinal law, questions concerning their nature are some of the more complex and controversial within international legal theory. In his new book, Territorial Status in International Law, Jure Vidmar grapples with this complexity, seeking ‘a new theory of statehood’ by conducting an international legal analysis of territory in general.

Vidmar makes this offering within an increasingly crowded field. There is a huge quantity of doctrinal and theoretical work on both statehood and territory, encompassing legal scholarship, political philosophy and the history of international relations, as well as interdisciplinary contributions across these fields. Given this, it is somewhat odd that Vidmar claims there to be a ‘paucity’ of legal work on the nature of statehood. There are nonetheless a great many things to recommend his new monograph, which mirrors the meticulous doctrinal analysis of his earlier book, Democratic Statehood in International Law. It is refreshing to see mainstream legal work which critiques some distinctions between state and some non-state entities, as well as to see an analysis of statehood that goes well beyond the archetypal citation of article 1 of the 1933 Montevideo Convention on the Rights and Duties of States (‘the statehood criteria’, to use Vidmar’s phrase). Vidmar also gives detailed attention to the territorial and statehood-related elements of several contemporary and controversial

---

5 UN SCOR, 383rd mtg, UN Doc S/PV.383 (2 December 1948) 11; Crawford (n 4) 48.
7 Ibid 14.
8 Carolin König, Small Island States and International Law: The Challenge of Rising Seas (Routledge 2022); Shadi Sakran, The Legal Consequences of Limited Statehood: Palestine in Multilateral Frameworks (Routledge 2020); Nicholson (n 1); Alejandra Camprubi, Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States (Brill 2016); John Quigley, The Statehood of Palestine: International Law in the Middle East Conflict (CUP 2019); Crawford (n 4); Kate Parlett, ‘State Conduct in Territorial Disputes Beyond Effectivités: Recognition, Acquiescence, Renunciation and Estoppel’ in Marcelo Kohen and Mamadou Hébié (eds), Research Handbook on Territorial Disputes in International Law (Edward Elgar 2018); Jane McAdam, “Disappearing States”: Statelessness and the Boundaries of International Law” in Jane McAdam (ed), Climate Change and Displacement: Multidisciplinary Perspectives (Bloomsbury 2010).
9 Philip Pettit, The State (Princeton UP 2023); Avia Pasternak, Responsible Citizens, Irresponsible States: Should Citizens Pay for Their States’ Wrongdoings? (OUP 2021); Anna Stilz, Territorial Sovereignty: A Philosophical Exploration (OUP 2019); Margaret Moore, A Political Theory of Territory (OUP 2015); David Miller, On Nationality (OUP 1995).
13 Jure Vidmar, Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice (Hart Publishing 2013).
14 Ibid 10–11.
15 Ibid 14; Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.
international conflicts, such as that between the State of Palestine and the State of Israel,\textsuperscript{16} as well as between the Russian Federation and Ukraine.\textsuperscript{17}

Notwithstanding the outstanding quality of this work, I disagree with Vidmar’s doctrinal analysis on a number of points. He alleges, for example, that several entities, including the Republic of Kosovo,\textsuperscript{18} Palestine\textsuperscript{19} and the Republic of Somaliland,\textsuperscript{20} do not possess statehood: on this we differ.\textsuperscript{21} Similarly, he disagrees with both Rowan Nicholson and myself about whether ‘effectiveness’ provides a basis for state creation—an orthodoxy that Vidmar completely denies.\textsuperscript{22} My focus in this review article, however, is not the detail and controversy of these doctrinal views, but rather the theoretical approach that Vidmar takes when seeking to elucidate them. In particular, what interests me is the question of what it means to provide a ‘theory of statehood’ and in particular what desiderata for success such a theoretical exercise might assume. At bottom, and despite his claims to have done so, I remain sceptical that Vidmar provides us with anything like a theory of statehood with \textit{Territorial Status in International Law}, although that text does perform valuable work in clarifying several points about the legal concept of territory.

To advance my argument, I begin by outlining three sets of questions one may wish to ask about states (section 2), before considering what desiderata a genuine theory of statehood would have to satisfy in order to qualify as a successful legal-theoretical contribution (section 3). Throughout both discussions, I highlight important contributions that Vidmar makes towards our understandings of both, as well as pointing out places in which his reasoning and conclusions fall short of the ideal. Having completed this task, I then sketch a theoretical approach to legal statehood that might satisfy the desiderata I identify (section 4). Although necessarily provisional, this sketch illustrates how an interrogation of statehood that employs non-positivist ‘rational reconstruction’ might yield more theoretically promising results than ‘black letter’ doctrinal analysis alone.

\section*{2. Framing the Problem: Existential, Essential and Consequential Questions}

Vidmar avers that his ‘overall aim … is to develop a new theory of international legal status of territories … because existing theories misconceive the concept of territory and the legal nature of statehood’.\textsuperscript{23} To this end, he proposes ‘a complete break with the so-called statehood criteria [to ask] what statehood itself is, ie statehood itself and independent of the statehood criteria’.\textsuperscript{24} This is bold stuff. To

\begin{thebibliography}{9}
\bibitem{16} Territorial Status 13, 140–3, 154–5, 162–4.
\bibitem{17} ibid 33–4, 54–5, 98–101.
\bibitem{18} ibid 88, 90–1, 174–81, 187.
\bibitem{19} ibid 13, 89, 140–1, 167–70, 172.
\bibitem{20} ibid 67, 74, 88, 197, 210–11.
\bibitem{21} Green, \textit{Statehood as Political Community} (n 2) 130–1.
\bibitem{22} Territorial Status 195–7.
\bibitem{23} ibid 14.
\bibitem{24} ibid.
\end{thebibliography}
my mind there are two principal challenges when providing theories of such com-
plex legal, political or social phenomena. First, such phenomena typically resist
abstract characterisation of anything more than a nominal sort, such that unless
our theoretical analysis is very lengthy indeed its insights will be limited. Second,
as I have argued elsewhere, what it means to denote the ‘nature’ or ‘essence’ of
something is itself a theoretically contested question.25

