HAS THE INTERNATIONAL COMMUNITY LEFT THE MONTEVIDEO CONVENTION PARAMETERS? ARE WE REVISITING CONSTITUTIVE THEORY BACK?

Aastha Mehta

INTRODUCTION

States are recognized as the primary part or entity in international law. There legal personality remains undisputed. Therefore, the creation of such entity, i.e. the issue of statehood lies at the heart of international law. Scholarly ink has flowed to a great extent on the subject, and a comprehensive overview is difficult for the same. However, in this paper, author has tried to give Montevideo Convention, a revamp, by having it linked to formation of newer states. Though literature is already available for the same, and author is partly inspired by the growing debates on different regions demanding statehood, the paper is also in tune with the growing material available on the changing notions of statehood. Though the paper does not discuss it but, it does primarily take from the Grotian Moment Theory, coined by Richard Falk, in 1985 which means there is development with lightning speed of the newer norms of international law, and older customary rules being replaced by them. ² The same has been weaved into the fast paced changes taking place in domain of statehood.

The underlying theme of the paper is to show how the recent developments have challenged the authority of Montevideo Convention, and why it is no longer the sole criteria for understanding statehood or recognition of statehood. Different case studies have been shown

---

¹ 4th year B.A LLB(H) Student, Amity Law School I
to reinforce on the relevance of the theories of recognition as well as the actual force the Montevideo convention holds in the minds of the international community.

**MONTEVIDEO CONVENTION: IS IT FAILING TODAY?**

Montevideo Convention on Rights and Duties of the State 1933\(^3\), is the core to understand this paper. This Convention defines a State in Article 1, which provides that an entity becomes a state if it has i) a permanent population ii) defined territory iii) government iv) capacity to enter into relations with other states. Without going into origin of the Convention, author’s primary focus is on why has Montevideo Convention not been adhered to strictly in recent times when it comes to creation of new states. Enough literature has been written on the four criteria of statehood, and well known jurists have given a detailed study of these elements.\(^4\) In recent times, recessionary movements, rebellions etc. are on hyperbolic rise, and the dissatisfied state of affairs throughout the world, has led to the tectonic situation of various groups and organizations demanding separate states from their current regime. Enough academic literature on different instances come before our eyes when we ponder upon the question of demand of new statehood\(^5\) be it Cyprus, Crimea or Palestine. This leads us to the question, is Montevideo Convention (hereinafter referred as 1933 Convention) a sufficient mechanism to be applied in modern context. Author opines that the origin of the 1933 Convention was based on a different philosophy of state. 1933 Convention was the first of its kind instrument which authoritatively gave out the picture of state’s international personality. It came at a time when the doctrine of

---

\(^3\) Montevideo Convention 1933, December 26 1933, The text available at http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml (accessed at 23rd march 2016)


Georg Jellinek of Drie-Elementem-Lehre 6 was popular, and the same was embodied verbatim in Article 1 of the 1933 Convention. The inception of 1933 Convention is the one of the reasons for its limited applicability in contemporary international relations, since no one contemplated the future questions which might be posed on creation of statehood. International landscape wasn't the same during the signing of 1933 Convention as it is today. In a critique to the 1933 convention, it was also pointed out that the fact that article 1 of the convention is oft quoted doesn't really show that the 1933 convention is sufficient, but the reliance is placed solely because of lack of alternative model. 7 Drawing further on the insufficiency of 1933 Convention, this Convention is not self-exhaustive instrument. It has seen that wide changes are being made in the applicability of the 1933 convention. Though the changes are not in the text, but scholarly material points out to the fact that with every new issue of statehood cropping up, it becomes more and more clear 1933 Convention’s traditional criteria aren’t enough. The additional set of criteria for statehood are seen as self-determination, protection of human rights, prohibition of racial discrimination etc. 8 This line of argument further clarifies how Montevideo Convention isn’t the only instrument which requires to be seen as touchstone of statehood. Montevideo Convention has not lost all its efficacy because of criticisms, and it is widely accepted definition for statehood, however with growing questions about different circumstances, like recessional acts, use of force, terrorist or non state actors organizations etc., its value has been diluted.

---


In further sections of the paper, author will show how according 1933 Convention, many of the new states formed in recent period couldn't have even qualified for statehood, and how some entities though are fulfilling the criteria for statehood are not recognized as states. This show that the interpretation given to 1933 Convention has been more political than legal, since existence of a state, has many repercussions in international politics. For the above reasons, author would now embark on a normative analysis of recognition of state theories, and establish its link with 1933 Convention.

