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Statehood and Secession; a New dimension in the concept of Statehood

Dr Chibike Oraeto Amucheazi

Faculty of Law,
University of Nigeria, Enugu Campus, Nigeria

ABSTRACT
A territory that seeks to gain state recognition by exercising its rights of self-determination will nonetheless meet a couple of formal criteria set down by the Montevideo Convention. This paper appraises the history and evolution of theories regarding the recognition of states in international law. Whereas the Montevideo Criteria for state recognition express the legal requirement and standard for statehood, recognition is largely dependent on the political will of the other states. The question posed by contemporary international community is whether a state is held to recognize another if it meets the said requirements. The paper finds that the theories on statehood do not solve the problem of how states emerge in international law. To achieve the aim of the research, the paper adopts the doctrinal research method which enabled analysis of literatures and reports on the subject.
Keywords: Montevideo Convention, statehood, secession

INTRODUCTION

From an analysis of some theories of state recognition, it will be clear that while the Constitutive Theory insists that a state could only exist as an international legal person if it is recognized by previously-established states, the Declaratory Theory rejects such a discretionary process. While the common practice among states was argued to be somewhere in the middle of these two theories, the declaratory conception is much closer to the current model followed by the international community as it is also enshrined in the rules contained in the Montevideo Convention and reiterated by the Badinter Commission. Nevertheless it is pertinent to consider whether the practice of state recognition is actually regulated by international law in spite of its importance. This work critically examines recognition and statehood from the two cardinal theories of statehood. It reviews history to establish that recognition has no place in international law. At the beginning of the twentieth century there are some fifty acknowledged states and almost 200 by 2005.[1] The emergence of many states is significant in the twentieth century as a major political development that has changed most global affairs and international relations. More so, the emergence of states has characteristically changed international law and the practice of international organizations. In fact even international conflict has mostly risen due to the emergence of states.

However even as the emergence of states appears to be a reality in the century, it is doubtful whether the process is regulated by international law. Although the development is of importance in international relations it may not necessarily be subject to international law but of facts.[2] Yet the equation of fact with law, as shall be shown, also obscures the possibility that the creation of states might be regulated by rules predicated on other fundamental principle- a possibility that now exists as a matter of international law. Nevertheless the Convention merely stipulates guidelines and does not have a legal force of binding effect

[1] See Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006. Pg. 2.
[2] See the views of Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006. Pg. 2.

under international law. There is however other necessary factors that play fundamental roles in the determination of a state. It has been amply submitted that *"the formation of a new state is a matter of fact, and not of law*."[3] The position regarding the factual rationale of state formation has gained support from a wide spectrum of legal opinion. One of the theories that shall be considered hereunder reflects in its argument that where a state actually exists, the legality of its creation or existence must be an abstract issue: the law must consider the new situation, despite its illegality.[4] In the same vein it is assumed that a nonexistent state implies that any rule treating it as existent is pointless and a denial of reality. The criterion according to the declaratory theory must be effectiveness rather than legitimacy. On the contrary, the constitutive theory holds the view that it is axiomatic to argue that the existence of a state is a matter of fact. If a state is and becomes an international person through recognition only and exclusively, and if recognition is discretionary, then rules granting to an unrecognized community a 'right to statehood' are excluded. The various theories do not satisfactorily explain modern practice. An attempt is made here to briefly analyze the theories before further extrapolation on the respective shortcomings of the theories.

Constitutive Theory of Statehood

State recognition has been initially founded on the constitutive theory of statehood, of which its essence could be traced back as early as 1815, at the Peace Congress of Vienna; the final act of this congress recognized only 39 sovereign states in Europe, and it also established that any future state could be recognized as such only through the acceptance of prior existing states.[5] The reason for such a distinction between the already established states and any future claim of statehood was argued to reside in the historical longevity of the former.[6]

Accordingly, the theory postulates that a state is considered to be a legal international person only if it is recognized as sovereign by other states. In this respect, L.F.L Oppenheim considered that 'international law does not say that a state is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a state become an international person and a subject of international law.'[7] The views were also found in the works of Hegel, which claims that every state 'is sovereign and autonomous against its neighbors, (being) entitled in the first place and without qualification to be sovereign from their point of view, i.e. to be recognized by them as sovereign', while also admitting that 'recognition is conditional on the neighboring state's judgment and will.'[8] Such position establishes a discretion that should obviously have limitations. Kelsen holds the opinion that 'a state violates international law and thus infringes upon the rights of other states if it recognizes as a state a community which does not fulfill the requirements of international law. Nevertheless it could also be possible to have a state refusing to recognize another even when the criteria for statehood have been met. It is for this that Lauterpacht proposed that a state has a legal duty to recognize one another when the conditions of statehood exist[9], although Kelsen denied the notion of any such duty.[10]