It is worth canvassing this second challenge before detailing my proposed solu-
tion to the first. According to one approach, something’s nature is fixed by the
necessary and sufficient conditions for being that thing.26 Just as there are nec-
essary and sufficient requirements for being an egg, the star Alpha Centauri or
Muhammad Ali’s copy of the Qur’an, one might investigate statehood by identify-
ing the necessary and sufficient conditions for possession of that status.27 Vidmar
does not offer such an account, by his own admission: his definition of statehood
as a ‘legal status established under customary international law’ would otherwise
be wildly over-inclusive.28 Nonetheless, he does valuable work by emphasising
that the commonly cited ‘statehood criteria’ also fall short in this respect.29

Article 1 of the Montevideo Convention sets these criteria out 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.

There are at least some populated territorial entities with a government that
are nonetheless not states,30 while the phrase ‘with other states’ is unhelpfully
circular in this context.31 Moreover, several non-state entities have the capacity to
enter into international relations.32

Turning away from necessary and sufficient conditions, we might instead say
that something’s more (or most) important aesthetic, ethical, moral or teleologi-
cal features determine its essence.33 For instance, like those who claim humanity
to be defined by vulnerability,34 so too we might argue that states are character-
ised by their capacity to make war, protect and threaten human rights35 or provide
means for collective self-determination.36 Several contemporary legal theorists
have provided accounts of this kind;37 however, this is very far from the approach

25 Green, Statehood as Political Community (n 2) 230–1. I use these terms interchangeably for present purposes.
27 Another possibility is focusing upon the ‘essential properties’ of φ, which are distinct from the complete set
of necessary conditions for φ. See Kit Fine, ‘Essence and Modality’ (1994) 8 Philosophical Perspectives 1, 4–5.
I eschew this here since such language does not advance us much in determining what ‘essence’ itself might be.
29 ibid 195–7.
30 ibid 89, 134, 137.
31 ibid 196.
32 ibid 110–11, 175–81.
33 For possibly the oldest version of this view, see Aristotle, Nicomachean Ethics (Christopher Rowe tr, OUP
2002) 101–2. See also Mark Greenberg, ‘How to Explain Things with Force’ (2016) 129(7) Harv L Rev 1932,
1951–4.
Journal of Law & Feminism 1.
35 Cridde and Fox-Decent (n 11).
36 Alex Green, ‘Three Reconstructions of “Effectiveness”: Some Implications for State Continuity and Sea-level
Rise’ (2024) 44(2) OJLS 201, 223–9; Miller (n 9).
37 See n 11 above.
that Vidmar himself takes, which relies upon the purely descriptive methodology of ‘black letter’ legal positivism. He is not alone in this respect within doctrinal international law: there have been no real attempts to characterise statehood in this manner by the International Court of Justice (ICJ) or the International Law Commission (ILC); however, some elements of recent state practice might be interpreted as provisional attempts of this kind. Alternatively still, the nature of something might consist only in the properties unique to things of that sort. We distinguish squares from other two-dimensional shapes by their having four sides of equal length and four equal angles; so too might we distinguish states from other entities on the basis that, for example, only states (or at least the state-like) have the right to confer nationality.

Although there is often significant convergence between these approaches, there need not be. To borrow an example that I have used before, we can cogently imagine a world within which only trees are naturally pigmented green, such that ‘being naturally green’ is unique to this form of life. However, it does not follow from this that being naturally green is necessary and sufficient for being a tree, nor does it necessarily follow that this would be the most important thing about trees as such. At some point the trees in our imagined world might lose their pigmentation (say, by dropping their leaves) and their most important features might be very remote from their pigmentation (for instance, they could be fun to climb). This is all to say that when attempting to theorise statehood we need to be quite clear about what we take theory itself to entail, which for all his doctrinal clarity Vidmar is not.

Going back to the first challenge identified above, the extreme abstraction ordinarily entailed by attempts to theorise phenomena as complex as contemporary statehood can be mitigated by distinguishing between three sets of questions. These are, in order of discussion: ‘existential’ questions related to the creation, continuity and identity of states; ‘essential’ questions pertaining to the nature of statehood stricto sensu; and ‘consequential’ questions covering the particular juridical implications of statehood in any particular case. Although there may be

---

38 Although Vidmar distinguishes himself from some positivist scholars (Territorial Status 3, 6, 102, 195), his exclusive focus upon the formal sources of international law is manifestly positivist in the legal-philosophical sense. See John Gardener, ‘Legal Positivism: 5½ Myths’ (2001) 46 Am J Juris 199.


41 Nicholson (n 1).

42 Crawford (n 4) 56–9, 701.

43 Alex Green, ‘Lines to a Don: Why It Isn’t Meaningless to “Reimagine” Jurisprudence’ (2023) 57(4) The Law Teacher 548, 550–1.

44 The clearest summary of his approach lists certain doctrinal propositions he departs from and particular axioms he rejects, but no detail on goal or method: Territorial Status 14–16, 191. Where Vidmar does speak explicitly about method, he states simply that he will undertake ‘doctrinal analysis … de lege lata’, as though this were self-explanatory (ibid 16).

45 Alex Green, ‘Subjects and Actors in International Law: States’ in Sué González Hauck, Raffaela Kunz and Max Milas (eds), Public International Law: A Multi-Perspective Approach (Routledge 2024).
some overlap between these sets, they nonetheless merit discrete treatment, not least because separating them out allows for more concrete advances to be made, notwithstanding the bearing each has upon the concept of statehood in general.

