Page 2190 - 2202

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

Creation of Statehood and Its Legal Existence under International Law

VARUN MODASIA[1]

ABSTRACT

States play a primitive role in the construction of legal relationships that are instigated, modified or extinguished at an international level. The paper intends to examine the criteria of statehood based upon the two theories of statehood i.e. constitutive theory and declaratory theory. The Montevideo Convention on the Rights and Duties of States of 1933 derived its significance from the declaratory theory which is highly acknowledged by the states at present. The object of this paper is to ascertain up to what extent these theories are sustainable as the method for determining whether a territorial entity is qualified to become a State under international law or not. The paper also discussing the rights and obligations of the states entitled and imposed upon by the international law respectively for their smooth functioning within its territory and between other States.

Keywords: *International Law, States, Constitutive Theory, Declaratory Theory, Montevideo Convention.*

I. INTRODUCTION

Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalization and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.

States play a primordial role in the structure of legal relationships that are commenced, modified or extinguished at an international level. In the field of international relations, the means by which states act and interact should be governed by principles such as sovereignty and equality. In reality, some states decide to act in a way dictated by geopolitical dynamics, that is, the power or influence held and through which their interests could be enforced at regional or global level. Thus, depending on each state's interests, massive inconsistencies can exist between the strategies that are carried out. One of the most elementary instruments used in diplomacy is, for these reasons, the mechanism of recognition.

[1] Author is a student at United world School of Law, Karnavati University, India.

 [ISSN 2581-5369]

State recognition has an important place in international law, being a unilateral act through which the very existence of a state and its status as a subject of international law are acknowledged. Only the states, as primary subjects of international law, are subject to this procedure, as international organizations are founded and act in a rather distinct manner.[2] An international legal person is capable of having rights and duties under international law, and states, in particular, can wield virtually any right and be held to fulfil any duty to which it has agreed. Without recognition, a state's capability to enter relations with another state is greatly limited due to its isolation from the international community.[3]

Two opposing theories have been developed to explain and order the admission of states into the international community. First, the Constitutive Theory embraces the opinion that any state completes its formation through recognition by other states. Recognition is thus seen as a requirement for statehood, but no state can be forced to recognize another. This discretionary nature of state recognition arguably turned the international community into an elite club of nations lead by the Great Powers. Second, the Declarative Theory came as a response to the constitutive conception, ruling out the necessity of international recognition as a condition for statehood, and introducing unbiased standards codified as the Montevideo Criteria.[4]

II. CONCEPT OF STATEHOOD UNDER INTERNATIONAL LAW

State is the primary legal subject (person) in International Law. A State, by evidencing a separate legal and corporate personality, fulfils the basic requirement for the entrance into the community of nations. For an entity to be a State, it should be free from political control of another State and be free to enter into relations with other States.

The separate position of the State is further underscored by the recognition of the existence of certain fundamental rights and obligations of States in international law. Werner notes that many of these fundamental rights and duties may be summarized in three principles closely related to the principles of liberty, equality and fraternity as those developed in the domestic sphere: the independence of States, the (sovereign) equality of States and the obligation of States to peacefully coexist.[5] The independence and equality of States includes for example, the right of States to choose their own constitution, to exercise (exclusive) jurisdiction over their territory and if necessary, to defend the State against an armed attack. The obligation of peaceful coexistence implies, among other things, that States have the duty to refrain from

[2] 1 Florica Braşoveanu, Drept Internaţional Public 67 (Pro Universitaria 2013).
[3] Anthony and Vlad, *State Formation and Recognition in International Law,* 7 Juridicial Tribune 7 (2007).
[4] *Id.*
[5] Hobach, Lefeber & Ribbelink, International Law 160 (1 ed. Den Haag: T.M.C. Asser Press, 2007).

