

Recognition of States: The Matters Still Unresolved

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Abstract: - The question relating to recognition of states is a growing concern whereas new states under current state of things could only be created through breaking away from an already established state. Since there is no universally accepted legal document nor a guideline to properly recognize an entity's claim for statehood, recourse has been often made to Articles 1 of the Montevideo Convention on the Rights and Duties of States which has become a customary international norm pertaining to the subject. However, the Montevideo Convention was not drafted to be used at a universal level and it was agreed upon by the American States to make their respective claims for their newly gained independence. The Montevideo Convention is outdated since the political realities has changed since its enactment. and this is also evident from the efforts of the European Union when they tried to establish new grounds for recognition of the entities making claims for statehood in the Eastern Europe which became a futile endeavor. Matters were further complicated by the International Court of Justice's judgement regarding the unilateral declaration of Kosovo where the ICJ failed to either decide or comment on the international law relating to recognition of states. Therefore, this article attempts to bring into context the issues related to recognition of states and where the international legal community stands regarding building up a proper mechanism to recognize statehood of entities making such claims.

Key Words: International Law, Montevideo Convention, Recognition of States

I. INTRODUCTION

International Law was once considered as a part of the positive morality and not as a law *per se*. John Austin, in his book 'The Province of Jurisprudence Determined' made these remarks looking at the fact that, since the international legal order does not possess a sovereign to whom all the State actors have given their habitual obedience where according to Austin law is the command of a sovereign backed by sanctions. In his analysis it can also be found that, Austin refuted International Law as law *per se* because it not only lacked a sovereign, but it also lacked a proper implementation mechanism which remains true to some extent even in the modern day. International law is seen as a normative order and therefore, in the hands of positivism international law is not law in the proper sense.

Austin coined the branches that were not law *per se* as 'laws improperly so called' as opposed to 'laws properly so called' to draw a distinction between the two and international law according to Austin fell within the ambit of 'laws improperly so called'¹. However, this positivistic ideology was challenged

by another positivist or to properly label, a soft positivist. H.L.A. Hart known as a soft positivist, argued that, a legal system whether domestic or international is a combination of both primary and secondary rules. Since international legal order is also comprised of both primary and secondary rules, international law is also a law *per se* and therefore, according to Hart, international law is also a 'law properly so called' in the Austinian sense.

International law when compared with a domestic legal order lacks a proper legislature to enact laws, an executive to implement the laws and a Court with a compulsory jurisdiction to adjudicate on the matters. However, even with these shortcomings, international law is capable of complying with the secondary rules envisaged by Hart.² With regard to the rule of recognition, the Statute of the International Court of Justice in its Article 38 (1) points out the sources of law which should be considered in determining cases coming before the International Court of Justice. Further, regarding the rule of change in the international legal order, customary international law has played a significant role in the past and in the modern era treaties have over taken this. Hence, international legal rules are also capable of being changed albeit in somewhat of a difficult manner. Regarding the rules of adjudication, the International Court of Justice, though lacking compulsory jurisdiction has produced a traveling body of jurisprudence which has found its place in many domestic Court decisions. Under these circumstances, the Austinian argument is incapable of holding water any longer. The argument therefore, whether international law is really law is only of historical value. In the modern era the fact that international law is also law *per se* is very well established.

After establishing the fact that, international law is law *per se*, it becomes important to investigate the historical evolution of international law. Some of the early writers have stated that international law as law *per se*, began with the conclusion of the Peace of Westphalia in 1648, which ended the Thirty Years War in Europe.³ Though may consider that, the Dutch jurist Hugo Grotius as being the founding figure of International Law, it was actually the British philosopher Jeremy Bentham who coined the term 'International Law; in 1789.⁴ According to Bentham, international law is 'that branch of jurisprudence exclusively concerned with mutual

¹W. Rumble (ed), *John Austin The province of jurisprudence determined* (1st edn, Cambridge 1995). P 17.

²H.L.A. Hart, *Concept of Law* (3rd edn, Oxford 2012). P 213. *Vide*, Chapter X.

³A. Abass, *Complete International Law: Text, Cases and Materials* (2nd edn, Oxford 2014) 10.

⁴*Ibid*

transactions between sovereign as such'.⁵ This definition gave rise to the traditional definition of international law which in general terms means that, international law is concerned with the mutual dealings of sovereign States with one another.