Turning first to existential questions, as noted, these can be further split into questions relating to the creation of states, those concerning their continuity (as well as their extinction) and issues of state identity over time. Most treatment of statehood within *Territorial Status in International Law* concerns the first of these three subsets. Vidmar advances a sophisticated understanding of state creation grounded substantially in his earlier work, wherein new states arise by overcoming the existing claims to territorial integrity of their ‘parent’ states by virtue of a law-governed political process. This can be done in three ways, namely: (i) the dissolution of the parent; (ii) the consent of that state; or (iii) the granting of international recognition. In the first two cases, any claim to territorial integrity will be dissolved: non-existent states have no rights, while rights that are waived raise no legal obstacle. In the third, Vidmar relies upon the reasoning of the ICJ in its *Kosovo* Advisory Opinion to the effect that international law neither prohibits unilateral secession nor provides a right to independence outside the context of decolonisation. Within the juridical space created by this, recognition can operate as ‘a grant of legal authority’ by the international community. Complicating this ‘sphere of legal neutrality’, Vidmar then identifies circumstances where recognition will be unlawful because the attempted secession in question has violated ‘a particularly strong norm of international law’. He also indicates that the provision of independence referendums ‘may make a claim for a change of legal status of territory politically more legitimate’, smoothing the way for recognition to occur. The care and coherence with which Vidmar consolidates his existing work on this topic makes a major contribution. Nonetheless, it remains a wholly doctrinal and above all a *procedural* account of state creation, rather than a theory of statehood as such.

On questions of continuity and identity, Vidmar has almost nothing to say. Extinction is discussed only in relation to the creation of new states following the dissolutions of the Socialist Federal Republic of Yugoslavia and the Union of Soviet Socialist Republics, while continuity itself is raised explicitly only once:

---

46 States are continuous to the extent that their existence under international law is not disrupted. State identity concerns whether (and why) a state at time T1 is the same entity as the one identified with it at time T2. See Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie E Droz 1954) 1–6; Crawford (n 4) 669–71.

47 Vidmar, *Democratic Statehood* (n 13).

48 *Territorial Status* 66.

49 ibid 70–1.

50 ibid.

51 ibid 72–5.

52 ibid 70–1.


54 *Territorial Status* 70.

55 ibid 66–74.

56 ibid 75–8, 81–5.

57 ibid 81.

58 My own view of the relevant law is markedly different, see Green, *Statehood as Political Community* (n 2) 12–15.

59 *Territorial Status* 70–1.
when Vidmar comments that the ‘presumption of Somalia’s territorial integrity prevents Somaliland from becoming a state … Somalia thus continues in existence virtually as a legal fiction’. This language is perhaps an odd choice, given that Vidmar’s overarching claim seems to be that all states are legal fictions, since statehood is a territorial status and all territory is legally and socially determined.

Even stranger is that his monograph purports to address the nature of statehood and territory but ignores pressing developments regarding state continuity and territorial delineation in relation to sea-level rise, which are currently under discussion within the ILC and elsewhere. Regardless, it is hard to see how any comprehensive existential treatment could ignore state continuity and identity to such a great extent as the argument within *Territorial Status in International Law*.

Turning to essential questions *stricto sensu*, it is not clear that Vidmar examines anything of this kind. His frequently restated formulation that ‘statehood is a territorial status established under customary international law’ provides neither necessary and sufficient conditions for the existence of states nor a property that is unique to entities in possession of statehood. As Vidmar himself argues at length, several non-state territorial entities possess a discrete customary international status. Moreover, as noted above, Vidmar never identifies any features of statehood that possess particular importance in ethical, moral or other terms. It is not even clear that his emphasis upon statehood as a customary international status is particularly helpful. On one interpretation, this claim is trivially correct. No competent academic or practising lawyer would deny that the law governing contemporary statehood is grounded at least in large part within the practice and *opinio juris* of states. Thankfully, Vidmar means something different: that the status of every individual state is itself a matter of customary international law, such that each state corresponds to a discrete customary norm providing for its existence.

This thesis is, as far as I know, original. It is also completely unsupported within state practice and written expressions of *opinio juris*, at least insofar as

---

60 ibid 74.
61 ibid 22–5.
64 ibid 132–41.
65 eg Green, *Statehood as Political Community* (n 2) 9; Nicholson (n 1) 94–5; Crawford (n 2) 3–4.
66 *Territorial Status* 197–8.
67 Nicholson briefly considers this possibility in hypothetical terms (see (n 1) 208) but – rightly in my view – almost immediately dismisses it as ‘largely inconsequential and unverifiable’. His reasons for doing so are somewhat different from my own (see below) and turn on a powerful point that Vidmar never addresses: that any state opting not to recognise an emerging entity would almost certainly count as a persistent objector to the alleged customary norm in question. (On persistent objection in this and other contexts, see: International Law Commission, ‘Conclusions on Identification of Customary International Law’ [2018] 2(2) ILCYbk, UN Doc A/73/10, conclusion 15.)
no direct references to it exist. That is not necessarily fatal to Vidmar’s argument, which, rather than appealing directly to such practice, is both inductive and deductive. Inductively, Vidmar claims that recognition should be seen as an expression of opinio juris in support of the emergence of a new statehood status under customary international law … [it] is not the only mode of expression, and non-recognised states can indeed exist … but it is a very common and central mode of such expression.

Deductively, Vidmar believes it to follow from the reasoning in International Status of South-West Africa and North Sea Continental Shelf that treaties purporting to create new states, which go on to become opposable erga omnes, do so by crystallising new customary norms to that effect.

