THE CONCEPT OF STATE RECOGNITION UNDER INTERNATIONAL LAW

BY

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DECLARATION

I hereby declare that this dissertation entitled, "The Concept of State Recognition under International Law: An Examination" has been written by me and that it is a record of my own research work. It has never been presented in any previous research work for the award of Degree of Master of Laws (LL.M). All quotations and references are indicated with specific acknowledgements.

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Shafi'i BARA'U **Date**

CERTIFICATION

This dissertation entitled, "The Concept of State Recognition under International Law: An Examination" meets the regulations governing the award of Master of Laws Degree-LL.M of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to my father Late Alhaji Bara'u Dalhat (Mallamawan Katsina IV) may his gentle soul rest in perfect peace, amin.

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All praises are due to Almighty Allah (SWT) who created man in best of form and gave him laws and endowed him with intellect and taught him by the pen which he knew not.

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ABSTRACT

State recognition is one of the oldest practice in international relations, and one of the most vexed concepts in international law since the middle ages, political communities have interacted with each other as sovereign, territorial states under an accepted system of rules. Determining which entity is to be recognized as state subject to these rules has hence been a basic component of international relations. As such, it is one of the most common discussed topics in the international law literatures. The main aim of this dissertation is to examine the legal framework for the practice of the concept of state recognition in international law in relation to the existing provisions of relevant international and regional constitutive instruments on one hand and the activities of the international community on the other hand. In view of this the main objective of this dissertation is to identify the adequacy or otherwise of the existing international regimes on the practice of state recognition (if any) and subsequently to proffer solutions to the lacunas identified so as to bring about an efficient practice in accordance with the provisions of the constitutive instruments. In the cause of this research the findings of the researcher is that lack of uniform criteria for the practice of state recognition among the international regimes, for example, the provisions of the U.N., the Montevideo Convention and E.U. are at variance. Therefore, in the light of this, the researcher concluded by recommending that there should be a singular and uniformly accepted mode of practice of state recognition so as to foster international cooperation which will go along way to reduce controversies in international jurisprudence. Doctrinal method of acquiring data has been adopted, using primary and secondary sources of information such as relevant text materials, statutes (including international instruments), judicial authorities, articles in journal publications and internet materials.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

The term "recognition" implies a process whereby a person or an entity admits to the existence or the being of another person, entity or state of affairs. The Chambers Twentieth Century Dictionary defines the concept as a sign, token or indication of acknowledgment of a thing or a state of being in relation to nation state.[1]

State recognition is one of the oldest practice in international relations, and one of the most vexed concepts in international law since the middle ages, political communities have interacted with each other as sovereign, territorial states under an accepted system of rules. Determining which entity is to be recognized as state subject to these rules has hence been a basic component of international relations. As such, it is one of the most common discussed topics in the international law literatures.[2]

Recognition of statehood grants an entity international legal personality and binds it to comfort it according to the rules established by international law in its relations with other states and peoples. At the same time, it makes the entity eligible to enter into treaties and alliances with other states as well as to participate in the development and enforcement of international law. Most importantly recognition is an affirmation of an entity's right to territorial sovereignty and integrity and its right to exercise coercive jurisdiction within this territory.

[1] McDonald, A.M. (1972) Chambers Twentieth Dictionary, 1 & A Constable Ltd., p. 1128
[2] Maraina O. Secession, Statehood and Recognition: Princeton University pdf document available at http://psujja.files.wordpress.com/2012/04/secession.final.pdf. Accessed on 27/2/2013

The right and powers attached to statehood make it desirable for a political entities to attain such a status, at the same time the expectation that each new state will abide by the rule of international law makes it desirable to include as many qualified political entities as possible in so far as this will further the goals of peace and stability.[3]

While in conformity with the above the Monte Video Convention of 1933 made a preliminary attempt to codify specific descriptive criteria for statehood thus:

(1) Permanent Population

(2) Define territory

(3) Functional government able to control the territory

(4) Capacity to enter into relation with other state voluntarily

Together these four requirements defined a state and presumably any entity aspiring independent statehood that met these criteria would automatically be regarded as a state under international law.

