
THE MONTEVIDEO CONVENTION: AN ESSENTIAL COMPONENT FOR ACHIEVING STATEHOOD FOR KAILAASA?

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ABSTRACT

The idea of statehood is regulated by the ambiguity of international law norms, hence the international context of statehood with respect to a community may be disputed and inconsistent. This essay addresses the issue of statehood and, more particularly, Art. 1 of the Montevideo Convention on the Rights and Duties of States, which outlines the requirements for statehood. This essay tries to evaluate how poorly the Montevideo requirements for achieving sovereignty under international law have been applied mainly to the statehood of the new country Kailasa.

INTRODUCTION

The idea of statehood is regulated by the ambiguity of international law principles, hence the international context of statehood with respect to a community may be disputed and inconsistent. This paper addresses the issue of statehood and, more particularly, Art. 1 of the Montevideo Convention on the Rights and Duties of States, which lays out the requirements for statehood.¹ This paper tries to evaluate how the Montevideo requirements for achieving sovereignty under international law have been applied. The major primary source for this research paper will be Art. 1 of the Montevideo Convention, which lays out the requirements for becoming a state. Each requirement will be evaluated in detail, and it will be shown how these requirements are insufficient for an entity to become a state. To establish a fair perspective on the implementation of the Montevideo criteria, Real-world examples will also be explored and debated in relation to the standards. Nithyananda, India's fugitive godman, has reportedly founded his own country somewhere in the Pacific. Across the world, various territories are agitating for independence — Catalonia in Spain, Kurdistan in Iraq, and Tibet in China are just some examples, new countries are suddenly in high demand.²

DEFINITION OF A STATE

“A State is not a fact in the 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”³.-by James Crawford

However, after the International Law Commission's efforts to develop a definition of statehood⁴ and the struggles of eminent scholars to attempt to draught a specific definition, the Montevideo Convention provides the most explicit definition. International law is partially regulated by unclear principles that are defined appropriately, depending on the interests of international law parties. According to United Nations Security Council “[O]ne cannot contemplate a State

¹ Article 1 Montevideo Convention on the Rights and Duties of States;
<https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>.

² Explained: From Bougainville referendum to Nithyananda's Kailaasa, how is a new country formed?;
<https://indianexpress.com/article/explained/bougainville-referendum-nithyanandas-kailaasa-how-is-a-newcountry-formed-6150936/>.

³ James Crawford, *The Creation Of States In International Law* (1st edn, 1979) 35.

⁴ James Crawford, *The Creation Of States In International Law* (1st edn, 1979) 35.

as a kind of disembodied spirit”⁵. Pasquale Fiore, an Italian Jurist⁶ defines the State as a group of individuals who reside in a certain area, form a society, and are subject to the rule of "the sovereign" government. This government has the capacity to enact laws, defend its citizens, and engage in international affairs.⁷

Fiore's definition is consistent with the terminology used in Art. 1 of the Montevideo Convention, which states that a State must have a permanent population, a clearly defined territory, and a functioning administration that is able to engage in contacts with other States⁸.

The Montevideo Criteria

Prior to the convention, the concept of legitimise arose in the 18th century and was based on the assumption that in a monarchy, a ruler had perpetual powers over a State and was thus remained sovereign even after being deposed. The contiguity concept, which held that if the supreme ruler had power over an area, the ruler would also have claims to surrounding lands, even though they were not initially under his control, emerged after the demise of legitimism.⁹ In the lack of State power in that region, this enabled States to gain more land.¹⁰ The Montevideo Convention on the Rights and Duties of States, which was prepared during the Seventh International Conference of American States and signed in 1933 and entered into force the following year, was established as a result of the rejection of the legitimism and contiguity doctrines.¹¹

The Montevideo Convention was an attempt by the States to codify the definition of a State. Art. 1 lays down that a State should contain the following qualifications": "(a) a permanent population; (b) a delimited territory; (c) a government; and (d) the ability to engage in relations with other States." This definition is the version of the state that is most frequently acknowledged, despite the fact that the Convention is not widely signed or ratified.¹² It is

⁵ UN SCOR, 3rd sess, 383rd mtg, UN Doc S/PV.383 (2 December 1948) 11.

⁶ Panayi, Panayiotis. (2018). 'The state of a State - The ineffective application of the Montevideo criteria.

⁷ Thomas D Grant, 'Defining Statehood: The Montevideo Convention And Its Discontents' (1999) 37 Columbia Journal of Transnational Law 409.

⁸ Article 1 Montevideo Convention on the Rights and Duties of States;
<https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>

⁹ Ibid at 420-21.

¹⁰ Ibid.

¹¹ Panayi, Panayiotis. (2018). 'The state of a State - The ineffective application of the Montevideo criteria.

¹² See, eg, Knop, above n 2, 95; Shaw, above n 6, 198; Lowe, above n 45, 153; Crawford, *The Creation of States in International Law*, above n 6, 45–6; Prosecutor v Milošević (Decision on Motion for Judgment of

generally acknowledged that these are the four prerequisites for the establishment of a state¹³ and that they reflect custom¹⁴ in the sense that they serve as the minimal standards for an entity to acquire the status of a state.

Kailaasa as a country with respect to Montevideo Convention

There is a “country” named Kailasa rumoured to have been created somewhere off the Pacific coast of Central America, run by a Swami Nithyananda. According to its website (accessed on 21 Dec. 2020), the island is for dispossessed Hindus around the world who have not been able to practice authentic Hinduism in their own countries¹⁵, which has its own flag, recognised several official languages, and even established a department for defence and home protection. It appears to be a real nation and might encourage other people to start their own. But it's not as simple as you may assume to establish a new nation.