This is clever stuff, but I wonder how far it really advances us. By Vidmar’s own admission, his approach cannot solve cases of uncertainty or indeterminacy, where recognition is insufficiently widespread to confirm beyond doubt that statehood exists. In such cases, Vidmar alleges that statehood exists only relatively, which is to say between recognising entities. However, this is scarcely an original contribution: it is doctrinally uncontroversial that formal recognition binds the recognising state in relation to the status of the recognised entity (a fact that Nicholson neatly captures with the phrase ‘states-in-context’). Moreover, while analytically neat, this insistence upon indeterminacy and relativity within the law of state creation will be of cold comfort to the political communities of Kosovo or Palestine, in relation to whom Vidmar explicitly denies statehood erga omnes. Furthermore, nothing about Vidmar’s customary thesis explains

---

68 The closest recent language is that of the Holy See, which claims that the ‘determination of statehood is not an academic exercise based on an assessment of the apparent fulfilment of the criteria mentioned in article 1 of the Montevideo Convention of the Rights and Duties of States, of December 26, 1933, but rather a unilateral legal and political act whereby one State recognized another as a member of the international community with all the rights and obligations that ensue from that status’: Permanent Observer Mission of The Holy See to the United Nations, ‘Information Submitted by The Holy See on the Questions of Statehood and the Protection of Persons Affected by Sea-Level Rise in Response to the Request Contained in §28 of the 2023 Report of the International Law Commission (A/78/10)’ (12 December 2023) Prot N 3.192/23, 1. Even that, however, is pretty shy of the mark.

69 Territorial Status 198 (emphasis in the original).

70 ibid 197–8; International Status of South-West Africa (Advisory Opinion) (1950) ICJ Rep 128, Separate Opinion of Judge McNair, para 154 (one may question how much reliance can be placed upon language used within a single separate opinion; however, I will not pursue this point here); North Sea Continental Shelf (Merits) (1969) ICJ Rep 3, para 39.

71 Territorial Status 74, 104–5.

72 ibid 74, 104–6, 198–9.

73 Nicholson (n 1) 143–5.

74 Territorial Status 13, 88–91, 140–1, 167–70, 172, 174–81, 187. Indeed, Vidmar cannot consistently claim both that: (i) legal statehood itself can exist relatively; and (ii) widely recognised entities like Kosovo and Palestine lack statehood, but other political communities nonetheless possess that status. Naturally, obligations to treat recognised entities as states can arise even if those entities lack statehood as an independent legal fact, since the legal effects of recognition on the recognising entity operate discretely. However, statehood itself must be either entirely relative or universally opposable (even if such opposability is itself partly established by widespread recognition). In the former case, all states possess their status only vis-à-vis the other states that recognise them, so it becomes meaningless to talk about statehood in non-relative terms (as Vidmar appears to in relation to several uncontroversially established states). In the latter case, statehood either exists or it does not, quite apart from the separate legal possibility that some states might nonetheless be bound to behave as if it exists, by virtue of their previous acts of recognition. One cannot argue for relativity in alleged ‘hard cases’ like Palestine and universal opposability elsewhere without appearing disastrously ad hoc. (I am grateful to an anonymous reviewer at the OJLS for bringing this to my attention.)
whether or not states have anything substantive in common by virtue of their statehood, beyond being legally grounded within international custom. Indeed, the view that each state is separately grounded within customary law raises an important question: what, then, unifies these entities as states so that statehood constitutes a distinct analytical category? Why, for example, should we view the French Republic as identical in kind or equal in status to the Federative Republic of Brazil if there are no shared legal criteria that ground their statehood? Since statehood is not unique in being a customary legal status, we will inevitably need an account of what makes it unique as a status, but Vidmar does not provide this. Without such analysis, his insistence upon the customary grounding of individual states belabours a purely technical point, adding little to an otherwise interesting account of state creation.

Turning to consequential questions, Vidmar offers a detailed account of territorial integrity as an entitlement consequent upon statehood, which is impressive in its doctrinal coverage and analytical depth. Absent, however, is any discussion of many other important entitlements that follow from statehood, such as the right to political independence and permanent sovereignty over natural resources. The latter is a particularly odd omission, given the clear practical importance of the connection between such sovereignty and claims of territorial title within international relations. Moreover, the freedom to choose political, social, economic and cultural systems is also absent from Vidmar’s discussion, despite both its supreme relevance to self-determination, which he does discuss, and its importance when viewed from the perspective of political community (see section 4). Considerable coverage, however, is given to self-defence and state responsibility under international law, alongside the power to create international law through the promulgation of treaties and customary practices.

True, it would be unrealistic for a single monograph to analyse all of the above, and the breadth of statehood’s juridical implications provides one of the best

75 ibid 103.
76 It bears repeating that no competent international lawyer would deny that statehood is a legal status under customary international law. The question is what Vidmar’s particular slant on this adds to that existing consensus.
77 He comes close, at one point, to imputing one unique property to states: that their practices alone provide the ultimate basis for international legal obligations (ibid 109–11). This is never fully developed, however. His position seems to be that law making by international organisations is really the ‘indirect’ activity of states because international organisations are themselves created and restricted by treaties between states (ibid). This is harmless enough in the abstract; in context, however, it is potentially disastrous because Vidmar also claims that each state exists by virtue of a discrete customary norm proclaiming its existence, individually grounded upon the law-making practices of other states (ibid 197–8). Were he to maintain both views, Vidmar may have to accept that all law making by new states is ‘indirectly’ attributable to the states responsible for creating them, which would be absurd.
78 Another possible interpretation, albeit one that Vidmar consistently denies, is that this approach is merely a small modification to constitutive views of recognition: that recognition itself can create statehood and that the mode through which this occurs is the formation of a new custom in each case.
79 ibid 66–74.
82 Territorial Status 7–8, 68–9, 135–41.
83 ibid 110–19, 120–32.
possible arguments for separating out consequential questions from existential and essential enquiries. (In many cases, concrete theoretical insights may be possible only when examining one or two such consequences at a time.)

The particular route Vidmar takes is determined by two things. First, his somewhat restrictive view that ‘the nature and structure of international law which … [is] like a system of private-law obligations created by the actors inter se. The public law framework is rather rudimentary and limited to jus cogens norms and obligations erga omnes’. Second, by his argument that with the partial functional exception of international organisations, actors in contemporary international law cannot create obligations and incur responsibility if they do not possess a ‘bordered power container’ in which they exercise jurisdiction, and do not have a territorial status established in the sources of international law.