However and unfortunately the present practice of recognition is not in conformity with the above criteria. According to the present recognition an entity is considered a state to the extent that other state recognized it as such, since new state cannot exercise right and obligation against state that do not recognize it. For example taking into consideration the case of Palestine, applying the Montevideo criteria for statehood, it becomes clear that Palestine should be considered a state and also be recognized, as it has a permanent population, concentrated in a defined territory, a functional representative

[3] Erticle 3 of Monte video Convention (1933)

authority (P.A), and has already entered into various agreements with other sovereign entities. However, as was already noted, its statehood bid is bound to be frustrated unless Israel and USA choose to alter their policy of non-recognition. Regardless of whether or not the U.S and Israel are right in denying recognition it is clear that recognition in this case is a matter of policy discretion from part of the states on both sides of the controversy. As this example shows recognition is often an opportunity for powerful states to express their approval or disapproval of a political entity, and hence recognition end up bringing a high selective and strategic policy decision.

Moreover, recognition does not tend to a single form. There is need to establish a generally acceptable form of recognition. Blix states, "Recognition being an institute that has existed for a long time, it may not be unreasonable to assume that it has some political function in international relations or several that is not merely an empty fetish. This function should also tell sometimes about the way the institutions operate"[4]

Against the above backdrop, therefore, this dissertation seeks to discuss the procedures of implementation of the criteria for state recognition in international law to identify reasons for the lack of exhaustiveness of Monte Video Convention criteria, and irregular practices within the international community which may eventually escalate conflict among states.

[4] Blix. H.M. (1970) Recognition Particular Problems, Definition Theories 130, Hague: 587 p. 596

1.2 Statement of Problem

As stated above, state recognition is one of the oldest practice in international relations, and one of the most vexed concepts in international law since the middle ages, hence the states practices in relation to the concept is marred with some problems. Some of those problems are stated as follows:

i. the first problem is that in the last centuries, the criteria of statehood were mainly based on legitimacy of state, which was expressed through recognition. For example the Montevideo convention defined four elements as requirement in order to claim statehood. The UN was born and created as a subject of international law, and the UN charter redefined international law and coming to an end resulting in the creation of many new states in Africa, Asia, South America, the breakdown of the so called communist, Soviet Union which has lead to another wave of state creation hence the issue of recognition.

ii. Recognition is given in a number of cases for purely political reasons. This point of view was emphasized by the American representative on the Security Council during discussion on the Middle East in May 1948, where it states that it would be highly improper for one to admit that any country on earth can question the sovereignty of the United States of America in the exercise of the highly political act of recognition of the *de facto* status of a state …. Indeed they added that there was no authority that could determine the legality or validity of the act of the United States. For example, the US and Israel deliberately refused to recognized Palestine, China refused to recognized Taiwan etc. Recognition need to be re-

emerged as an important legitimizing criterion for statehood and be modified through the changes in the world. The concept of unilateral recognition can be discarded; it is outdated to believe that the recognition of one or a few more states can be constitutive. Unjustified political reason and preferences can affect the decision of a state to or not recognize a state. Moreover, unilateral recognition is incompatible with international law since the implementation of the UN charter. To decide alone who should be a state the crucial principle of sovereign equality of state will be shunned. The limit and impact of political recognition of statehood also posed a problem for state recognition under international legal parlance.

iii. There is lack of exhaustiveness of the Monte Video Convention legal criteria for state recognition under international law.

1.3 Research Questions

i. why is it that some principal legal instruments for state recognition under international law are at variance with one another?

ii. Why does political requirement on state recognition in the modern time has more impact than the legal instruments in the international community?

iii. Why is Monte Video Convention legal criteria not exhaustive by state actors in state recognition under international law?