 [ISSN 2581-5369]

intervention in the (internal or external) affairs of other States, from using their territory (or allowing it to be used) for activities that violate the rights of other States, or form a threat to international peace and security, and to comply with obligations imposed on them by international law in accordance with the principle of good faith. The last requirement implies, for example, that States are obliged to respect human rights on their territory.[6]

(A) Characteristics of State

Crawford observes that States possess certain exclusive and general legal characteristics, which he divides into five principles that constitute in legal terms the hard core of the concept of statehood, the essence of the special position in customary international law of States.[7]

i. In principle, States have full competence to perform acts in the international sphere, such as entering into treaties. This is one meaning of the term 'sovereign' as applied to states.

ii. In principle, States are exclusively competent with regard to their internal affairs: a principle that is underscored by Article 2, paragraph 7 of the UN Charter. While this does mean that States have the authority or legal capacity to act in all matters, in international law, regarding those affairs, it does mean that their jurisdiction is prima facie both complete and not subject to the control of other States.

iii. In principle States cannot be compelled to take part in international processes, settlements, or jurisdiction unless they consent to such exercise (either in general cases or specifically).

iv. States are considered 'equal' in international law. A principle also recognized by art. 2 paragraph 1 of the UN Charter. This is to some extent a confirmation of the above-mentioned principles, but it may have certain other consequences. Crawford states that, "it is a formal, not a moral or political, principle. It does not mean, for example, that all States are entitled to an equal vote in international organizations, merely that, in any international organization not based on equality, the consent of all the members to the derogation from equality is required."

v. Finally, it is only possible to derogate from these principles if it has been clearly established. In case of doubt or disagreement an international tribunal or court will have to resolve disputes relating to the (external or internal) freedom of action of States, or

[6] *Id.*

[7] James R. Crawford, The Creation of States in International Law 108-109 (2 ed. Oxford Publication 1977).

 [ISSN 2581-5369]

as not having consented to a specific exercise of international jurisdiction, or to a particular derogation from equality.

(B) Theories Justifying Statehood

(i) Constitutive Theory

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.[8] 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.[9]

According to this theory, 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 isn't recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law".[10] Such constitutive views were also found in the works of Hegel, which claimed that every state "is sovereign and autonomous against its neighbours, [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 neighbouring state's judgement and will."[11]

On the other hand, this discretionary prerogative should have its limitations. Kelsen was of 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 fulfil the requirements of international law".[12] However, the opposite of this could also be possible: a state refusing to recognize another even if it does fulfil the criterion for statehood. For this reason, Lauterpacht proposed that states have a legal duty to recognize one another when the conditions of statehood exist,[13] although Kelsen denied the notion of any such duty.[14] Kelsen also argues for instance, that

[8] Kalevi Jaakko Holsti, Taming the Sovereigns: Institutional Change in International Politics 128-129 (1 ed. Cambridge University Press 2004).
[9] *Id* at 129.
[10] L. Oppenheim, International Law 135 (9 ed. Oxford University Press 2008).
[11] G.W.F. Hegel, Elements of the Philosophy of Right 331 (1 ed. Oxford University Press 2000).
[12] Hans Kelsen, Principles of International Law 70 (2 ed. Rinehart & Company, Inc., 1952); Adel Safty, The Cyprus Question: Diplomacy and International Law 191-192 (iUniverse, 2011).
[13] Hersch Lauterpacht, Recognition in International Law 12-24 (2 ed. Cambridge University Press, 2013).
[14] *Supra* note 12.

 [ISSN 2581-5369]

international law provides existing States the freedom to determine in each case separately whether an entity meets the necessary criteria for statehood.[15] Recognition is therefore necessary to close the gap between the general rules of international law and the specific facts on which these rules should be applied.

The weaknesses of this theory include the case in which recognition of a particular state is not unanimous. In this instance, a rigid application of the constitutive principle would mean that the respective state would not be a subject of International Law, which in turn would hold back its capacity to assume rights and obligations in the resemblance of other states that are recognized. However, Lauterpacht considered that the constitutive theory "deduces the legal existence of new States from the will of those already established."[16] In the absence of a body responsible for observing and subsequently declaring that a certain state meets the conditions for statehood, Lauterpacht believed that the already established states are ought to "administer the law of nations", without being "entitled to serve exclusively" their national interests.[17]

(ii) Declaratory Theory

While the constitutive theory gained ground and dominated international law since 1815, it only lasted until the shift in geopolitical dynamics that marked the beginning of the 20th century. This approach of the State was gradually replaced by one which defined the State primarily as a 'matter of fact' rather than a 'matter of law'. The State became to be viewed as an independent and defined unit of (centralized) authority, which exists independent of its recognition by other States. The notion that "recognition does not bring into legal existence a State which did not exist before" is known as the 'declaratory theory of recognition'.[18]