This explains, for example, his focus upon territorial integrity and self-determination (for Vidmar, these principles are primarily used for managing territorial attribution) and his eschewing of political independence and the freedom to choose political, social, economic and cultural systems, which have less to do with the territorial aspects of statehood than with their governmental and political dimensions. This attempt to see all international law through a territorial lens suffers from the distorting effects common to every theory that imputes a singular or restricted character to something as normatively complex as an entire legal order. Vidmar is forced to claim that international organisations have an empirically marginal role within that order, and eschews discussion of international legal personhood in favour of ‘legal capacity’ explicitly because doing so allows him to exclude discussion of non-territorial legal persons.

In terms of statehood, these distorting effects result not only in the omissions noted above, but also in some rather awkward passages, where Vidmar’s elision of statehood with territorial status creates conceptual problems that remain unsolved. For example, the above-quoted passage employing the term ‘bordered power container’ refers to territorial entities both as territories and as entities in possession of territories. One is forced to wonder whether such entities somehow ‘possess themselves’, and what this could possibly mean. This is repeated in his treatment of states that lose control of their territories through armed incursion or insurrection, where he is forced to speak of territorial units as distinct from statehood, contrary to his framing of the latter as a territorial status. Such awkwardness and conceptual confusion come in large part from Vidmar’s unwillingness to accept the fundamentally gestalt nature of statehood—its characteristic existence as a combination of people, government and territory—which lies downstream of

---

85 Territorial Status 199 (references omitted).
86 ibid 144.
87 Green, Statehood as Political Community (n 2) 231–5.
88 Territorial Status 111.
89 ibid 200–1.
90 ibid 122–3, 126–9.
his desire to reject altogether the statehood criteria as expressed within article 1 of the Montevideo Convention.

In sum, the difficulties with Vidmar’s purported ‘theory of statehood’ are three-fold, stemming from the two primary challenges posed by attempts to theorise any complex legal, political or social phenomena. First, he takes no clear position on what it means to disclose the nature of either statehood or territory, such that it is not clear how he offers anything like a theoretical account of either. Second, he operates at such a high level of abstraction across a mixed set of existential, essential and consequential questions that the theoretical conclusions he aims to provide suffer either from a lack of practical utility or a distorting effect in relation to the substance and structure international law. Third and finally, he routinely conflates existential and essential questions, claiming that his account of state creation is really a theory of the nature of states. To be absolutely clear, none of this detracts from the outstanding doctrinal contribution of the book, nor from the rigour with which Vidmar pursues those aspects of his text. Nonetheless, *Territorial Status in International Law* represents something of a cautionary tale within international legal theory, from which important lessons must be drawn. It is to those lessons that I now turn.

### 3. Avoiding Empty Vessels: Some Desiderata for Theories of Statehood

Theories of statehood must tell us something interesting and important. They need not, however, all explore precisely the same thing. We can coherently pursue theories of state creation, for example, which tell us relatively little about the entitlements that nascent political communities may gain after statehood accrues. Similarly, we can have useful theoretical contributions on the entitlements of states, both discretely and in general, without considering either the essence of statehood or its continuity or extinction. When establishing desiderata for such theories, we must therefore distinguish between desiderata that apply across the board and conditions unique to particular areas of inquiry. Given the breadth and complexity of the terrain that this distinction entails, my focus here will be upon general requirements only. Nonetheless, I cannot hope to be comprehensive: my aim is only to provide some necessary desiderata for successful theorising, rather than aiming to be exhaustive. Three such desiderata suggest themselves: first, a requirement of interpretive fidelity; second, a requirement of clear conceptual focus; and third, a requirement to provide added value in either explanatory or prescriptive terms (or both). These desiderata are quite abstract; however, in the context of statehood, I believe they nonetheless provide some rather concrete guidance.

Interpretive fidelity, sometimes described in terms of ‘fit’, requires correspondence between theories and the phenomena they explain. For international

---

law, interpretive fidelity is satisfied to the extent that theories can comfortably explain the legal salience and implications of material such as: the text and context of international instruments, including but not limited to formally binding treaties; the practice and *opinio juris* produced by state representatives; and the judgments of international courts and tribunals. As regards the law governing the existence and essence of statehood, international recognition practices must be added to this list.92 Fidelity is scalar, and the better a theory fits, the more persuasive it will be. Nonetheless, since all theories must be *theories of something*, minimum thresholds do exist. Within international legal scholarship, this threshold is to be found at the point where productive discussion becomes possible, which entails not only shared language(s), but also sufficient technical knowledge to ensure solid practical understandings of the legal phenomena under discussion.93 Without this, scholars could not avoid talking past each other.94 It is impossible to specify this threshold *a priori*, although works of doctrinal skill on the elevated level of *Territorial Status in International Law* will satisfy it almost self-evidently. Theoretical engagement does not risk endemic misunderstanding simply by failing to endorse or explain each and every widely accepted legal proposition. All that is required for the minimum threshold of fidelity is concordance with sufficient paradigmatic legal propositions for productive discussion to take place.

If anything, Vidmar is sometimes too exacting (and a little inconsistent) as regards fidelity. Although he considers mistaken every item of state practice or expression of *opinio juris* that endorses the traditional statehood criteria,95 he nonetheless believes that no account of the relevant law will be plausible unless it can explain, for example, why Somaliland has been denied international recognition.96 On this basis, for example, he finds both James Crawford’s and Rowan Nicholson’s accounts of state creation implausible.97 However, as Nicholson himself points out, all accounts of international law must make room for the possibility of difficult cases and legal mistakes.98 There is nothing necessarily problematic *vis-à-vis* fidelity about theories that cast doubt upon a number of paradigmatic legal propositions or suggest that several widespread assumptions about the status of a particular entity are wrongheaded.99 As detailed below, the added value of theory in relation to phenomena like statehood lies in interrogating the rational basis for such things and, in the abstract at least, even widely held legal beliefs are as apt to express inchoate misunderstanding as they are truth.

