

SYMPOSIUM ON THE OLYMPICS AND INTERNATIONAL LAW

STATEHOOD AND THE OLYMPIC GAMES

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Sport is a useful area of study to test assumptions of international law.¹ International law has traditionally focused on states and on international organizations that oversee specialized areas of human activity. International sport is overseen by an NGO—the International Olympic Committee (IOC). Yet sport is of great interest to states, serving as a testing ground of national superiority by providing a simple narrative of “winners” and “losers” in competition. Meanwhile, entities that are not yet states have historically been able to participate in international sport more readily than in other areas of international relations. This essay will examine the connection between participation in the Olympic Games and claims to statehood. In doing so, this essay will outline the modern approach to statehood, consider sport’s role in that approach, and examine two case studies: the German Democratic Republic, and Kosovo.

A Modern Approach to Statehood

Despite the state’s central place in international law, the factors that lead to the establishment of a state are still contested. Recent scholarship has shifted from a “checklist” approach to a contextual approach to defining statehood. Historically, a state has been defined as an entity fulfilling the criteria encapsulated in the *Montevideo Convention* (people, territory, government, capacity to conduct international relations), in addition to possibly requiring recognition by other states (depending on if one ascribed to the “declaratory” or “constitutive” theories of recognition). This “checklist” approach has been criticized. The *Montevideo* criteria have been found to be both over- and under-inclusive.² Meanwhile, the debate over recognition is giving way to an acknowledgement that recognition is essentially a political act.³

Today, international legal scholars view establishing statehood as a contextual inquiry. Fundamentally, this approach examines how the actions and identity of a potential state lead to the recognition of that state by others.⁴ As part of this inquiry, international legal scholars have suggested broader factors to augment or replace the *Montevideo* criteria, such as “independence” of the potential state,⁵ or the “effectiveness” of the potential state’s

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¹ See Antoine Duval, *Lex Sportiva: A Playground for Transnational Law*, 19 EUROPEAN L.J. 822 (Duval makes this point in regards to transnational law).

² Thomas D Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403 (1999).

³ JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW* 44, 50 (2013).

⁴ See David Tan, *The Metaphysics of Statehood*, XXXI CAN. J. L. & JURIS. 403, 423–24 (2018); Eva Erman, *The Recognitive Practices of Declaring and Constituting Statehood*, 5 INT’L THEORY 129, 133 (2013).

⁵ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 62–66 (2d ed. 2007).

institutions.⁶ These new factors are not binary “yes/no” factors. Instead, their strength is assessed holistically as part of examining the “discursive web” of statehood.⁷

This modern, contextual approach is vital to make international law work in the twenty-first century. This is in large part because any state formed today is not formed *de novo*.⁸ Instead, any new state is inevitably created as a partition of an existing, recognized state. A contextual approach, incorporating broader factors, allows space for an entity to achieve statehood gradually: beginning down the path of looking and acting like a state, engaging in the practices of a state, and eventually becoming a state. This flexibility makes the current status of states in the world less rigid and static. While this flexibility is positive for emerging states, it may generate concern among current states hosting groups that wish to secede.

Participating in International Sport to Support Statehood

One way that entities seeking statehood can support their claim is to participate in international relations, for example, as members of international organizations. One way to participate in international relations is to participate in sporting events such as the Olympic Games. States (and their cities) seek to host the Olympic Games and other sporting events with the same fervour as seeking seats on the UN Security Council. Heads of state make a point of showing up (or not) to the Olympic Games. The identity of an entity as a state is bolstered when it marches into a stadium, amongst other states, with its own flag, national emblems, and the like.

Using the factors of “independence” and “effectiveness”, described above, participation in international sport supports a claim to statehood by providing evidence of the fulfilment of these factors. Sending a discrete group of individuals to represent an entity in a sporting event is evidence of some form of independence. For example, it becomes more difficult to claim that Kosovo is part of Serbia and not independent when the Kosovo flag flies amongst other states’ flags at the opening ceremony of the Olympic Games. As a symbol of a nation or state, performance in sport is as powerful as it gets.⁹ But the evidence of independence runs deeper than the performative aspect of sport participation. Putting a team on the field requires independent organizational capacity. An independent sporting structure including national sporting organizations, coaches and athletes, physical infrastructure, and (ideally) institutions that address sporting integrity issues such as corruption, match-fixing, and doping, is required to participate in international sport.