THEORIES ON RECOGNITION OF STATE: ON WHICH SIDE ARE YOU?

Recognition of a state has legal and political implications for the state created, as well as it results into interaction of new foreign policies, new agendas and newer balance of power by the other states. Creation of one new state, big or small, will result into paradigm shift in the international relations, especially if the state has been created after prolonged acts of violence, internal conflicts, civil wars etc. The importance of the creation of new states is that, as more states are created, the international community faces a lot with their recognition along with the fact that the question of recognition is essentially under the political realm. Once a state is born, there are two questions that come up before the world, and academic community has focused on these two questions very minutely. The questions posed are as follows,

I) Will creation of a state depend upon whether other states recognize it or not?

II) Does the state exist even apart from the fact that they have been conferred recognition by other states or not?

The answers to these questions lies in the two diagonally opposite theories, namely, constitutive theory and declaratory theory. The title of this section “On which side are you?” is in essence pointing out towards the inherent dichotomy of the situation. Both these theories have been used at some point of time in international law, and though declaratory version is followed in modern times, constitutive theory also holds a strong precedent which cannot be shirked away easily.  

It is essential to discuss these theories in brief and then move on to understand its relevance in modern context.

Constitutive theory goes on to say that recognition by other states, is determinative of the creation of new state. Oppenheim follows this approach and writes, “A state is and becomes and international person through recognition only and exclusively.” It is based on the discretion or the will of the other states, whether it accepts an entity as state or not. Non-automatic nature of creation of state, is linked to acceptance by other older states. Even if an entity has all the four criteria under Article 1 of 1933 Convention, its creation and existence is dependent on the policy/approach taken by other states. This theory makes the question of recognition subjective, and an entity can be a state for those who recognize and a non state for those who don't recognize it.

Declaratory theory however, goes on to say that once the conditions of statehood are fulfilled, then recognition or non-recognition has no constitutive effect on creation of state. This means that once Article 1 1933 Convention requirements are met, then there is automatic creation of a state and no action or inaction on part of other states will have consequence for its creation.

---

14 See the case of Somaliland, Alexis Arieff De facto statehood? The strange case for Somaliland Yale Journal of International Affairs p.61 (2008); Redie Bereketeab (ed.) Self Determination and Secession in Africa: The Post Colonial State, Routledge (2014)
Article 3 of 1933 Convention\textsuperscript{15} embodies the declaratory theory when it provides as follows, “The political existence of the state is independent of recognition by the other states.” It is further reiterated by Article 6 of the 1933 Convention\textsuperscript{16}, which reads “The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.” This theory has found support not only among the academia, but even certain international cases favor this school of thought.\textsuperscript{17}

The world community is however divided, and no one school of thought has been rigidly applied. Author would state here, that in absence of any coherent application, of either of the theories, it has become a case by case analysis. But one thing is however concluded, which can be seen from examples that 1933 Convention has been disregarded majority of the times by international community, which can be seen from the fact that reaction to creation of new states, whatsoever its origin, is primarily on case to case basis. One very pertinent aspect to be noted according to the author is that there is no significant taking of sides by scholars as to which theory is applicable, primarily because no universal pattern in creation of states can be seen. New states can be created by decolonization (e.g. India and Pakistan in 1947), a new state can be created by procession of secession (Baltic states in Eastern Europe), a new state can be created by acts of violence, or dissolution of former state (e.g. former Yugoslavia). Therefore, the degree of recognition required in each is different, the value recognition by other states holds in different, and the approach is different as well. Following are the few examples, where it is seen that declaratory theory and 1933 Convention’s application are on a decline, and recognition is a constitutive factor for creation of new states.

\textsuperscript{15} Supra fn.2
\textsuperscript{16} Ibid
\textsuperscript{17} Deutsche Continental Gas Gesellschaft v. Polish State (1929) 5 A.D 11; Bosnia and Heregovina v. Serbia and Montenegro (2007) ICJ 2
The classic case is of Biafra, which was a region in Nigeria, and it attempted to create a state by way of secession from Nigeria in 1967, after a long and heinous civil war. It was recognized by few African states\(^\text{18}\), but not recognized by majority of the countries, or Organization of African Unity or the UN, and the conclusion drawn was that by applying declaratory and constitutive theory, the recognition given to Biafra was premature and therefore it was not a state.\(^\text{19}\) By applying both the theories, it had not yet fulfilled the criteria for statehood, however it needs to be noted that the non-recognition of majority of the states also, was one factor which ultimately resulted into death of this state, or so as to say the still-birth of the state. Therefore, this instance, is an example of recognition being constitutive and a deciding factor. It was also a general opinion, that a state created out of secession, recognition is utmost for its existence.\(^\text{20}\)