Conceptual focus contours the plurality of aims that a theory of statehood might possess and is best approached through the distinction between existential, essential and consequential questions. It has two principal elements. First, theories of statehood should clearly identify the set of issues they are addressing,

---

92 Green *Statehood as Political Community* (n 2) 8.
93 Dworkin (n 91) 65–6, 90–3.
94 ibid 43–4, 72–3.
95 *Territorial Status* 195–7.
96 ibid 60, 67, 197.
97 ibid 197.
98 Nicholson (n 1) 191.
99 Dworkin (n 91) 99.
whether these be an entire category of question or some subset thereof. For instance, a theory of state creation should delineate itself with precision from one of state continuity and extinction, while a theory of territorial title or acquisition should discriminate carefully between that topic and the adjacent matter of territorial integrity. Second, any movement within the theory beyond or between these focuses should be justified, such that there is no conceptual slippage or leaps in reasoning. For instance, it is famously hazardous to conflate the principles of state creation with those of state continuity, given that different legal standards pertain within these two areas. These requirements may seem basic; however, considerable mischief occurs when they are not observed.

Vidmar’s conflation of existential and essential questions is a case in point. He writes that if ‘one rejects the natural or even metaphysical theories according to which states are treated as creatures of nature rather than law, this also has certain consequences for the law that governs the emergence and existence of states’. Thereafter, he points to various consequences, which I shall briefly analyse. First, if ‘statehood is not naturally created, it needs to be grounded as a legal status in the sources of international law, as enumerated in Article 38(1) of the International Court of Justice (ICJ) Statute’. Leaving aside that article 38(1) does not mention ‘sources’, and that the precise nature of international law-determination is a matter of some philosophical dispute, the broader point that international legal statuses must be grounded within the practices that determine international law is clearly correct and few competent lawyers would disagree. However, Vidmar then claims that if ‘one rejects the theory of natural personality of states in international law, it also needs to be acknowledged that international legal status is not created by virtue of self-executing legal procedures under the law of statehood’. This is clearly a non sequitur: statehood is a legal status and, like very many other such statuses, it is logically possible for it to arise by operation of law once particular criteria are satisfied.

Vidmar assumes, perhaps because he falls victim to the very analogies that he decries, that artificial legal persons must arise through ‘political development’, since only artificial processes can create artificial entities. But Vidmar himself acknowledges that non-state self-determination units arise automatically when particular legal criteria are met:

The conditions for the creation of such a legal status may be summarised as follows: (i) an organised political authority has established territorial jurisdiction over a certain spatial area; (ii) the jurisdictional authority was not established illegally …; (iii) the

\[\text{References:}\]

100 Crawford (n 4) 59, 89, 672–90.
101 Territorial Status 9.
104 Territorial Status 9.
105 Ibid 102.
spatial area concerned is geographically separate and populated by ethnically distinct people.\textsuperscript{107}

That this automatic accrual of status can happen both without the consent of the parent state, whether via treaty or otherwise, and without international recognition is confirmed by Vidmar in his analysis of both the Republic of China (Taiwan) and East Bengal (now the People’s Republic of Bangladesh).\textsuperscript{108} It is inconsistent and unmotivated to accept the possibility of status via operation of law in relation to self-determination units but not states. Self-determination units arguably lack full international legal personality;\textsuperscript{109} however, since Vidmar’s central claim is that both states \textit{and} non-state territorial entities are forms of territorial status, this distinction leaves his argument untouched. Vidmar errrs because he rushes from the somewhat banal \textit{essential} insight that, like corporations in the domestic setting,\textsuperscript{110} states are legal entities, to the \textit{existential} conclusion that their creation must be ‘birthed’ through a law-governed process.\textsuperscript{111} In sum, he conflates two sets of conceptually distinct questions.

The most essential desideratum for successful theories of statehood is the provision of additional explanatory or prescriptive value. Without this, theories risk becoming empty vessels: abstract formulations with no connection to practice. I raised concerns of this sort above in relation to Vidmar’s thesis that each individual state corresponds to a discrete customary norm providing for its existence. It is unclear what of consequence that theoretical formulation adds to our existing understanding, since it cannot be used to address either uncertainty or indeterminacy in international legal status, nor does it tell us anything substantive about what is unique to states or what they otherwise have in common. In light of these concerns, it is useful to return to the three accounts of ‘nature’ or ‘essence’ noted above and to ask what additional work a theory of statehood might perform.

The identification of properties unique to statehood is perhaps the least promising. Although succeeding in this task in relation to essence \textit{stricto sensu} might allow us to distinguish states from other things, there is no guarantee that this would be particularly useful in either explanatory or prescriptive terms. The result would likely be little more than a list of features already familiar within international legal doctrine, along the lines of the ‘exclusive and general legal characteristics’ offered by Crawford, from which derogations ‘will not be presumed’:\textsuperscript{112}

(1) In principle, States have plenary competence to perform acts, make treaties, and so on, in the international sphere: this is one meaning of the term ‘sovereign’ as applied to States.

(2) In principle States are exclusively competent with respect to their internal affairs, a principle reflected by Article 2(7) of the United Nations Charter. This does not of

\textsuperscript{107} ibid 141.
\textsuperscript{108} ibid 137–8.
\textsuperscript{109} Crawford (n 4) 124.
\textsuperscript{110} Territorial Status 102–3.
\textsuperscript{111} ibid 197–8.
\textsuperscript{112} Crawford (n 4) 40–1.
course mean that international law imposes no constraints: it does mean that their jurisdiction over internal matters is prima facie both plenary and not subject to the control of other States.