Evaluating the “effectiveness” of an aspiring state in sport can be unique compared to other possible measures of state effectiveness, such as diplomacy, economic growth, or human development indicators. Unlike these other areas, sport is a zero-sum game, with clear winners and losers. While the Olympic Games themselves are officially not a competition between “countries,”¹⁰ national media often keep track of medals won. Even established states go to great lengths to demonstrate their superiority in sport, such as the United Kingdom’s investment in sport before the 2012 London Games, or Russia’s investment in sport and engagement in systematic doping prior to and during the 2014 Sochi Games. The more medals an entity wins, the more likely it is to be seen as not only having an independent sporting infrastructure, but also an effective sporting infrastructure. An old saying goes, “it doesn’t matter whether you win or lose, it’s how you play the game.” But for some, winning is likely to support a claim to

⁶ Janis Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law*, 28 EJIL 409, 430 (2017).

⁷ *Id.* at 431.

⁸ VIDMAR, *supra* note 3, at 50.

⁹ See TIM EDENSOR, *NATIONAL IDENTITY, POPULAR CULTURE AND EVERYDAY LIFE* 78 (2002); ERIC J HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 143 (1990).

¹⁰ Int’l Olympic Comm., *Olympic Charter* (2019), Rule 6.

statehood far more than mere participation would. The question remains, how have entities that have sought recognition as states fared in using sport for that purpose?

The International Olympic Committee Defines and Restricts Sporting Geography

International sport, including the Olympic Games, has been an area where non-state entities may participate on the same playing field (literally and figuratively) as states. “States” do not participate in the Olympic Games. Instead, National Olympic Committees (NOCs), which must be recognized by the IOC, send teams of athletes to the Games. In determining which territories may have a recognized NOC, the IOC has moved from a broad definition to a narrow definition.

The founder of the modern Olympic Games, Pierre de Coubertin, wrote in 1911: “The fundamental rule of the modern Olympiads is summarised in these terms: ‘All games, all nations’ . . . I must add that a nation is not necessarily an independent State. There is an athletic geography that may differ at times from political geography.”¹¹ This approach is consistent with the IOC’s (highly-contestable) claim to political neutrality.¹² This approach also balances a few of the IOC’s goals: organizing the Games,¹³ having a “big tent” to include as much of the global community as possible in the Games,¹⁴ and encouraging “appropriate expressions of nationalism.”¹⁵

However, since de Coubertin’s statement on “athletic geography,” the IOC has moved much closer to aligning with political geography. Throughout much of the twentieth century, a NOC could hail from a “country or geographical area.”¹⁶ Beginning in the mid-1970s, the IOC has narrowed the scope of precisely what entity could have a recognized NOC. Today, a NOC is expected to develop the Olympic Movement in their “country,”¹⁷ and “country” has been defined since 1996 as “an independent state recognised by the international community.”¹⁸

This narrowing of who can be recognized as a NOC has reduced the ability of non-state entities to participate in the Games. The earlier approach allowed NOCs in territories that were not states, but had some distinct political organization or geography, to be recognized by the IOC.¹⁹ In the early twentieth century, this position allowed the IOC to recognize emerging states such as Bohemia in 1899 (then part of the Austro-Hungarian Empire), South Africa in 1904 (then a colony of the United Kingdom), Finland in 1907 (then part of the Russian Empire), and India in 1927 (a colony of the United Kingdom, whose athletes participated under “India” in several prior Games).

¹¹ Pierre de Coubertin, *Géographie Sportive*, 64 REVUE OLYMPIQUE 51, 51 (1911).