As the term international law originated in the continental Europe, Dugard observes that, during the seventeenth century, international law was an international law of the Christian Europe. This is very important for anyone who is trying to evaluate the international law from a non-European sense. As the roots of international law are rooted with the ideologies of the European Christianity, other perspectives when trying to evaluate the international law as it is instead of what it ought to be, will inevitably find that it will cater to more of the European need than any universal kind of needs.

Klabbers⁶ makes some interesting observations regarding the international law as it stood in the seventeenth century. He observes that, the seventeenth century as a pinnacle in the development of international law as we know it today. Before the seventeenth century the continental Europe consisted of large empires and hence the notion of sovereign statehood was not a common parlance. The mentality during this period was to think that 'their empires as single entities, with the consequence that law was largely conceptualized as internal.'⁷ It could be argued that, with regard to the birth of sovereign States, the most important event that occurred in the seventeenth in the Peace of Westphalia which was responsible for ending a Thirty Year War. Soon after the war ended the secular power of the pope, as the leader of the Catholic Church, was brought to a permanent halt. The 1555 Peace of Augsburg, which agreed to divided Europe into a number of territorial units and to allow each of these units to decide for themselves the particular religion which they wish to adopt without any outside interference or intimidation resulted in the creation of sovereign states which inevitably lead to development of the modern international legal order consisting of sovereign states as its primary concern.

The newly created concept of sovereignty gave rise to the concept of imperialism where by the self-proclaimed notion of sovereignty was used to justify the colonization process. During the seventeenth century naval force played a key role in the development of a country. Most of the continental Europe was out to explore the riches of the other territories in Americas and Asia, and in the beginning Spain and Portugal were the leaders in colonial process. Sometime later the power shifted from these two nations to Great Britain and Netherlands. France also came in to prominence latter on. The freedom of the seas as envisaged by Grotius was used to justify the colonization process by the Europeans.

Freedom of the seas allowed freedom of discovery and freedom to trade. Under the concept of 'freedom of the seas'

there came other rules which had to be followed in enjoying this freedom. Once such rule related to dealing and trading with the natives of a new found territory. One such rule was the rule that territories found overseas were to be considered as non-sovereign entities lacking such capacity. These territories were declared as '*terra nullius*' meaning that these territories belonged to no one. As this was the case Europeans were able to proclaim the new found territories in Asia, Americas and Africa as being their own subject to the power and control of the European power who discovers such non-sovereign territories first. During this process the original inhabitants were either not considered as being important in the decision-making process or they were just ignored. However, when it came to trading, they were given enough status to conclude contracts with the European sovereign States. With the colonization process countries in the Asian, African and African continent were subjected to the power and control of the Europe. Within the colonization process the concept of sovereignty was taken away from the colonized territories and they remained subjected to the sovereignty of the colonizer.

The decolonization process was very slow in its momentum until the conclusion of the second world war. However, once the colonizers relinquished their powers over a colonized territory, the decolonized entity could not be considered as a sovereign entity *per se*. Instead there was lot of politics which was apparent in the recognition of these entities as sovereign states. The State practice for the most part seems to showcase a different reality in which there are lesser legal norms than political ones. Even with the rapid expansion of the International Law 'states' remain the axiomatic concern of the discipline⁸. Though in the modern era, 'state' is not the only subject of International Law, it remains the most portent source of discussion.⁹

II. STATEHOOD IN INTERNATIONAL LAW

The recognition of an entity's claim for Statehood hence becomes one of the crucial matters in International Law¹⁰. The answer to the questions of as to what constitutes a state and who is responsible for creating it are very much different and the one that matters the most has been the latter one. As mentioned in the very beginning, international legal order is not as strong as a domestic legal order and therefore, the fragility of the international legal order dictates that when it comes to a rule in international law, that there is coherence as to the substance of the rule and state practice build upon that, if there is a paradox between the two it then becomes problematic as due to the comparatively fragile nature of international law state practices would undermine the importance of a particular rule of international law.

⁵ J. H. Burns and H. L. A. Hart (ed), *Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (1st edn, Athlone Press 1970). P 297.

⁶ Jan Klabbers, *International Law* (2nd edn Cambridge 2017) 9.

⁷ *Ibid*

⁸ John Dugard, *International Law* (3rd edn, Juta 2006). P 95.

⁹ *Ibid*

¹⁰ *Vide*, James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006).