(3) In principle States are not subject to compulsory international process, jurisdiction, or settlement without their consent, given either generally or in the specific case.

(4) In international law States are regarded as ‘equal’, a principle recognized by the Charter (Article 2(1)). This is in part a restatement of the foregoing principles, but it has other corollaries.113

As a theoretical account this is conceptually thin, more akin to a legal summary than a theory properly so-called. For the same reason, the utility of seeking necessary and sufficient conditions is doubtful. This may also allow us to distinguish states from other things, but at the essential level it may do little more than replicate such lists. More might be gained in relation to existential or consequential questions. For instance, Nicholson employs the language of non-necessary but sufficient conditions when presenting his doctrinal account of state creation.114 Nonetheless, although this framework adds considerably to the clarity of his arguments, it is doubtful whether the use of such terminology alone entails a theoretical (as opposed to purely doctrinal) contribution.

More promising by far is the search for something important about statehood in aesthetic, ethical, moral or teleological terms: an approach that I have taken elsewhere on both existential and essential questions.115 By utilising what I call ‘rational reconstruction’,116 scholars can provide theoretical accounts of statehood that move beyond doctrinal repetition, while at the same time offering new normative propositions internal to international law itself. What distinguishes this from other forms of legal argumentation is its relation to genuine normative reasons.117 Rather than placing sole emphasis upon interpretive fidelity, rational reconstruction assumes that any plausible conception of the relevant law must also have an immanent rationality, which the interpreter therefore has an obligation to explicate. Such reconstructions take seriously the idea that international law reflects some set of independently attractive normative reasons, such that discovering de lege lata requires the identification of those reasons and an articulation of why they matter. This additional critically normative element corresponds to Dworkin’s interpretative dimension of ‘justification’118 and reflects the ‘Grotian’ method that Lauterpacht describes as seeking a ‘workable synthesis of natural law and State practice’.119 Such synthesis inevitably adds explanatory value, since it necessarily involves an account of why some area of international law should be

113 ibid (footnotes and citations omitted).
114 Nicholson (n 1) 92.
115 Green, Statehood as Political Community (n 2); Green, ‘Three Reconstructions of “Effectiveness”’ (n 36); Alex Green, ‘A Political Theory of State Equality’ (2023) 14(2) TLT 178.
116 Green, Statehood as Political Community (n 2) 8–12.
117 ‘Reasons’ are ‘considerations that count either in favour or against something’; ‘normative reasons’ are ‘considerations that count in favour of doing or not doing something’: Derek Parfit, On What Matters, vol 1 (OUP 2011) 31.
118 Dworkin (n 91).
119 Hersch Lauterpacht, ‘The Grotian Tradition in International Law’ (1946) 23(I) BYIL 1, 5.
considered *pro tanto* binding or otherwise valuable *as law*. Moreover, it may add prescriptive value insofar as rational reconstruction possesses radical argumentative potential sufficient to accommodate Lauterpacht’s emphasis upon ‘progressive interpretation’. In what remains, I illustrate the potential of this method by sketching an approach to the theory of statehood that sits across existential, essential and consequential topics.

4. Crewing Ships of State: Pursuing the Values that Ground Statehood

States, as noted above, are gestalt entities. This is indispensable in existential terms, as proven by current debates surrounding sea-level rise. Loss of population through climate-based migration presents the most immediate existential threat to Large Ocean States, rather than the physical submergence of their extant territory. Although the law of state continuity in fact guarantees the existence of states with wholly diasporic populations, the very fact that this is being debated within bodies like the ILC demonstrates that statehood is more than a territorial status. States are complex entities formed at the nexus of independent governance, civic and political identity, and spatially determined jurisdiction. By reducing statehood to its territorial element, we omit much of what makes states important within international relations, the global legal order, and our ethical and moral lives.

To reflect this, theoretical approaches to statehood must embrace its gestalt orientation. When approaching existential, essential and consequential questions, rational reconstruction must never wholly conflate statehood with government or territory, which in any event are treated as separate concepts within doctrinal international law. Instead, a framework or approach must be adopted from which the genuine normative reasons that ground statehood—the values, as it were, which crew our ships of state—themselves encompass its essentially complex and plural nature. Within the law of state creation, I have argued that this can be accomplished via the concept of political community. Several orthodox propositions, including the territorial elements of statehood and the prohibition upon state creation via the unlawful use of force, can be explained, justified and interpreted through two broader normative conditions. First, emerging states themselves must constitute ‘genuine political communities’: collectives within which intrinsically valuable individual political behaviour is possible. Second, states must emerge in a manner consistent with the normative value of such

---

120 Green, *Statehood as Political Community* (n 2) 12.
123 Green, ‘Three Reconstructions of “Effectiveness”’ (n 36).
125 Green, *Statehood as Political Community* (n 2) 12–15.
behaviour.\textsuperscript{126} Similarly, in relation to the doctrine of sovereign equality, I have argued that states are comprehensible as equals insofar as they each constitute political communities of the relevant kind.\textsuperscript{127}

The crux of both arguments is that statehood can be usefully theorised through a broadly Arendtian conception of power: the physical, political and social potency of multitudes that exists only by virtue of their collective capacities.\textsuperscript{128} State creation is an expression of such power, both in sociological terms and \textit{vis-à-vis} the requirements that international law establishes for the accrual of statehood as a customary international status.\textsuperscript{129} The law of state continuity, which places particular emphasis upon the importance of self-determination as a continuing right of peoples,\textsuperscript{130} must be interpreted consistently with respect for the discrete political traditions that have developed within existing states, each of which to a greater or lesser extent exhibit power of this sort being exercised as an expression of positive freedom.\textsuperscript{131} Something similar might be said, in consequential terms, of entitlements such as territorial integrity, permanent sovereignty over natural resources and the freedom to choose political, social, economic and cultural systems, which exist in large part to secure the self-determination of peoples and therefore to allow Arendtian power to be exercised autonomously within legally defined territorial units. Indeed, to this extent, a broadly Arendtian schema might be used to supply Vidmar’s excellent doctrinal analysis of territorial integrity with a theoretical basis, going beyond mere demonstrations of interpretive fidelity to explain why it is rationally intelligible for international law \textit{qua} binding legal order to include such a principle.