A major shortcoming of the constitutive theory is that recognition by states may not be unanimous. Thus where the principles of the theory is to be applied rigidly, there may be the implication of the state not

[3] Oppenheim (1st edn), Vol 1, 264, 209 (1); cf Erich (1926) 13 HR 427, 442; Jones (1935) 16 BY 5, 15-16; Marston (1969) 18 ICLQ 1, 33; Arangio-Ruiz (1975-6) 26 Ozfor 265, 284-5, 332. See also the formulation in Willoughby, Nature of the State, 195: 'Sovereignty upon all legality depends, is itself a question of fact, and not of law,' see also Oppenheim (8th edn), Vol 1, 544, 209; and the somewhat different formulation in Oppenheim (9th edn), vol 1, 120-3, 34.

[4] Cf Chen, Recognition, 38.

[5] Kalevi Jaakko Holsti, Taming the Sovereigns: Institutional Change in International Politics, Cambridge University Press, 2004, pp. 128-129.

[6] Ibid, p. 129.

[7] L. Oppenheim, International Law. A treatise, vol 1-Peace (Clark: The Lawbook of Exchange, 2005), pp. 135-136.

[8] G.W.F. Hegel, Elements of the Philosophy of Right, Oxford University Press, 2000, 331, quoted in James Crawford, Recognition in International Law: An Introduction to the Paperback Edition 2013, in Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. xxxi.

[9] Hans Kelsen, Principles of International Law, Rinehart, 1952, 70, in Adel Safty, The Cyprus Question: Diplomacy and International Law, iUniverse, 2011, pp. 191-192.

[10] Hans Kelsen, Recognition in International Law, in American Journal of International Law (1941), pp. 609-610; see also Krystyna Marek, Identity and Continuity of States in Public International Law, Libraire Droz, Geneva, 1968, p. 154.

being subject to international law which affects its capacity to assume rights and obligations that accrue to a recognized state. However Lauterpacht considered that the constitutive theory "*deduces the legal existence of new states from the will of those already established.*"[11] In addition eurocentrism was perceived to be a key feature of such recognitions, as early diplomatic and trade contacts with some Asian countries such as China, Japan, Siam or Persia involved a de facto acknowledgement of their sovereignty, but full-fledged relations and recognition were only granted upon meeting a certain standard of civilization.[12] However the constitutive theory eventually followed the changes and eventual fading of the Pax Britannica and Splendid Isolation doctrine and titled more to a more American-led international community.

Declaratory Theory of Statehood

While the constitutive theory gained ground and dominated international law since 1815, it only lasted until the shift in geographical dynamics that marked the beginning of the 20th century. At the end of the previous century, a great number of European nations became independent-Germany, Italy, Romania- and the first world war (1914-1918) led to the further emergence of sovereign states in Europe- Poland, Yugoslavia, Czechoslovakia- with the establishment of British or French mandates in some areas after the partition of multinational empires such as Austria-Hungary or the Ottoman Empire. However, the speech delivered by the United States President Woodrow Wilson on his fourteen points propagated the concept of self-determination, with direct consequences for the international order.

In Wilson's conception, the lack of self-determination has been at the centre of Europe's turbulent history. The Great Powers, such as Britain and Austria, have previously resisted any attempt to partition the Ottoman Empire, expressing fears that the resulting independent states would be small and too fragile. It was reasoned that such partitioning may make the units potentially easy targets for annexation and could thus undermine the long established international order based on the balance of power.[13] The Wilson doctrine has arguably marked the end of Pax Britannica and paved the way for greater US influence on the world stage.

In response to these changes, the constitutive theory lost its pre-eminence in favor of a new conception- the declarative theory of statehood. While the constitutive theorists claimed that recognition is a requirement for statehood, the declarative conception established by the 1933 convention of Montevideo challenged such an idea; according to article 3 of this treaty, statehood does not depend on recognition by other states. The declaratory model argues that a state does not obtain international legal personality through the consent of others, and as such the recognition of a state signifies nothing more than the admission of a factual situation.[14]

While the common practice among states was argued to be somewhere in the middle of these two theories, the declarative conception is much closer to the current model[15] followed by the international community as it is also enshrined in the rules contained in the Montevideo convention and reiterated by the Badinter commission.