This kind of a dilemma would not be able to create a separate rule under customary international law as well. The reason for this would be the lack of unity in a state practice with the requisite *opinio juris* to create a binding rule under customary international law. Rules relating to recognition of states have suffered this consequence.

The traditional normative framework for recognition of states is contained in the 1933 Montevideo Convention on the Rights and Duties of States. Though this convention has truly passed its time, it remains the main source of customary international law principle regarding the recognition of states.¹¹ Even in modern day literature some reference is made to this convention regarding recognition of states. Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States declares that, a State is an entity which possesses a defined territory, a permanent population, a form of government and the ability to engage in relations with other countries. The Convention only postulates the requirements which need to be satisfied. However, once these requirements are fulfilled, the convention does not impose any legal obligation on the other recognized states to recognize an entity who has fulfilled these criteria's as a state. Hence, it becomes problematic as to whether an entity automatically becomes a state once it meets the Montevideo criteria or whether recognition by other states are still required.

III. THEORIES OF RECOGNITION

International law has advanced two theories regarding the recognition of a state. According to the declaratory theory, an entity will automatically become a state once it fulfills the Montevideo criteria. This declaratory theory is based on the factual reality where an entity is able to showcase that they possess the requisite criteria for recognition merely becomes an act of acknowledgement and it is not the acknowledgement or the recognition which grants the entity with the statehood, rather it is the facts themselves which become *erga omnes* or an undeniable truth.¹²

In contrast, the constitutive theory is focused with the act of recognition. Under the constitutive theory, an entity is not able to gain statehood merely by fulfilling some requisite criteria. It is the act of recognition by other states that grants an entity with statehood. Recognition therefore, becomes a *conditio sine qua non* for statehood. However, in its pure theoretical form, the constitutive theory does not require an entity to fulfill any prerequisites before it can gain statehood, instead everything depends on the act of recognition by other states.

The Convention with the implications of Articles 1, 3 and 6 advocated for a declaratory theory of recognition which rests on the premise that, once the Montevideo criteria are met the other states simply declare the existing fact and

recognition was automatic upon fulfilling the criteria. However, the existing practice for the most part has contradicted this view and instead has followed a constitutive theory wherein the acceptance granted to a new emerging entity by the already existing states is at the core of recognizing a new entity as a state¹³.

The 1933 Montevideo Convention on the Rights and Duties of States depicted the prevailing realities of both the international community and International Law of the early twentieth century which was mostly Eurocentric or Westernized in its conceptualization.¹⁴ The convention itself was designed to mitigate the lack of capacity of, then decolonizing states which were making demands for recognition. However, the creation of new states at present and the future, as decolonization has almost ended, can only be accomplished as a result of the diminution or disappearance of existing states, and the need for careful regulation thus arises¹⁵.

Though International Law has expanded in many respects in fields such as Human Rights, Sovereign and Diplomatic Immunity, Use of Force and International Environment Law since the inception of the Montevideo Convention of 1933, the International Law relating to recognition of States has not been able to keep track with these expansions of the International Law. Though the European Union tried to bring in a new regime regarding the recognition of countries¹⁶ that broke away from the Union of Soviet Socialist Republic of the USSR and especially the Yugoslavian Republic it failed to achieve its objectives. European Union included matters of human rights and the means in which new entities became a state as determining factors for the new entities to be granted with the statehood. However, those efforts failed when Croatia, Slovenia and Bosnia-Herzegovina were hastily recognized, though they failed to showcase the existence of even the Montevideo criteria¹⁷. The recognition of Kosovo in 2008 as a State is one of the most recent cases which warranted an opinion from the International Court of Justice¹⁸ where it opined that the declaration of independence of Kosovo was not illegal under the prevailing principles of International Law.

¹³Malcolm D Evans, *International Law* (4th edn, Oxford Univ Press 2014). P 294.

¹⁴Thomas Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' [1999] 37 Colum. J. Transnat'l L 403

¹⁵Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008). P 198.