The example of Bantustans is also apt for the same, where except South Africa, no other state recognized it, even though 1933 Convention requirements were fulfilled.\(^\text{21}\)

There are well known deviations from the 1933 Convention, which can be seen from the creation of Eastern European countries, which were created after disintegration of Soviet Union. Author L.S Eastwood Jr.\(^\text{22}\) has done a comprehensive study of secessionary movements in Baltic states, and his conclusion was that Baltic states like Estonia, Latvia and Lithuania, were recognized by other countries was not an affirmation right to secede, in international law, but more of a beginning of a new trend because of the peculiar circumstances, since these countries were illegally occupied and annexed by Soviet Union, during the World War I.

---

[^18]: Tanzania, Gabon, Ivory Coast, Haiti and Zambia
Author states that in cases of the Baltic States, it is essential notice, that 1933 Convention was never the primary criteria for conferring statehood. In 1991, the European Council members adopted additional criteria, in wake of dissolution of former Yugoslavia, and these criteria were known as Declaration on the Guidelines on Recognition of New states in Eastern Europe\(^\text{23}\). Apart from 1933 Convention’s four essential elements, other elements were also included in these guidelines. It is pertinent to note that Badinter Commission, which was looking into various applications of different states for their statehood, did not grant recognition to states Bosnia and Heregovina, Macedonia etc. because even though they had fulfilled the criteria under 1933 convention, but were unable to meet the 1991 guidelines.\(^\text{24}\) This shows that 1933 Convention was never really regarded as the sole deciding instrument, and further the rise of these new nations after disintegration of USSR, has given a drastic blow to 1933 Convention’s authority. This further shows that constitutive theory has been applied more, rather than 1933 Convention’s approach of declaratory theory, since independence of majority of smaller states of Europe, has essentially been based on what is the treatment meted out to it by other EU members. The fact that one EC recognized small states like Bosnia and Heregovina, Crotia, Slovenia etc. other states followed suit, it has been written by one author that Badinter Commission’s recognition was constitutive for these countries.\(^\text{25}\) Further the fact that a state is recognized by other countries, actually bolsters its position in international arena, since a sort of validation or acceptance is given which further helps a state to meet the criteria of 1933 Convention. This generally happens in case a state at its inception has not been able to fulfill


\(^{24}\) Ademola Abass, Complete International Law, OUP Oxford, pg.126, (2012)

\(^{25}\) Andrew Coleman, Resolving Claims to self determination: Is there a role for International Court of Justice?, Routledge pg. 132 (2014)
all the elements of statehood under Article 1 of 1933 convention, but due to its recognition by other states, it has stabilized and has been able to achieve all the criteria of 1933 Convention. These examples, are a proof of that internationally, the trend is more on imposing additional criteria for statehood, and 1933 Convention has been left behind, along with its declaratory theory. In the next section, we see the reasons behind recognition and non-recognition, sans the political ones, but to understand whether the origin of state itself has some inkling to its future destiny. The next section is solely devoted to incorporate the reasons why some states were or are recognized, whereas some are denied, furthering the argument that 1933 Convention does not deal comprehensively with all aspects of statehood and issues ancillary to it. After building up a case for showing that constitutive theory is on a rise, author now turns to the most recent development in international law, especially in the field of creation of state i.e. the Kosovo declaration of independence. The reason for incorporating the same in the paper is to make the argument stringer that 1933 Convention, no longer holds true, atleast its effect has been highly watered down.

ICJ ADVISORY OPINION ON KOSOVO: VALIDITY OF UNILATERAL DECLARATION OF INDEPENDENCE AND A QUESTION MONTEVIDEO FAILS TO ANSWER?