The declaratory theory prescribes that recognition of a State is nothing more than expressing the willingness to enter into relations with that State. In other words, an entity becomes a State for the reason that it meets all the international legal criteria for statehood and the recognizing State 'merely establishes, confirms or provides evidence of the objective legal situation, that is, the existence of a State.'[19] Recognition is therefore retroactive and status-confirming. In contrast, the previously mentioned constitutive theory, views recognition as status-creating and

[15] *Supra* note 6.
[16] Thomas D. Grant, The Recognition of States: Law and Practice in Debate and Evolution 2 (1 ed. Praeger Publishing, Westport, 1999).
[17] *Supra* note 14 at 385.
[18] Meijknecht, Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law 43 (3 ed. Oxford Publication 2001).
[19] S. Talmon, *The Constitutive versus the Declaratory Theory of Recognition: Tertium Non Datur*, 75 British Yearbook of International Law 105 (2004).

non-recognition as status preventing: without recognition, there can be no State.[20]

Over the course of the 20th century the declaratory theory on recognition became the predominant theory on statehood.[21] It finds support in treaties, declarations of States and particularly jurisprudence.[22] This factual approach of the State is confirmed by Article 1 of the Montevideo Convention[23], which describes the attributes of the State in terms of effective authority and independence, instead of civilization or dynastic legitimacy.[24] Given the 'factual' description of the State in art. 1 of the Montevideo Convention it is not surprising that a statement against the constitutive theory of recognition can be found in Article 3 of the Montevideo Convention:

"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 subsequently 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. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law."[25]

The theory also finds its support in the below mentioned declarations:

I. This view is shared by the Institute de Droit International, which declared in art. 1 of its Brussels Resolution Concerning the Recognition of New States and New Governments of 23 April 1936.
II. The Arbitration Commission of the Hague Conference on Yugoslavia also known as the 'Badinter Commission', Opinion on 29 November 1991.
III. The Deutsche Demokratische Republik (DDR) was established on the 7th of October 1949, but it would take until the 1970s before it would be formally recognized by Western States.

III. FORMATION OF STATEHOOD

(A) Definition

Given the State's central role in international law and international relations, it would seem evident that a clear and codified definition of a State exists in international law, so to determine

[20] *Id.*
[21] *Supra* note 20 at 106.
[22] *Id.*
[23] The Montevideo Convention on the Rights and Duties of States of 1933 art. 1.
[24] *Supra* note 6 at 177.
[25] The Montevideo Convention on the Rights and Duties of States of 1933 art. 3.

 [ISSN 2581-5369]

which entity may be considered a State. Since 1945, several attempts have been made to agree on such a definition. During the negotiations over the draft text on the Declaration on the Rights and Duties of States (1949), the Vienna Convention on the Law of Treaties (1956 and 1966) and the articles on Succession of States in respect of Treaties (1974), attempts were made to describe the concept of the State. The importance of effective control was underscored as early as 1929 by the arbitrator in the case of the *Deutsche Continental Gas-Gesellschaft*.[26] The arbitrator stated that, a State does not exist unless it fulfils the conditions of possessing a territory, people inhabiting that territory, and a public power which is exercised over.

Similar formulations are found in older literature, among which special attention should be given to Jellinek's 'Drei Elementen Lehre', which affirms that a State consist of three essential elements: a government, a territory and a population. A codification of Jellinek‟s doctrine of the three elements can be found in the Montevideo Convention on the Rights and Duties of States of 1933. Article l of the Convention provides a description of the State as a subject of international law:

"The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter info relations with the other States."