¹⁶The EC Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union

¹⁷Rebecca M. M Wallace and Olga Martin-Ortega, *International Law* (7th edn, Sweet & Maxwell 2011). *Vide* Chapter 04

¹⁸ Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), Available at <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>

¹¹C. Ryngaert and A. Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' (2011) 24 LJIL 467, 472

¹²*Ibid*

IV. PROBLEMS ASSOCIATED WITH RECOGNITION

According to Kelsen¹⁹ international law or the law of nations by its common definition refers to a body of rules which by its usual definition regulates the conduct of states in their interactions with one another. According to Kelsen, international law is a normative order. However, when compared to a domestic legal system it can be argued that it is rather a weak normative order as the ground norm in this normative system would not be so obvious as in a domestic legal system. Under the traditional definition of international law, states were considered as the only subjects of international law. However, Ademola²⁰ observes that, states though still being the primary subject of international law is not the only subject. In addition to states, entities such as international organizations, multinational organizations, pressure groups and even individuals through the developments in the human rights law have become subjects of international law. Becoming a subject of international law is important to both acquire and protect international rights, duties and obligations. Starke, giving a more modern definition to international law observes that, '[i]nternational law is that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore do commonly observe in their relation with each other'²¹ in addition to this, Starke observes that, international law is also concerned with the international organizations and institutions. Further, international law, may be to a lesser extent is also concerned with the individuals and non-state entities as well.

Even in the modern era states are the primary concern when it comes to international law. As being the primary concern of international law, it becomes very important to have a proper mechanism to identify an entity as a state since when so identified, it becomes a primary concern of international law. However, as international law is based on the consent of the parties who are taking part in this international order, the rules and customs in international law are fragile. While some rules and customs have acquired a strong compliance other rules and customs have not. For an instance, as Denza²² observes that, the law governing Diplomatic immunity is concrete and for the most part has been settled through the Vienna Convention on Diplomatic Relations of 1961. In contrast, when it comes to recognition of states, the picture is very blur.

While all who are involved in the international legal order have agreed upon the premise that, states are the main concern of international law. However, it is somewhat ironical to find that, there has not been a keen ambition to properly define the term 'state'. Even though many rights, duties and obligations

are granted for states, there is no definition for the word under international law. Even the United Nations being the main organ of the international legal order has not endeavored to define in exact terms as to what accounts as a state for the purpose of international law. Even the draft articles on state responsibility compiled in 2001 fails to define what is meant by a state.

Hillgruber²³ opines that, recognition of a new state grants the recognized entity, the legal status of a state under International law which in turn enables such an entity to possess international rights and obligations capable of being vindicated through international law. According to this view, an entity is not given birth as a new state, instead an entity is only chosen as a subject of international law. It is only when the other existing states recognizes a new state that, it comes in to being. Lauterpacht²⁴ states that, there are very few branches of international law which are of greater importance or significance for the law of nations than the question of Recognition of States. Kelsen²⁵ endorsing the same view observes that, however, the problem regarding recognition of states has neither in theory nor in practice been solved in a satisfactory manner. Therefore, in the realm of international law there is hardly any other question which is more controversial, disputed and paradoxical. Kelsen asserts that, recognition is both a political and a legal act. Being a political act, all that is required is to show a willingness to enter into transactions with the entity in question. However, as the political act presupposes the legal existence, the legal act of recognition thus become a very crucial part of recognition. It is in this regard that Kelsen find the existing legal framework being inapt to give a good account of itself.

Kelsen made this observation in 1941 after 8 years from the implementation of the Montevideo Convention on Rights and Duties of States, which under article 1 of the convention laid the ground work a definition of a state. Ryngaert²⁶ observes that, this later became the customary international norm when it came to recognition of states. Terry²⁷ observes that, recognition of states is primarily governed by customary international law principles. However, the Montevideo criteria were not expected to be used universally. In fact, when the convention was drafted, it was done with the view of giving the opportunity for the territories in the South American region to claim statehood. Grant²⁸ states that, the

¹⁹H. Kelsen, *Principles of International Law* (1st edn, The Lawbook Exchange 1952) 1.

²⁰A. Abass, *Complete International Law: Text, Cases and Materials* (2nd edn, Oxford 2014) 165.

²¹J. Starke, *International Law* (11th edn, Butterworths 1994) 3.

²²E. Denza, *A Commentary: Vienna Convention on Diplomatic Immunities* (4th edn, Oxford 2016) Preface.

²³C. Hillgruber, 'The Admission of New States to the International Community' (1998) 9 *European Journal of International Law* 491, 492.

²⁴H. Lauterpacht, *Recognition in International Law* (1st edn, Cambridge 1947) 3.

²⁵H. Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *The American Journal of International Law* 605, 606.