ICJ in its advisory jurisdiction under Article 65 of ICJ Statute, opined in Advisory Opinion on Kosovo’s unilateral declaration\[26\] held that there is no prohibition on a unilateral declaration of independence in international law, and therefore it is not in violation of any international law rule. It is one of those rare cases, where actually ICJ departed from the question posed to it by

---

\[26\] Advisory Opinion on the Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22)
United Nations General Assembly’s resolution\textsuperscript{27}, and went to reformulate the same. The basis of the same has been multiple sources, however interestingly it has looked into how in 18th-19th Century, states were created by way of unilateral declaration of independence, and they were recognized as a matter of international law. \textsuperscript{28} ICJ further stated as follows one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination” in the context of “non-self-governing territories and peoples subject to alien subjugation, domination and exploitation”\textsuperscript{29} This ICJ opinion has not been immune to criticisms. There are various criticisms, not only from the scholarly arena, but even the dissenting opinions have not spared the majority opinion. Judge Koroma\textsuperscript{30}, has voiced his caution by stating that the majority opinion can have catastrophic effect across the world, since it can fuel secessionist movements and stability of international law will be severely undermined. World integrity is will be at stake, if each group is allowed to have their own separate state, without giving due consideration to the parent state, or to the process of recognition. This opinion has been taken up as a shield by the secessionist groups in Crimea, which have recently demanded independence from Ukraine, to join the Russian Federation. The same opinion has been used to strengthen the opinion on the statehood of Turkish Republic of Northern Cyprus (TRNC) which has claimed statehood from Greece, though not recognized by international community.\textsuperscript{31} In fact the concurring opinion of Judge Yusuf expressed his concern by stating that the narrow scope of question has allowed an opportunity to slip from the hands of the court to clarify the position on self-determination, in

\textsuperscript{27} G.A. Res. 63/3, U.N. DOC. A/RES/63/3 of (Oct. 8, 2008)

\textsuperscript{28} Supra fn.15 para 79

\textsuperscript{29} Ibid

\textsuperscript{30} Dissenting Opinion pg. 403, para 4

\textsuperscript{31} Nejat Dogan, \textit{Ramifications of ICJ Kosovo advisory opinion for the Turkish Republic of Northern Cyprus} Ankara Bar Review, pg. 71-72 (2013)
its post-colonial conception. Similarly, for future cases, the value of this opinion is seriously doubted, firstly because it is given under advisory jurisdiction, and emphasis should be put on the fact that Kosovo’s declaration of independence puts in narrow limits of their own peculiar situation, and does not in any manner make it a precedent for other regions in the world. The verbatim text is quoted here “Observing that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation.” However, in relation to 1933 Convention, can one say that unilateral declaration of independence is valid, even though a state might not have required criteria under 1933 Convention? To put it differently, has the ICJ opinion given rise to dilution of 1933 Convention, and liberalizing the process of the creation of state? The answer to this question is twofold. Firstly, declaring a particular region as independent, does not mean it is automatically fulfilling the criteria given in 1933 Convention. Therefore, mere declaration, still keeps the question awake whether other states will recognize that region as a separate state or not. Secondly, it invariably is observed in practice that those states who unilaterally declare their independence are not in a position to meet the 1933 Convention requirements, since there will be an absence of government, secondly the boundaries will be disputed and there will not be clear demarcation of boundaries, and lastly that since it has unilaterally declared its independence, its capacity to enter into foreign negotiations, without the help of the parent state or UN will also be seriously doubted. This is not the case in creation of states by process of decolonization, however definitely it is applicable to the recent states that have been created due to their recessionary efforts. The essential idea lies in the fact that though, unilateral declaration of independence is not violative

33 Kosovo’s Declaration of Independence, Preamble (February 17, 2008) Available at http://www.assembly-kosova.org/?cid=2,128,1635 (accessed on 25th March 2016)
of international law, even then its sanctity or viability still depends on the recognition by other state, giving rise to constitutive theory of recognition. Unilateral declaration of independence often is and can be called “premature stage of statehood “and only after recognition by other states, can the position of entity having acquired the essential criteria of statehood from 1933 Convention can be decided.

Moreover, unilateral declaration of independence, primarily means a group seceding away from a mother state, by unilaterally declaring itself to be separate, and creating a subnational entity. It is important to see that unilateral declaration of independence does not have the consent of the mother state, since every state will have legitimate interest in preserving its territorial integrity. However, the group ceding itself, basis its right to do so on the core principle of self determination, pervading in various international instruments. 35 One flaw which 1933 Convention has over the years shown is that it does not state anything on self determination, or the legality of the origin. 1933 Convention is silent with respect how the criteria need to be fulfilled for statehood, whether the state needs to fulfill them at once, and then be called a state, or whether it is a gradual process, something that generally happens when an entity calls for unilateral declaration of independence, and whether the origin of the entity as the state should be considered or not. Tinoco Concessions Arbitration36 has thrown some light on the origin and its value for recognition. It had stated that if the non recognition is not based on the factors like de facto sovereignty, complete governmental control, but it is based on illegitimacy or irregularity of origin then non recognition loses some evidential value. This however makes the entire act of recognition essentially constitutive, since illegitimacy or irregularity of origin and its relation to non recognition is a completely political act, guided by

35 Article 1(2) of UN Charter; Article 73 of UN charter; Article 1(3) of ICCPR; Declaration on Principles of International law concerning friendly relations and cooperation among states in accordance with UN Charter 1970
36 (1923) RIAA I. 369
political considerations. It can so happen that a state does not recognize new state as a mark of disapproval, or recognition is maybe due to garnering support or creation of puppet states. 