¹² Int’l Olympic Comm., *supra* note 10, Fundamental Principles of Olympism, Principle 5.

¹³ The Court of Arbitration for Sport (CAS) noted in 2017 that the “attempt to mirror the solutions and realities of the political map onto the sporting world makes a lot of sense”. *Football Association of Serbia v. Union des Associations Européennes de Football (UEFA)*, CAS 2016/A/4602, para. 123 (Jan. 24, 2017) [hereinafter *Football Association of Serbia v. UEFA*].

¹⁴ Int’l Olympic Comm., *supra* note 10, Rule 27.1.

¹⁵ Byron Peacock, *Legitimacy and the Dynamic (Re)Constitution of Olympic Conceptions*, 32 THIRD WORLD Q. 477, 482 (2011).

¹⁶ Int’l Olympic Comm., *Olympic Charter* (1975), Rules 8, 24.

¹⁷ Int’l Olympic Comm., *supra* note 10, Rule 27.1.

¹⁸ Int’l Olympic Comm., *Olympic Charter* (1996), Rule 34.1; Int’l Olympic Comm., *supra* note 10, Rule 30.1.

¹⁹ The current Olympic participants that are not UN Member States are, in order of recognition by the International Olympic Committee, Bermuda (1936), Puerto Rico (1948), Hong Kong (1951), Chinese Taipei (Taiwan) (1960) (although it has a more complicated history of recognition vis-à-vis the People’s Republic of China), the U.S. Virgin Islands (1967), the Cayman Islands (1976), the British Virgin Islands (1982), the Cook Islands (1986), Aruba (1986), Guam (1986), American Samoa (1987), and Palestine (1993).

Since the definition of “country” was added in 1996, the IOC has only recognized NOCs that belong to a territory of a UN Member State, with one exception.²⁰ In 2014, the IOC recognized Kosovo’s NOC, although Kosovo is not a UN Member State. The recognition was more a result of Kosovo’s recognition by many other international sporting federations, than a political stance by the IOC.²¹ It is much more difficult for a non-state entity to become a new participant in the Olympic Games today than it was for most of the twentieth century.

What is the Weight of Participation in the Olympic Games?

Several emerging states have used sport to bolster claims to statehood throughout the history of the Games. For the sake of space, I will briefly examine two: the German Democratic Republic (GDR, or East Germany), and Kosovo. The GDR is an example of a successful use of sport as state policy as part of the transition to statehood. Kosovo is a contemporary example, and as noted above, is the only example in the past twenty-five years of an entity receiving recognition from the IOC before becoming a UN Member State.

East Germany made it official state policy to participate in sport as part of its claim to statehood. The GDR put significant resources into sport, based on the assumption that sporting excellence would lead to international recognition of an independent East Germany.²² The GDR was wildly successful in sport, first competing among Soviet Bloc states, then in international sport. By the 1972 Olympic Games, East German athletes marched into the opening ceremonies under their own flag—in Munich, West Germany. The GDR was admitted as a member of the United Nations in 1973. In part through sport, the GDR demonstrated its independence from West Germany. The success of East Germany in sport²³ demonstrated the effectiveness of the state. The state-run doping program that brought about many of those medals could also arguably be seen as evidence of state effectiveness.²⁴ This is not to say that sporting success directly led to the recognition of the GDR by the international community, but it likely formed part of the “discursive web” supporting a claim to statehood.

Kosovo is a more recent case. Like East Germany, Kosovo has struggled for global recognition of its claim to statehood. Shortly after declaring independence in 1991, Kosovo established an NOC. Both the declaration and the NOC were largely ignored until the 2000s. The international community only started to recognize Kosovo following a second declaration of independence in 2008. Meanwhile, in sport, Kosovo’s sporting bodies were recognized by international federations beginning in 2003. The IOC eventually recognized Kosovo’s NOC in 2014. Has sport supported Kosovo’s case for statehood? In terms of independence, Kosovo’s increasing participation in international sport can be seen as evidence of independence from Serbia. In terms of effectiveness, Kosovo’s gains from sport have been more limited. Unlike the resounding success of the GDR in the competition, Kosovo has

²⁰ By UN Member State/IOC recognition date: Micronesia (1991/1997), Eritrea (1993/1999), Palau (1994/1999), Kiribati (1999/2003), Timor-Leste (2002/2003), Marshall Islands (1991/2006), Montenegro (2006/2008), Tuvalu (2000/2008), and South Sudan (2011/2015).