Again neither theory of recognition satisfactorily explains modern practice. The declaratory theory assumes that territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status, which is rather complicated as to the effect of fact or law in formation of states.[16] In line with the declaratory theory, effectiveness is the dominant principle. However Kelson reasons that "even if effectiveness is the dominant principle, it must nonetheless be a legal principle. A state is not a fact in the

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[11] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 38. See also Thomas D. Grant, The Recognition of States: Law and Practice in Debae and Evolution, Praeger Publishing, Westport, 1999, p. 2.

[12] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 385.

[13] Henry Kissinger, Diplomatia, All Publishing House, Bucharest, 2010, pp. 191-192.

[14] Malcolm Nathan Shaw, International Law, 5th edition, Cambridge University Press, 2003, p. 382.

[15] Ibid

[16] See Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013. 45-50, for an effective critique of the 'state as fact' dogma. Lauterpacht's dismissal of the declaratory theory results in large part from his identifying the declaratory theory with this dogma.

sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is a legal status attaching to a certain state of affairs by virtue of certain rules or practices."[17]

Furthermore, the declaratory theorist's equation of fact with law also obscures the possibility that creation of states might be essentially regulated by rules which becomes a standard that may be founded in international laws. Conversely the constitutive theory fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis. Although the constitutive theory refers to the relevance of subjects of international law and the possibility of taking into account relevant legal principles not based on fact.

It may be logical to appraise whether a state can become a subject of international law without the assent of the existing states. It is equally pertinent to consider whether there is an objective system of law to which the new state owes its being. Logically if is discovered that the state owes its existence to a system of law, then that existence is not of 'fact' only.

To investigate these points, it is fundamental to ask whether international law is itself, in one of its most important aspects, a coherent or complete system of law. In history, there were no rules determining what 'states' were for the purposes of international law. It appears to be a matter within the discretion of existing recognized states.[18] The international law of the period was manifestly incoherent.[19]

THE HISTORIC POSITION OF STATEHOOD IN INTERNATIONAL LAW

This aspect of the discussion investigates the question whether, and to what extent, the formation and existence of states is regulated by international law, and not simply a 'matter of fact.' The opinion of scholars may be helpful in reviewing the historic perception of statehood in international law. It is important to consider statehood in history in order to ascertain the perspective of recognition and its role in formation or emergence of states. Most conception of statehood has been essentially contextualized from a philosophical stand point rather than legal. For instance Grotius defined a state as '*a complete association of free men, joined together for the enjoyment of rights and for their common interest*.'[20] What can be deduced from the definition is that there is no consideration for externalities such as relations with other states and any law that regulates such relations. It does appear from the context of the definition that the law of a nation prevailed and applied within the nation and the people that compose it. Thus, asides the law of nations, often referred to as law of nature, there was hardly any other law common to all nations.[21] In essence the breadth of international was essentially vague and the most potent of laws was the law that applied internally within a nation.

In the same vein, Pufendorf defined a state as '*a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security*.[22] Incidentally there is a confluence of thoughts on the fact that natural law and the law of nations were the same and was in force at the time. Accordingly Pufendorf expressing agreement with Hobbes[23] and Grotius states:

> *Nor do we feel that there is any voluntary or positive law of nations which has the force of law, properly so-called, such as binds nations as it proceeded from a (p.7) superior… (Convergences of State behavior) belong either to the law of nature or to then civil law of different nations…But no distinct branch of law can properly be constituted from these, since, indeed, those laws are common to nations, not because of any mutual agreement or obligation, but they agree*

[17] Kelson (1929) quoted in Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006.
[18] L. Oppenheim, International Law. A treatise, vol 1-Peace (Clark: The Lawbook of Exchange, 2005), pp. 264.
[19] The same incoherence has been noted in respect of the legality of war: Lauterpacht, Recognition, v-vi 4-5; and the discrepancy character of nationality: Brownlie (1963) 39 BY 284, 284; Principles (2nd edn), 73; (6th edn), 69. Cf Briggs (1950) 44 PAS 169, 172.
[20] De lure Belli ac Pacis (1646), BK I, ch I, xiv.
[21] Ibid; see also Dickson, Equality of States, 55-60; Kennedy (1986) 27 Harv ILJ 1, 5; Tuck, Rights of War and Peace, 82-96.
[22] De lure Naturae et Gentium Libri Octo, Bk VII, ch 2, p. 13, para 672.
[23] De Cive, ch 14, paras 4-5.