It should be noted that the fourth criterion, the ability to enter into relations with other States, is generally not considered a prerequisite for the existence of a State. It is instead the other way around: if an entity meets the first three criteria (a territory, a population and a government) it can be considered a State and therefore has the ability to enter into relations with other States. In other words, the ability to enter into relations with other States, is seen as a consequence and not a prerequisite of being a State,[27] a State cannot enter into a relations with other States if it does not exist.[28]

(i) A Permanent Population

The existence of a permanent population is naturally required as an initial evidence of the existence of a State. This requirement suggests a stable community. Evidentially it is important, since in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a State.[29] The size of the population, however, is not

[26] Deutsche Continental Gas-Gesellschaft v. Polish State, 5 A.D. 14-15 (1929).
[27] *Supra* note 6.
[28] Ali Zounuzy Zadeh, *International Law and the Criteria for Statehood*, Course Hero (March 24, 2020, 07:05 PM), < https://arno.uvt.nl/show.cgi?fid=121942 >
[29] Brownlie, Principles of Public International Law 70 (7 ed. Oxford University Press 2008).

relevant since International Law does not specify the minimum number of inhabitants as a requirement of statehood. Nevertheless, an acceptable minimum number of inhabitants is required with regard to self-determination criterion.[30]

(ii) A Defined Territory

The requirement of a permanent population is intended to be used in association with that of territory. What is required by a defined territory is that there must be a certain portion of land inhabited by a stable community. A defined territory does not suggest that the territory must be fixed and the boundaries be settled since these are not essential to the existence of a State, although in fact all modern States are contained within territorial limits or boundaries.

The past practice shows that the existence of fully defined boundaries is not required and that what matters is the existence of an effective political authority having control over a particular portion of land. In 1913, Albania was recognized as a State by a number of States even though it lacked settled boundaries, and Israel was admitted to the United Nations as a State in spite of disputes over its existence and territorial delineation.[31]

The existence of a particular territory over which a political authority operates is essential for the existence of a State. For this reason, the "State of Palestine" declared in November 1988 at the conference of Algiers was not legally regarded as a valid State since the Palestine Liberation Organization had have no control over any part of the territory it was claiming.[32]

The size of the territory of a State and alterations to its extent, whether by increase or decrease, do not of themselves change the identity of that State. A State continues to exist as long as a portion of land is retained.

(iii) A Government

For a stable community to function reasonably effectively, it needs some sort of political organization. It is required that an effective government be created, and this political authority must be strong enough to assert itself throughout the territory of the State without a foreign assistance. The existence of an effective government, with some sort of centralized administrative and legislative organs, assures the internal stability of the State, and of its ability to fulfil its international obligations.[33]

However, the requirement related to the existence of an effective government having control

[30] Malcolm N Shaw, International Law 178-179 (6 ed. Cambridge University Press, 2008).
[31] *Id*. at 179-80 and *supra* note 25.
[32] *Supra* note 31, at 179.
[33] *Id*. at 180.

 [ISSN 2581-5369]

throughout its territory although strictly applied in the past practice, it has been subjected to certain modification in modern practice. In certain cases, the requirement of an effective government was not regarded as precondition for recognition as an independent State. The State of Croatia and the State of Bosnia and Herzegovina were recognized as independent States by the member States of the European Community, and admitted to membership of the United Nations at a time when substantial areas of the territories of each of them, because of the civil war situations, were outside the control of each government.[34] In other cases, the requirement of an organized government was unnecessary or insufficient to support statehood. Some States had arisen before government was very well organized, as for example, Burundi and Rwanda which were admitted as States to the membership of the United Nations in 1961.[35]

Moreover, a State does not cease to exist when it is temporarily deprived of an effective government because of civil war or similar upheavals. The long period of de facto partition of Lebanon did not hamper its continuance as a State.[36] The lack of a government in Somalia did not abolish the international personality of the country.[37] Even when all the territory of a State is occupied by the enemy in wartime, it continues to exist as in the cases of the occupation of European States by Germany in the Second World War and the occupation of Germany and Japan by the Allied powers after that war.[38]

Nevertheless, the requirement of effective government remains strictly applied in case when part of the population of a State tries to break away to form a new State.

(iv) Capacity to Enter in Relations with other States

The capacity to enter into relations with other States is an attribute of the existence of an international legal personality.[39] A State must have recognized capacity to maintain external relations with other States. Such capacity is essential for a sovereign State; lack of such capacity will avert the entity from being an independent State. Capacity distinguishes States from lesser entities such as members of federation or protectorates, which do not manage their own foreign affairs, and are not recognized by other States as full-members of the international community.