37 Author James Crawford comments as follows “It should be recalled that the Montevideo Convention was drafted at a time when the principle of self-determination was not generally recognized in international law, and when the implications of the nascent rule prohibiting the use of force between states in this context had not been worked out It may be that the idea of statehood, imperfectly expressed in the Montevideo Convention, has been modified by these developments.” 38 The same author also shows his surprise that even though 1933 Convention has its own situational defects, still it is used to determine a status of a state. 39 This shows that 1933 Convention's germ was sown in a time when current state of affairs where not contemplated, and history has also a played a role in eroding the plank of 1933 Convention, especially the Cold War, and the rise in ethnic-indigenous divide within states.

Further one aspect to be considered is how unilateral declaration of independence can be given a form of statehood, by way of collective recognition i.e. membership into UN. The idea of becoming a member of UN, implicitly gives way to constitutive theory being practiced for years. Though on the face of it, 1933 Convention embodies the declaratory theory, it is apparent by various examples of unilateral declaration of Rhodesia, unilateral declaration of Palestine in 2011, that practice of the states points to the contrary. If declaratory theory is followed, then today the world would have had over 200 countries, and unilateral declaration of independence would have been a routine tactic for any group or organization to secede territories from the existing states, there by creating innumerable small states in the world. But author states that

37 Supra fn.10, pg. 89
39 Ibid pg.309
constitutive theory has been the undercurrent since years, without due acknowledgement of it. From an international relations perspective, constitutive theory i.e. the recognition being conferred by other states, is also confined to members of Security Council, the top 5 players of international relations and not the world community, which is evident from the rules of procedure for admission as member in UN. 40 Therefore, the question of legality of origin and whether an entity is capable enough to be a state, will also be in hands of the powerful few, and recognition by world community is not a boost for the new state, a classic example of which is Palestine, which has been recognized by over a 100 countries of UN, but still hasn't been given membership, due to the decision being tied in the hands of Security Council. 41

In the next section, author would provide, why the world is at crossroads, to shift from the old notions of statehood and sovereignty, and to go ahead and come up with something new and tailor made for the present times.

DO WE NEED ANOTHER MONTEVIDEO CONVENTION?

Just like, laws have amendments, and to suit the growing needs of the society, change is utmost, author proposes that international community should draw up, a new convention, which realizes and incorporates the current situations. Though not scrapping the Article 1 criteria of 1933 Convention, there needs to be some answers, or solutions, for questions that face us in wake of the new demands for statehood. Similarly, it is observed, and in the paper also author has shown how constitutive theory is actually being used, 1933 Convention needs to be modified to the extent of giving some role to recognition by other states, for creation of statehood. The criticisms of subjectivity in constitutive theory is well known, and to address

the same, one needs to ensure that stringent and more conditions for statehood are imposed, and once those conditions are fulfilled, the other states should recognize it. However, till the complete adherence to statehood criteria under the new instrument, a leeway or a breathing space should be given to other countries whether to extend recognition or not. One issue that author has all along used in the theme of the paper, as to the non-uniform policies used by states to extend recognition to other states, is essentially a case by case approach. In order to introduce some coherent pattern, instead of 1933 Convention, additional instruments should also be developed which give some guidance for countries to build their recognition policy. It is essential that a consensus is made between the countries, and maximum support for such convention would be required. It will definitely be a longer process, however it will in the end crystallize the world opinion, and remove the clouds of doubts, uncertainty and hardships from entities that have been struggling for recognition or statehood.

CONCLUSION
Concluding, the author would state that though there seems to be defects and the archaic law of 1933 Convention no longer holds true, it is the only instrument today, and therefore in absence of any other alternative being proposed, due respect needs to be offered to it. However, this should be done keeping in mind that, international law needs a change to address the current themes of statehood, and the dialogue shouldn't end in 1933 era.