> *accidentally, due to the individual pleasure of legislators in different states. Therefore, these laws can be and many times are changed by some people without consulting others.*[24]

Although a few contrasting views could be gathered from the letters of early writers, it nevertheless does not over turn the popular position of claims to non-existent international laws, as it were. For example Victoria writing in the 16th century gave a definition of the state much more legal in expression and implication than either Grotus or Pufendorf. In Victoria's view:

> *A perfect state or community…is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the kingdom of Castile and Aragon and the Republic of Venice and the like…Such a state, then, or the Prince thereof, has authority to declare war, and no one else.*[25]

Basically the focus on ability to declare war clothes Victoria's definition with the garb of legality. This is particularly as the definition appears to centre on capacity of a government as well as independence of an entity. Incidentally the writers with naturalist tendencies concerned themselves with the law of nations, which was merely the application of natural law to internal governance of a forum.

The early positivist shared same sentiments with the naturalist although in some instances there was significant divergence. Vattel's literature *Le Droit des gens, ou principles de la loi naturelle, appliqués a la conduit et aux affaires des nations et des souverains* conjunctively harnesses earlier views with deductions from the sovereignty and equality of states that tended to set aside those views. Vattel pontificates on the goal of a state and described a state thereof as "*a political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security*."[26]

The emphasis on the unity of men and the advancement of their collective goals stipulates that the basic criterion is that such nations be 'free and independent of one another.'[27] In Vattels opinion:

> *Every Nation which governs itself, under whatever form, and which does not depend on any Nation, is a sovereign state. Its rights are, in the natural order, the same as those of every other state. Such is the character of the moral persons who live together (p.8) in a society established by nature and subject to the law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.*[28]

Consequently Vattel's definition of a state essentially puts it in a position of self rule without resort to any external law for its existence and administration. The emphasis on the equality of states has as an implication the ability of states to be the sole judge of its rights and obligations derived from within an under the law of nations. The law of nations has been stated to mean from its origin, the law of nature applied to nations. Accordingly "*the law of nations is in its origin merely the law of nature applied to nations…we use the term necessary law of nations for that law which results from applying the natural law to nations…*"[29]

"A Nation is free to act as it pleases. So far as its acts do not affect the perfect rights of another Nation, and so far as the Nation is under merely obligations without any perfect external obligation. If it abuses its liberty it acts wrongfully; but other Nations cannot complain, since they have no right to dictate to it."[30]

Incidentally the crux of the description above is that sovereignty has an effect on the supremacy of nations. This supremacy tends to establish the authority of a state as a final mechanism for its concerns. Sovereignty is inherent in a community and is thus independent of the consent of other states. "To give a

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[24] BK II, ch 3, 156.
[25] De Indis ac de kure Belli Relectiones (Publ 1696, ed Simon); De lure Belli para 7, 425-6.
[26] Le Droit des Gens (1758), vol 1, Introduction, 1; ch 1, 1.
[27] Ibid.
[28] Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. Introduction, BK 1, ch 1, 4.; Cf Oppenheim (1st edn), vol 1, 108, p. 71,
[29] Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. Pg. 6
[30] Ibid

Nation the right to a definite position in this great society, it need only be truly sovereign and independent."[31]

The effect of sovereignty nevertheless brings to the fore the possibility of an internal and external import of recognition to a state. This is so because the internal sovereignty of a state nonetheless grants independence to a state while its external sovereignty connects the state with other states. In fact, Wheaton's classic Elements of International Law expresses statehood for the purposes of international law as a concept that differs from actual independence. Writing under the influence of Hegel[32] he states:

> *"Sovereignty is acquired by a state, either at the origin of the civil society of which it previously formed a part, and on which it was dependent. This principle applies as well to internal and external sovereignty. But an important distinction is to be noticed…between these two species of sovereignty. The internal sovereignty of a state does not, in any degree, depend upon its recognition by other states. A new state, springing into existence, does not require the recognition of other states to confirm its internal sovereignty…The external sovereignty of any state, on the other hand, may require recognition by other states in order to render it perfect and complete…if it desires to enter into that great society of nations…such recognition becomes essentially necessary to the complete participation of the new state in all the advantages of this society. Every other state is at liberty to grant, or refuse, this recognition."*[33]

In essence the implication of the dichotomy as it relates to the internal and external aspects of sovereignty is that a nation can and do stand on its own on issues concerning its internal affairs. Thus for a nation to attain sovereignty within its borders, it does not require ratification or recognition by other states, in principle and in actuality. Consequently new states can be formed and there are no criteria for other states to grant recognition to the new states in order for it to function as a state. Nevertheless the reality of statehood is that, like human beings, a state must interact across border as of necessity and need for survival. In such areas where the new state relates externally beyond its borders it must, in Wheaton's view, gain recognition by other states.