²⁶C. Ryngaert and A. Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia' [2011] *LJIL* 467, 472

²⁷P. Terry, 'The Recognition of New States in Times of Secession: Is State Recognition Turning into Another Means of Intervention?' (2014) 20 *Asian Year Book of International Law* 53, 54.

²⁸D. Grant, 'Defining Statehood: The Montevideo Convention and its Discontents' (1999) 37 *Colum. J. Transnat'l*

framing of the Montevideo Convention has gone largely unexamined may reflect the fact that its content was a restatement of ideas prevalent at the time of the framing.

The Montevideo criteria, though not expected to be used in a universal manner by its framers nevertheless came to be the main reference point when it came the questions pertaining to statehood. Crawford²⁹ has once mentioned that, Montevideo criteria are the 'best known formulation of the basic criteria for statehood'³⁰. However, the *droit international*³¹ in 1936 made a special resolution regarding recognition of states and governments. Article 1 of the said resolution made it clear that, existing states has the power to recognize, according to their free will, other entities as being states under international law. It is interesting to note that the said resolution though not making any reference to Montevideo convention copy pasted all of the requirements mentioned under Article 1 of the Montevideo convention.

A significant number of references were made to the Montevideo convention with regards to recognition of states. While there were many references, no one tried to evaluate the contemporaneous nature of the criteria until the Yugoslavian issue came as a serious issue for the continental Europe to solve. Berlin³² states that, after Slovenia and Croatia declared their independence from the Yugoslav Federation in June of 1991, it marked the beginning of the dissolution of Yugoslavia. Then, the European Community determined that it needed to come up with criteria for recognizing the entities that emerged as states. Rich³³ speaking on the dissolution of Yugoslavia recalls that, on 16 December 1991, the EC Foreign Ministers meeting in Brussels decided to issue a 'Declaration on the Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union' in order to calm down the existing tensions in the region. The guidelines made it the choice of existing states to decide whether they are going to accept an entity as a state or not. The guidelines envisaged a moral aspect for recognition which went beyond the mechanical criteria found in the Montevideo convention. State practice has provided some examples for non-recognition based moral aspects. As McNair³⁴ observed regarding the non-recognition of Manchukuo which was invaded by the Japanese, a territory which belonged to China. It was interesting to note that, related to the non-recognition of Manchukuo, a separate doctrine was created called the 'Stimson Doctrine' which envisaged that, an entity that comes in to being through illegal

or illegitimate manner will not be recognized. However, Dold³⁵ observes that the guidelines so created did not come to be recognized as a customary rule regarding recognition of states as it clearly lacked the *opinion juris* required for such a rule to become a customary rule. He argues that the main reason behind this was the fact that the legal theory behind recognition was probably not the most pressing problem for the European Community during this period. The EC was more concerned with putting an end to the atrocities of the war. This fact is further epitomised by the fact that, when Kosovo made its unilateral declaration of independence, no reference was made to these guidelines. When Kosovo made its UDI, the state practice regarding recognition was marked by politics than any law. Countries which had internal conflicts and issues vehemently rejected the Kosovan UDI. Caspersen³⁶ in the wake of the UDI of Kosovo point out that, the recognition of Kosovo exacerbated existing uncertainties over state recognition; the right to self-determination was seemingly extended, but the normative criteria that had been introduced in the early 1990s appeared to have given way to great-power politics. It is also noteworthy to mention that the ICJ in the Kosovo Judgment³⁷ that the court was very careful to mention the fact that peculiarities of the case before it demanded answers to exactly the questions put before it and Kosovo's judgment should not set any precedent for the future. The court deliberately abstained from formulating any ground whatsoever for the purpose of recognition a state.

V. CONCLUSION

In this backdrop the recognition of states under international law is much more blur than it used to be. The failure of the ICJ in either deciding or commenting on the international law aspects related to recognition of states has made things even more controversial since it did declare that the unilateral declaration of independence by Kosovo was not in violation of international law. There seems to be no uniformity in the state practice based on any legal principle or norm regarding recognition of states as well. It is always seemed to be based on a political agenda which makes no binding obligation upon a state to act or behave in a certain way. Therefore, the quest for finding a proper legal framework for the recognition of states under international law should be made an endeavour.

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L. 403, 414.

²⁹ James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006)

³⁰ *Ibid* 36

³¹ 30 Am. J. Int'l L. Sup 185 (1936) 185

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