In essential terms, we should be cautious. Although one could view states as ‘genuine political communities’ of the sort mentioned above, this is only one facet of their normative importance. Again, we must embrace their gestalt orientation: thankfully, this is something that the conceptual framework of Arendtian power allows us to do. Simultaneously with recognising the ‘natality’ of power (its seemingly miraculous capacity to augment human freedom and bring about the new and unexpected), Arendt acknowledges the extraordinary danger it poses.\textsuperscript{132} Just as individuals can self-author as callous, cruel or vicious, political communities can collectively self-determine as illegitimate or unjust. International law recognises this, which is why state sovereignty is subject to legal limitations such as those found within international human rights law and the law governing the use or threat of force.\textsuperscript{133} States are complex not just because they are composite

\textsuperscript{126} ibid 1.
\textsuperscript{127} Green, ‘A Political Theory of State Equality’ (n 115).
\textsuperscript{128} Hannah Arendt, \textit{On Violence} (Harcourt 1970) 42.
\textsuperscript{129} For instance, on the Arendtian schema, politics and violence are inimical, insofar as circumstances where the latter is endemic destroy the capacity for political action (ibid 45–7). This insight supplies an important normative foundation for the prohibition on state creation through the unlawful use of force: it would be morally \textit{incoherent for} international law to permit state creation through means that violate individual political capacity. Green, \textit{Statehood as Political Community} (n 2) 52–4.
\textsuperscript{130} Liechtenstein, ‘Submission by the Principality of Liechtenstein’ (n 39).
\textsuperscript{131} Green, ‘Three Reconstructions of “Effectiveness”’ (n 36) 23–9.
\textsuperscript{132} Hannah Arendt, \textit{The Human Condition} (University of Chicago Press) 9, 199–207.
\textsuperscript{133} Criddle and Fox-Decent (n 11); Capps, \textit{Human Dignity} (n 11) 191–6.
entities, but also because they are normatively ambiguous: they exist as communities within which justice and legitimacy can be pursued and as potent collective threats to those same values. In the event that an overarching theory of statehood’s nature was to be attempted, this would have to be borne in mind.

In sum, explaining statehood as an international legal status requires articulating the discrete normative positionality that states possess within the international community. The lens of Arendtian power offers one promising way to do this, since it embraces the gestalt nature of statehood as a combination of government, people and territory, while at the same time reflecting its complex and normatively ambiguous nature. When deployed within a rational reconstruction of international legal practice, such an approach tells us something more about the doctrinal positions it endorses than could be achieved by any straightforward enumeration of the prescriptive content of those doctrinal propositions, no matter how nuanced and accurate such an enumeration might be. The crucial additional element here is the theoretical ‘why’ to the doctrinal ‘what’: something that is unfortunately missing within otherwise rigorous legal texts such as Territorial Status in International Law. Insofar as this additional element can be added, a meaningful theoretical contribution can be made.

5. Conclusion

With Territorial Status in International Law, Jure Vidmar offers a solid contribution to international legal scholarship on the law governing both statehood and non-state territorial jurisdictions. His treatment of principles such as territorial integrity and discussion of topics such as statehood under the United Nations Charter and treaty regimes is clear, precise and insightful. I fully anticipate returning to the text many times in the future, for precisely these reasons. Nonetheless, insofar as Vidmar claims to contribute something of genuine theoretical depth to the doctrinal fields he interrogates, he fails to deliver. The central theoretical claim about statehood within Territorial Status in International Law—that the international legal status of each individual state exists independently as a discrete customary norm—makes no noticeable contribution to his doctrinal analysis of state creation and does very little to advance our substantive understanding of statehood as an international legal status.

Happily, there are important lessons to be learned from this. When approaching questions such as the nature of ‘statehood itself’, we must take pains to specify what we are doing and what the added value of this exercise might be. Are we looking for necessary and sufficient conditions, unique properties or some conception of statehood’s importance or value? In this review article, I have argued that the latter is the most promising theoretical exercise when engaging with concepts like statehood within international law and suggested that

---

135 Territorial Status 145–72.
136 ibid 14.
the methodology of rational reconstruction is the most appropriate means for accomplishing that task. In addition, by reading Vidmar closely, we are forced to appreciate the importance of distinguishing between different facets of the law that governs statehood. Are we asking existential questions about the creation, continuity or identity of states, or are we concerned with the legal consequences that follow once statehood has been established? Finally, if we really are concerned with questions of ‘nature’ or ‘essence’ *stricto sensu*, then we must proceed with caution and not mistakenly reduce the gestalt nature of statehood to one or more of its individual attributes.

At the end of this article, I sketched a framework through which one might undertake useful theoretical work on statehood within international law. Focusing on the Arendtian conception of power, this framework reflects not only the gestalt nature of states, but also their normative ambiguity, while at the same time providing the justificatory elements required for a fruitful rational reconstruction of doctrinal law. That sketch was necessarily abstract and provisional, such that we can draw no absolute conclusions about it without considerably greater reflection. Nonetheless, it discloses one way in which theoretical engagement might add something to doctrinal analysis—the missing element of why the normative content of international law might be justifiable on a particular point, given the content of contemporary practice. One final consideration does merit noting, however. Theoretical work of this sort can only get off the ground to the extent that careful doctrinal analysis persists within broader legal scholarship. Vidmar must be congratulated for upholding this standard and, in so doing, providing so much excellent material for theoretical reflection.