ESSENTIAL THEORY: A NEW DIMENSION IN THE CONCEPT OF STATEHOOD

It has been stated that the character of recognition appears more confusing that it has hardly resolved any of the problems in international law practice. Accordingly this work referred to Brownlie's statement where he stipulated that "*the theories on recognition has not only failed to enhance the subject but has created a tertium quid which stands like a bank of fog on a still day."*[34] Again it was noted that the absence of recognition has not and does not hamper the functioning of new states in the sense in which it is conventionally reasoned. That is to say, that there is no state in actuality where there is no recognition. Crawford submits that the denial of recognition to an entity does not affect the existence, nationality and

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[31] Ibid

[32] Grundlinien der Philosophie des Recht, vol III; Hegel, Werke (1854) VIII, pt 3, para 331; cited by Alexander (1958) 34 BY 176, 195: In Nisbet's translation the passage reads: The state has a primary and absolute entitlement to be a sovereign and independent power in the eyes of tohers, i.e to be recognized by them. At the same time, however, this entitlement is purely formal, and the requirement that the state should be recognized simply because it is a state is abstract. Whether the state does in fact have being in and for itself depends on its content-on its constitution and condition; and recognition, which implies that the two (i.e for and content) are identical, also depends on the perception and will of the other state. Without relations with other states, the state can no more be an actual individual than an individual can be an actual person without a relationship with other persons. On the one hand, the legitimacy of a state, and more precisely- in so far as it has external relations- of the power of its sovereign, is purely a internal matter (one state should not interfere in the internal affairs of another). On the other hand, it is equally essential that this legitimacy should be supplemented by recognition on the part of other states...When Napoleon said before the peace of Campo Formio "the French Republic is no more in need of recognition than the sun is," his words conveyed no more than that strength of existence which itself carries with it a guarantee of recognition, even if this is not expressly formulated.' Hegel, Elements (1991), 366-67.

[33] Elements (3rd edn, 1846), pt 1, ch II, p. 6.

[34] Brownlie (1982) 53 BY 197, 197.

exercise of state rights of the non-recognized entity.[35] Consequently, certain writers express the view that recognition is a political act or at least subsists as an act of political accommodation.[36]

In view of the difficulty of ascertaining the actual import and effect of recognition and the surrounding complexities associated with the application of recognition to statehood, it is considered necessary to propound a theory which shall in effect meet the challenges in the subject of recognition. The over-all consideration of the new theory is predicated on the human rights of peoples. It is reasoned that if recognition continues to play a fundamental role in statehood, then the reason for which the principles of self-determination has been developed would have been defeated. It is here imagined, like sending back a fleeing man to the forest wherein he is attacked by a fearsome lion. In other ways, it is likened to a case of refusing a grant of divorce where a marriage has broken down irretrievably.

Nevertheless it is not intended to relegate or deny the relevance of recognition in international law. But as shown earlier, it is doubtful whether recognition has a place in international law. In fact, according to Chen, recognition is a mere construct bearing no relationship to state practice or general legal opinion.[37] Nevertheless the Essential theory avoids a complete denial of the relevance of recognition in the context of statehood. The theory does hold the view that recognition does not create the rights essential to a state but merely consolidates an existing right and status.

It must be borne in mind that a nation-state refers to a political territory with a population, a government, and legally recognized boundaries that indicate or grant sovereignty.

There is a general assumption that a state has sovereign recognition when it gains membership to the UN—it's acceptance by the international community. And the fact is that though the number nearly four times higher than the UN had as members at its founding in 1945 has been added to its membership. The overwhelming majority of new members joined in the 1950s and 60s, when European nations shed their Asian and African colonies.

The 1933 Montevideo Convention**,** which set out the modern rules of statehood, stipulates that a country should possess a permanent population, a defined territory, a government, and the ability to enter into relations with other countries. Montevideo was written at the start of the end of empires and colonization, so it is not too much of a leap to say that it reflects the sign of the times or what was expected to come. It makes sense to have legal space for the creation of new states with the assumption that recognition will automatically come at the point of decolonization. And that is what happened for most post-colonial states that gained their independence in the 20th century.