[34] *Supra* note 31, at 180-181.
[35] *Supra* note 30, at 71.
[36] Malanczuk, Modern Introduction to International Law 77 (7 ed. Routledge Publication, 1997).
[37] *Id.*
[38] *Id.* at 77-8.
[39] *Supra* note 31, at 181.

 [ISSN 2581-5369]

IV. RIGHTS AND DUTIES OF STATE

Rights and duties of a State have been the primary concern of International Law. The formulation of a list of the so-called fundamental or basic rights and duties of a State has been a persistent preoccupation of international conferences and bodies. The Montevideo Convention of 1933 on the Rights and Duties of States was the first attempt in the process of such formulation.[40] This attempt was followed by the preparation of the International Law Commission of the United Nation "The Draft Declaration on the Rights and Duties of States of 1949",[41] and the adoption of the General Assembly of the United Nations the Resolution 2625 of 1970 entitled the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations."[42] The above instruments, together with the Charter of the United Nations, provide references for fundamental rights and duties of States. Accordingly, under International Law States are entitled to enjoy certain fundamental rights and bound by certain duties.

(A) Rights of a State

The rights of a State are those inherent rights which a State is entitled to under International law. These rights exist by virtue of the international legal order, which is able to define the rights of its subjects. Among the fundamental rights of a state are the following:

(i) The Right of Independence

Apart of being a requirement of statehood as mentioned previously, independence is an outstanding fundamental right of a State. Independence as defined by the Draft Declaration on the Rights and Duties of States of 1949 is the capacity of a State to provide for its own well-being and development free from the domination of other States.[43] However, any political or economic dependence that may in reality exist does not affect the legal independence of the State, unless that State is formally compelled to submit to the demands of a superior State, in such a case a dependent Status is involved.[44]

The right of independence in International Law includes a number of rights, such as, the right of territorial integrity, and the right to have an exclusive control over own domestic affairs.

---

[40] The Montevideo Convention on the Rights and Duties of States of 1933.
[41] *Draft Declaration on Rights and Duties of States with commentaries*, Yearbook of the I.L.C. (1949) (March 25, 2020, 08:00 PM) < https://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf>
[42] G.A. Res. 2625, 25 GAOR, Supp. 28, U.N. Doc. A/8028, at 121 (1970). [Hereinafter cited as The Declaration on Principles of International Law 1970]
[43] *Supra* Note 42 at 286.
[44] *Supra* note 31, at 189.

(ii) The Right of Sovereignty

The right of sovereignty is a fundamental right of a State. All States must enjoy such right. Sovereignty has twofold meaning. Firstly, sovereignty means that a State has the supreme undivided authority over its territory--this concept of sovereignty is known as territorial sovereignty. Secondly, sovereignty means the capacity of a State to enter into relations with other States, such as sending and receiving diplomats and engaging in treaty making, and the enjoyment of certain immunities and privileges from the jurisdiction of other States--this concept is connected with the concept of international personality.

(iii) The Right of Territorial Jurisdiction

The Right of Territorial Jurisdiction is derived from the right of sovereignty. This right entitles a State to have the absolute and exclusive authority over all persons, property and events within the limits of its national territory. This authority implies jurisdiction of the State to enact the law, to enforce the law and to adjudicate persons and events within its territorial land, its internal and territorial water, and national air space.

(iv) The Right of Sovereign Equality

Sovereign equality means that all State have equal rights and duties, have the same juridical capacities and functions, and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.[45] Sovereign equality is mentioned in the Charter of the United Nations as the principle on which this Organization is based.[46]

(v) The Right of Self-Defense

The right of self-defence to which a State is entitled is recognized by Customary International Law as well as Article 51 of the Charter of the United Nations. However, this right cannot be exercised by a State unless an armed attack occurs against it and until the Security Council has taken the measures necessary to maintain international peace and security. The Court in the Nicaragua case stated that there was a 'specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.'[47]

[45] The Montevideo Convention on the Rights and Duties of States of 1933 art. 4 and The Declaration on Principles of International Law 1970, principle (f).
[46] U.N. Charter art. 2, cl. 1.
[47] I.C.J. Reports, 1986, at 14, 94 and 103.