²¹ The Union of European Football Associations (UEFA) used a narrower definition than the IOC, requiring a national football association to be in a country that is “recognized by the United Nations as an independent state.” This CAS found this requirement to be absurd and struck it down, as the United Nations does not recognize states. [Football Association of Serbia v. UEFA](#), *supra* note 13, at para. 108.

²² MIKE DENNIS & JONATHAN GRIX, [SPORT UNDER COMMUNISM: BEHIND THE EAST GERMAN ‘MIRACLE’](#) 19 (2012); BARRIE HOULIHAN, *SPORT AND INTERNATIONAL POLITICS* 72 (1994).

²³ [As of 2020, East Germany still ranks 11th overall in all medals won by a country at the Olympic Games, ahead of Australia, Canada, and Japan, despite not having competed since 1988.](#)

²⁴ Although the program arguably only truly became a state-run systematic system in 1974, after recognition of East German statehood. Werner W Franke & Brigitte Berendonk, [Hormonal Doping and Androgenization of Athletes: A Secret Program of the German Democratic Republic Government](#), 43 *CLINICAL CHEMISTRY* 1262 (1997).

not been too successful, although a Kosovar judo athlete won a gold medal at the 2016 Summer Olympics. But, as Kosovo continues to build sporting infrastructure, sporting success could serve as further evidence of state effectiveness. Demonstrating effectiveness might be more important for Kosovo than East Germany, as Kosovo is still operating alongside the UN Interim Administration Mission in Kosovo, which helps provide an effective state apparatus for the people of Kosovo.

These cases are examples of the differing strength of sport in supporting claims to statehood. The case of East Germany is a strong case where an entity made sport a priority, was wildly successful, and that success in sport likely bolstered claims to statehood. Kosovo is an emerging case where participation and success in sport has been limited. But, as time goes on, perhaps sport's role as part of Kosovo's "discursive web" will become stronger.

Connecting Sport and Statehood

International law and sport have moved in opposite directions regarding states over the past decades. International legal definitions of statehood have moved from a narrow, criteria-based analysis to a more contextual approach to defining a state. Meanwhile, sport has moved from a "big tent" approach to a narrower, criteria-based analysis of who may be recognized.

While the actual effect of sport participation on statehood recognition is indeterminate, emerging states such as Kosovo still appear to believe in the value of sport to support a claim to statehood. It is unlikely that new entities seeking statehood will participate in the Olympic Games in the near future. However, these entities are increasingly participating in sport through other venues, such as in events specifically organized for non-state entities.²⁵ Additionally, the IOC has allowed refugees to compete as part of a Refugee Team in 2016, and also in 2021.²⁶ It is uncertain what this step may mean for the future of non-state entities and the Olympic Games, but it demonstrates that sport need not use "states" or "nations" as a central organizing principle.

Ultimately, this question is not just of academic importance. Athletes representing Palestine, Kosovo, Hong Kong, and Taiwan (competing as Chinese Taipei) are all scheduled to participate in the 2021 Summer Olympics in Tokyo. Will a few medals at that event, and some time on global television showing athletes marching into the stadium help the claims of these entities of either sovereignty, independence, or statehood? Or would it help them diplomatically in their disputes with other states? Perhaps surprisingly, what happens "on the field" in sport can have significant impacts "off the field" in international law and international relations.

²⁵ For example, the CONIFA World Cup is competed in by teams that "represent[] nations, minorities, isolated dependencies or cultural regions." *About Us: FAQ*, CONIFA.

²⁶ *IOC Refugee Olympic Team*, INT'L OLYMPIC COMM.