But in the second decade of the 21st century, the world is looking much different: There are more countries as well as many separatist movements. Most would-be states satisfy at least one of the criteria laid out by Montevideo: They have a permanent population. Some would say they have a defined territory, as well, but that would likely be challenged by the government of whichever territory they are trying to secede from. Some may even possess the ability to enter into relations with another country. An example of this is Taiwan, which has a defined territory, a permanent population, and a government with the ability to conduct foreign relations-subject to some limitations-but which is not considered sovereign by most countries in the world and not a UN member.

There is another, perhaps more important reason why new states are rarely formed, or, if they claim independence, are rarely recognized by others. The parent state, as assumed under international law, must cede the territory.

However, existing sovereign states are not very keen to give up their territory. And other sovereign states are not keen to recognize new states without the parent state's permission. Doing so without the parent state relinquishing its sovereign claim over that territory would not only raise serious questions about the norm of sovereignty, but it would also set what many states would see as a dangerous precedent. It is doubtful whether any state would want to start the establishment of practice that certifies the act of an external actor to take away territory and give it to another forum. It is perhaps not a coincidence that

[35] Crawfors James, Creation of States in International Law, 2nd ed. Oxford University Press, 2007, p.20.
[36] Lach (1959) 35 BY 252, 259; Higgins, Development, 164-5; Verhoeven, Reconnaissance, 721.
[37] Chen, Recognition, 152-45.

Spain, where the impasse over Catalonia is only the latest territorial problem to arise in recent years, did not recognize Kosovo, which broke away from Serbia in 2008. Most countries, including the U.S., recognized Kosovo, but because Russia and China, both veto-wielding members of the UN Security Council, did not, it is not a UN member state—and hence not viewed as sovereign under international law. Kosovo's other challenge is that Serbia, the country from which it was carved, refuses to accept its independence.

This kind of impasse helps explain why Catalonia and Iraqi Kurdistan's attempt at self-determination was not progressive. Both places enjoy widespread domestic support for independence, but the central governments in both Madrid and Baghdad, respectively, are opposed to letting it go forward. And a reason for their opposition is one of the very same reasons those territories want to secede in the first place—the central government benefits from their economic output which in some sense tramples on the rights of the people. But this does not mean the new states would be economically viable on their own. And they face opposition not only from their parent states but also the countries surrounding them—in the case of Catalonia, members of the European Union, and in the case of Iraqi Kurdistan, Turkey, Iran, and Syria.

By implication, the right of self-determination is superseded by sovereignty and territorial integrity. A state can declare independence (an act of self-determination), but unless sovereign control over that territory is relinquished by the parent state, that act of self-determination is more than likely to end in something short of sovereign statehood. This can be seen in the political impasse in Catalonia: The government in Madrid threatens to withdraw the autonomy Catalonia enjoys as punishment for the referendum, which was deemed illegal by Spain's constitutional court.

The countries that have joined the UN since 1945 did so under conditions that have not been repeated in the cases of Catalonia and Kurdistan. When the former colonies became independent, they did so with the approval (in many cases won over decades at great cost) of the countries they had been part of. The dissolution of the Soviet Union involved the peaceful redrawing of borders; in the case of Yugoslavia's successor states (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, and Macedonia)**,** Timor-Leste's secession from Indonesia and South Sudan's from Sudan, it involved negotiated peace settlements with parent countries. In the absence of a repetition of any of these conditions, it is difficult to see how new states can emerge. Indeed, since 1945, only Bangladesh in 1971 and the states created by the breakup of the former Yugoslavia in 1990s have primarily emerged which ultimately resulted from unilateral declarations of independence**,** and only after wars were fought to prevent it.

Yet self-determination in a sense, establishes independence from a system that is adverse to the human rights of a population in an existing state. It is important to reiterate that the principle of self-determination was articulated as a fundamental human right that is necessary for human existence.[38]

The difficulty in achieving statehood even after a declaration does logically undermine the supposed strength of the right of self-determination. It is illogical to imagine that a break-away entity will have to obtain recognition from the hostile parent state and other existing states in order to acquire rights of statehood. Yet recognition may still possess some virtue in the area of consolidating the status of the entity.

Herein lies a conundrum: How do nation states and the international system address calls for independence in a system that does not support or encourage a process for emergence of states? One model will be to take a contemporary view of the concept of recognition from the perspective of theories in matters pertaining to statehood.

In its main, the theory propounded here, adopts the criteria for statehood in the Montevideo convention. It lays a foundation by first identifying who a 'people' are that can exercise the rights of a people in forming a state through self-determination. The theory adopts the definition of a people from the UNESCO standard. According to UNESCO, a people for the 'rights of peoples' in international law context have the following characteristics:

[38] Thurer Daniel, Self-Determination, in R. Bernhardt (ed.) Encyclopedia of Public International Law, Volume IV, North Holland, 2000, p. 366.