 [ISSN 2581-5369]

(B) Duties of a State

In correlation to the rights of the States, there are duties binding the States. All States are bound to observe their duties under International Law. Non-compliance of a State with its duties constitutes a violation of International Law for which it is responsible under this Law. Among the duties of a State are the following:

(i) The Duty to Refrain from the Threat or Use of Force

A State is under a duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State. This duty includes within its scope certain recognized duties, such as, the duty to refrain from propaganda for wars and aggression, the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands for incursion into the territory of another state, the duty to refrain from organizing, assisting or participating in acts of civil strife or terrorist act in another State and the duty to refrain from forcible action which derives peoples from their rights to self-determination, freedom and independence.[48] However, the use of force is accepted and considered lawful under International Law only if it is exercised in case of self-defence and in accordance with the provisions of the Charter of the United Nations.

(ii) The Duty to Settle International Disputes by Peaceful Means

A State is under a duty to settle its international disputes with other States by peaceful means in such a manner that international peace, security, and justice are not endangered. The Charter of the United Nations, in Chapter 6, provided the machinery for the fulfilment of this duty by the States. Accordingly, States must seek a just settlement of its international dispute by any of the peaceful means stated in the Charter or by any peaceful means agreed upon by them.[49] In case of their failure to reach a peaceful settlement by themselves, they are under a duty to comply with the actions taken by the United Nations.

(iii) The Duty not to Intervene in the Affairs of Other States

A State is under a duty not to intervene, directly or indirectly, for whatever reason, in the internal or external affairs of any other State.[50] It constitutes a violation of International Law any use, encourage the use or threat to use of military, economic, political or any other form of intervention against a State or against its political, economic and cultural elements.

[48] The Declaration on the Principles of International Law 1970, principle (a) and U.N. Charter art. 2, cl. 4.
[49] U.N. Charter arts. 2, cl. 3 & 33 and The Declaration on the Principles of International Law 1970, principle (b).
[50] The Montevideo Convention on the Rights and Duties of States of 1933. art 8 and The Declaration on the Principles of International Law, 1970 Principle (c).

 [ISSN 2581-5369]

(iv) The Duty to Co-Operate with One Another

A State is under a duty to co-operate with other States, irrespective of the differences in their political, economic and social systems, in various spheres of international relations, in accordance with the Charter of the United Nations.[51] Accordingly, a State should co-operate with other States in the economic, social, cultural, educational and scientific fields, as well as, in the fields of peace and security, and human rights and freedoms.

(v) The Duty of a State to Fulfill Its Obligations in Good Faith

A State is under a duty to fulfil in good faith the obligations assumed by it under the Charter of the United Nations and the International Law, including international treaties.[52] The concept of good faith implies that a State should perform its assumed obligations honestly, without malice and defraud, and without seeking unconscionable advantage.

V. CONCLUSION

On the basis of the above held discussion it is quite clear that a state is a primary legal subject in the field of international law. In contemporary international law, the concept of statehood revolves around two competing theories: the (predominant) declarative theory and the constitutive theory. The core of the discussion around these theories revolves around question whether the formation (and continued existence) of States is dependent or independent of recognition by the existing States. In other words, it is about the legal effect of recognition on statehood. Some legal scholars have attempted to explain some of the ambiguities in the theories by arguing that the factual criteria for statehood as described in the Montevideo Convention might have been intended as criteria for assessing the creation of States rather than criteria for assessing the continuation of States. This explanation falls short however, as both during and after the process of decolonization, territorial entities have managed to achieve and maintain statehood, despite lacking effectiveness. But perhaps even more importantly is the legal nature of statehood. As Talmon notes: "The legal status of 'State' describes a state of affairs, not a one-off event; therefore, the criteria for statehood serve as a test for both the creation and the continued existence of the State."[53] Moreover, the States has inseparable rights and unavoidable duties upon itself which is of primary concern by the International Law. Only on the basis of such rights and duties recognized by international treaties and bodies the smooth functioning of States within its territory and between other States is promising.

[51] The Declaration on the Principles of International Law 1970, principle (d).
[52] *Id.* at principle (g).
[53] *Supra* note 27.

 [ISSN 2581-5369]