A nation seeking statehood The Montevideo Convention on the Rights and Duties of States established the requirements for becoming a country in its 16 articles. These requirements include having a defined territory, a permanent population, and a government that is able to develop and maintain diplomatic relations with other nations. Kailaasa passes the litmus test and has successfully joined the ranks of Transnistria, Sealand, Somaliland, and a host of other countries¹⁶.

According to the Convention, the first criteria is permanent population, and it requires that people permanently reside on the defined territory of the State. This requirement is seen as being ambiguous because it merely specifies that the population should have a permanent address without offering any restrictions or a required minimum number of inhabitants. The several microstates that were admitted as States in the international domain demonstrate that

Acquittal) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54-T, 16 June 2004)

[85]–[86]; Österdahl, above n 2, 50; David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002) 24, 49; Grant, ‘Defining Statehood’, above n 2, 416; Michael P Scharf, ‘Musical Chairs: The Dissolution of States and Membership in the United Nations’ (1995) 28 *Cornell International Law Journal* 29, 32 n 15; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 39; O’Connell, above n 10, 284; Nkambo Mugerwa, ‘Subjects of International Law’ in Max Sørensen (ed), *Manual of Public International Law* (Macmillan, 1968) 247, 250.

¹³ Lowe, above n 45, 153 .

¹⁴ David Harris, *Cases and Materials on International Law* (Thomson Reuters, 7th ed, 2010) 92.

¹⁵ <https://tigsindia.com/kailasa-a-country/> .

¹⁶ How to start your own country: All you need is ‘friends’ - SHIBANI MEHTA; <https://www.deccanchronicle.com/opinion/op-ed/111219/how-to-start-your-own-country-all-you-need-isfriends.html> .

no minimum population requirement exists. For example, Vatican, Legal propagandists like James Crawford contend that due to its size and the professional and transient character of its populace, the Vatican does not have a permanent population.¹⁷ Because when this definition is applied to the instance of the Vatican, it is found that the need of a permanent population is not met, but then also Vatican is still regarded as a State. But in the case of Kailasa it has already permanent population, according to the website, Kailasa has a population of about 100 million Adi Shaivites and 2 billion practicing Hindus. The languages of the new nation are stated to be English, Sanskrit and Tamil, and it also invites citizens to Kailasa through visa and it also requests for funding.

The possession of a specified area by a State is the second requirement outlined in Art. 1 of the Montevideo Convention.¹⁸ This criterion is crucial and connected to the preceding criterion since stability in the community depends on the inhabitants having a place to live. When this definition is applied to the instance of the Vatican, it is found that the Vatican City that is located inside Rome and consists of 109 acres of land that is 1/3 of the size of the second smallest State, Monaco.¹⁹ But in the case of Kailasa which has defined territory, the criteria passes.

The third criteria is having an effective government which is considered essential in establishing a State. It is connected to the need for a clearly defined territory in that the level of government control over an area is taken into consideration²⁰; as a result, the demand for a defined territory is somewhat reliant on the government exerting effective control. If Kosovo is only compared to the Kurdish area on the basis of an effective government control, it is unclear if Kosovo meets the requirement. While Kosovo may have a police force, it is heavily dependent on outside forces to maintain peace and order and conduct foreign policy,²¹ which is why the World Bank Institute estimated the local government effectiveness in Kosovo to be 45%.²² But in the case of Kailasa this criterion also passes as it has proper government as it is

¹⁷ James Crawford, 'The Criteria For Statehood In International Law' (1977) 48 British Yearbook of International Law 114.

¹⁸ Article 1 Montevideo Convention on the Rights and Duties of States; <https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>.

¹⁹ Yasmin Abdullah, 'The Holy See At United Nations Conferences: State Or Church?' (1996) 96 Columbia Law Review 1863.

²⁰ James Crawford, 'The Criteria For Statehood In International Law' (1977) 48 British Yearbook of International Law 116.

²¹ Zohar Nevo and Tamar Megiddo, 'Lessons From Kosovo: The Law Of Statehood And Palestinian Unilateral Independence' (2009) 5 Journal of International Law and International Relations 99-100.

²² 43 Secretary General Report, *supra* note 49 at paras. 2, 17, 31-32; UNMIK, Kosovo in February 2008, online:

based on temple-based ecosystem and it has a PM and an effective government.

The capacity of an entity to engage in interactions with other States is the fourth cumulative condition that an entity must satisfy in order to be regarded as an international legal person and, consequently, a State. This criterion is questioned for its lack of definition and because an entity cannot be classified as a State because of its ability to interact with other States. This is because international organisations like the United Nations also have this capability. In the case of Kailaasa it does not have any recognition from any country.

CONCLUSION

A state must at least have some level of recognition today in order to be admitted into the international community. Membership in the United Nations is the best and most important symbol of international legitimacy. Being admitted to the UN signifies acceptance as a full member of the world community of nations. The sole need for joining the UN is a letter submitted to the Secretary-General, but despite how basic the procedure is, power politics remain the major barrier. As far due to not completion of all the conditions of Montevideo Convention results in Kailaasa, as it is today, is an imagined community with the skeleton of a state. It is not a country yet.²³

<www.unmikonline.org/docs/2008/FactSheetFebruary_2008.pdf>; European Union: European Commission, Kosovo (under UNSCR 1244) 2007 Progress Report, 6 November 2007, SEC (2007) 1433.

²³ How to start your own country: All you need is 'friends' - SHIBANI MEHTA; <https://www.deccanchronicle.com/opinion/op-ed/111219/how-to-start-your-own-country-all-you-need-isfriends.html> .