"(a) A group of individual human beings who enjoy some or all of the following common features: (i) A common historical tradition; (ii) Racial or ethnic identity, (iii) Cultural homogeneity; (iv) Linguistic unity; (v) Religious or ideological affinity; (vi) Territorial connection; (vii) Common economic life.

(B) The group must be of a certain number who need not be large such as the people of microstates, but must be more than a mere association of individuals within a state.

(C) The group as a whole must have the will to be identified as a people or the consciousness of being that people-allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness.

(D) Possibly the group must have institutions or other means of expressing its common characteristics and will for identity."[39]

Further the 'people' must necessarily connect and relate with the prescription of the Montevideo convention. The Montevideo Convention on Statehood of 1933 sets out several requirements for Statehood. The criteria of the convention are: (1) a permanent population, (2) a defined territory, (3) government and (4) the capacity to enter into relations with other States. The Convention, and prevailing law at the time, viewed States as a kind of *sui generis* legal entity operating and existing under its own authority and power. Article 3 provides:

"The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."

Article 6 then goes on to state:

"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."

The criteria of the Montevideo convention are for the most part good black letter law. Modern debate looks more to the pronouncements of Articles 3 and 6.

The issue of Statehood also played a central role in the decision of the Prosecutor at the International Criminal Court to not open an investigation into allegations of crimes in the Palestinian Territories. I will try to briefly frame the issue in this post and suggest a way to view the legal criteria for the creation of a new State.

There is a debate taking place in the international legal world over whether or not satisfying the Montevideo criteria alone is enough to be a State or if recognition is also necessary. The two main doctrinal views are known as the declaratory and constitutive theories of Statehood. The both theories have been examined above. Nevertheless in summary the declaratory theory provides that the moment in which an entity satisfies all the conditions set out in the Montevideo convention the entity is a State. This theory is close in line with the convention itself and the pronouncements of Articles 3 and 6. It however fails to adequately describe the creation of "States" in international practice. There are entities in the world that *de facto* satisfy the criteria of the Montevideo convention but do not as a general matter benefit from being "States" and do not receive or benefit from the rights that come with such a status. One example that comes to mind is the nominally Moldovan territory of "Transnistria". This non-State entity has essentially been independent since the collapse of the Soviet Union. It has a territory, a permanent population, a government and has engaged in relations with other States. Notwithstanding its meeting the Montevideo criteria, it does not participate in international affairs as such because it lacks recognition. The lack of empirical validity to the declaratory theory might lead one to believe that the constitutive theory explains State formation, however, like the declaratory theory; it equally fails to explain the actual formation of States.

[39] *UNESCO* Report and Recommendations of an International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations, February 22, 1990, Document SNS-89/CONF.602/7.

The constitutive theory sets out that it is the recognition of an entity as a State that makes it so. This theory would explain why "Transnistria" and other similarly situated entities are not considered to be States.[40] This theory, however, fails to explain why certain entities that have received numerous recognitions as such are not in fact States. It also raises the question of how much recognitions are necessary in order for an entity to become a State. One clear example of this problem is the "State of Palestine". As of July 2011, the Palestinian Liberation Organization (PLO) was reporting that it had received at least 122 recognitions of its "Statehood". To put things in perspective, there are about 193 members of the UN. That means over half, 63%, of the United Nations recognizes Palestine as a State. However, not even the PLO's negotiators discuss Palestine as if it were already a State. One simple reason for this might be that States serve a regulatory function in the world. Their function is to administer a portion of the planet where people live. If they cannot serve that function because they lack authority over a territory or people on the territory, no matter the nomenclature they may assume, they are not States. This is the case of Palestine: it has no effective control of which to speak and therefore cannot, even with recognition, be a new State. The constitutive theory, like the declaratory theory, therefore would seem to provide little useful information standing alone on whether an entity is or is not a State.

Arguments can go round and around about the importance of recognition over fulfilling the Montevideo elements. The question still remains: what is it that makes a State? Articles 3 and 6 of the Montevideo convention make it clear that the recognition of an entity as a State is not what makes it a State. However, even that convention makes room for recognition as an element in its requirement that the new State be able to enter into international relations. I propose that "Statehood" is the product of a balance between the Montevideo criteria and recognition. The more you have of one (criteria or recognition) the less you need of the other. However, in all cases, you need a little of both to be a State.

One example of the curative effect of recognition is the Vatican City State. This State was created in 1929 as a result of the Lateran Pacts between the Catholic Church and the Kingdom of Italy. The State is exceedingly small, only about 110 acres, and has a population just over 800, which is not permanent as it is not self-replenishing. The recognition of the Vatican City State as a State, especially by Italy that surrounds it, allows it to operate as such even though it does not completely satisfy the Montevideo criteria. In other words, an entity with a government and a territory that can interact with other States does not need a permanent self-perpetuating population (as long as it has some form of population) in order to be a State if it is recognized as such. Another example of slight deficiency in the Montevideo criteria that has been cured by recognition is the State of Israel. It would be hard to argue that Israel does not have a government or a population. However, its territory has been in dispute since the country declared its existence in 1948. International recognition of the State as such though has "cured" this defect in the criteria for Statehood and Israel has now been allowed to join the United Nations and participate in other international institutions.

Where does all this leave us? Quite simply, it is necessary that a State have certain characteristics. It must have a territory, population, government and the ability to interact with other States. In addition, because the State is an entity that belongs to a wider community, it must be accepted, recognized at least to some extent, by that community. Recognition can also cure certain defects in the characteristics of a State as long as they are not too serious to prevent that entity from fulfilling its purpose. Having a two-tier system like this is to the benefit of the international community. If all that mattered were the Montevideo criteria, any warlord or group that could assemble enough force could carve out a new State simply by controlling a territory and nothing else. This would encourage any group that wanted their own State to simply take up arms instead of encouraging democratic compromise by requiring individuals and groups to work within the States they find themselves. On the other hand, if all that was required were recognition, the politics of State creation could easily leave the world of reality behind. States would be able to preclude new States from forming not because they are insufficient in some manner, but based entirely on politics without regard to circumstances that necessitated the break-away particularly human rights situations.

[40] A brief list includes, as it were, the Republic of Abkhazia, The Independent State of Azawad, Nagorno-Karabakh Republic, Turkish Republic of Northern Cyprus and the Republic of Somaliland. They are also all claimed by one or more other States.

Thus a mixture of the constitutive and declaratory theories is here proposed. The said mixture is considered productive and results to a model of theory here referred to as Essential. In its main, the essential theory balances the relevance of the aforementioned theories but relaxes the strict need for recognition as a basis for statehood. Illustratively, in the English context of marriage, one may ask whether a marriage contract having met all essential requirements becomes void only because it is not recognized by family members. It is submitted that an entity that meets the specifications in the Montevideo convention is indeed a state. However, the effect of recognition will further consolidate the status of statehood. The most important criteria of the convention in this regard will be the capacity of the state to govern itself. Self-government provides assurances that the population's rights shall be protected. Factually, it may amount to further abuse of rights if a break-away state is unable to govern itself democratically in order to enthrone the pillars of human rights in the entity. Such failure may reflect the initial resolve of the Israelites to return to the parent state of Egypt upon realizing that the leader of the exodus had no capacity to govern the population.

Consequently it is at the level of self-government that recognition becomes relevant. States may not recognize an entity where it is deemed incapable of governing itself by universally acceptable and democratic standards. Even so, it will be observed that capacity of self-government equally affect the ability of a state to enter into international relations with other states. Most states have recognized a newly formed state on economic grounds. In essence, the true test for statehood should be recognition of the ability of a newly formed state to govern itself which invariably portends its capacity to enter into international relations. To refer again to the analogy of marriage; there is a contract where two persons who meet the essential requirement of marriage are joined in matrimony. However the announcement and pronouncement of the marriage does consolidate the parties' new status. It is in this way that a state is formed soon as it is declared in compliance with the criteria for statehood under the Montevideo convention. The fact of recognition consequently consolidates this status by announcing the current position of the state in order to easily foster international relations and engagements.

Nevertheless even as recognition plays a pivotal role in statehood, it is immaterial whether a substantial number of existing states do not recognize the new state. To set majority recognition as a yardstick will be to politicize the process of recognition. It can easily be imagined how some states will refuse to grant recognition to an enemy territory and vice versa. Most states may also refuse recognition because they enjoy friendly relations with the parent state. Thus it is submitted that recognition be limited to such number of states that may be reasonably considered essential for the welfare of the newly formed state. After all, is it not true that most states refuse to enter into bilateral relations with others because they were common foes? What should be of importance to the international community is the welfare of the population of the new state in view of their most basic human rights. Once assured, the criteria for self-government would have been met, and a new state formed. The paramount consideration for statehood should therefore be the ability for self-government which is essential to the survival of the human population of a state.