1.4 Aim and Objectives of the Study

This dissertation aims at appraising the concept of state recognition in international law. In view of this the objectives of this dissertation are as follows:

a. to examine the extent criteria of statehood vis-à-vis the concept of recognition and its impediments.

b. examine the concept of recognition, the failure or refusal of a state recognizing another state, the various provision of international statute, charter and convention with a view to addressing the issues in line with the current situation, for example the case in Palestine, Southern Sudan, Taiwan, Kosovo and a host of others..

c. Examine the practice of state recognition within the international community vis a vis views and opinions of the World political leaders, international institutions and organizations on the issue of recognition of states in international law and practice.

d. to identify the adequacy or otherwise of the constitutive international and regional legal instruments to provide some recommendations to the issues identified.

1.5 Scope and Limitation of the Research

The scope of this research covers the concept of state recognition under international law in accordance with the provisions of the various international and regional legal instruments. This study also covers some aspects of state practices in early international law as a basis for the development of the practice of state recognition within the international community.

It also covers State recognition in modern international law in accordance with the existing legal regimes on state practice that is international and regional legal instruments. It further covers issues constituting challenges to the effective practice of the concept of state recognition in international community with particular reference to Nigeria.

The study is limited to the applicability of state recognition in international legal parlance.

1.6 Justification

The justification of this work is that it would be of great importance to its readers such as judges, justices and all members of the bar in relation to the knowledge of the current trend of state recognition under international law. It will help lawyers who are practicing international law. The work brings out the reforms brought through the modern practice of state recognition. This work will be of great help to lecturers and students of international law in this country.

1.7 Literature Review

There are plethora of current existing literatures on the overall meaning, nature and scope of the concept of self-determination under international law. Some of these materials would be used as source of acquiring data and informational and be reviewed accordingly.

The problem of recognition under international law is because perhaps it is a subject of a far flung practice of states, of many practice and enormous literature. It is obvious that many scholarly literatures have been written on the topic. This is because the subject is quite refreshing and topical. Even though a lot was elicited on this topic and abundance literature was also in place, most of the existing literature on this field either by time and current happening or as a result of oversight did not cover some important aspects; for example the requirement of having one standard criteria of recognition as in the case of statehood. In this piece of research, it is proposed to review some literature with a view to finding out the extent to which other scholars have studied, the filed on the one hand and on the other hand, to examine lapses or lacunae in their argument or presentation and further development that have taken place which they did not include in their discussions.

According to William[5], International law is dominated by two competing theories of state recognition, with the "declaratory" view currently in prominence but possibly just beginning its decline in favor of the "constitutive" view. However, if indeed the constitutive view is gaining ground, then its slow and partial re-emergence is forcing us to rethink the nature of the state in international law. The constitutive theory states that recognition of an entity as a state is not automatic. A state is only a state when it is recognized as such and other states have a considerable discretion to recognize or not.

[5] William, W. (2010), Sovereignty: two Competing Theories of State Recognition, University of The Hague, Netherlands

Moreover, only upon recognition by those other states does the new state exist, at least in a legal sense.

Some practice in contemporary situations may evidence the application of the constitutive theory rather than the declaratory. Numerous classical scholars have weighed in support of the constitutive theory, and many modern scholars are beginning to reexamine the constitutive theory, considering whether it provides a firmer foundation for the determination of statehood status.

The declaratory theory looks to the purported state's assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane. It is the opposite of the constitutive theory in that it holds that recognition is almost irrelevant because states have little to no discretion in determining whether an entity constitutes a state. The status of statehood is based on fact, not on individual state discretion. The majority of contemporary scholars and commentators favor this theory.

There is considerable support for the argument that recognition is irrelevant for whether a state exists as such or not. The Montevideo Convention of 1933 states: "The political existence of the state is independent of recognition by the other states." According to the author the International Court of Justice has held in the Genocide Convention case that it adheres to the declaratory view, in the sense that the failure to maintain effective control over territory does not extinguish the legal entity in the eyes of the United Nations. It has also held in the South West Africa cases that the state as an entity with rights and obligations does not cease to exist. This opinion on the declaratory theory was also supported by the Arbitration Commission of the European Communities Conference on

Yugoslavia, chaired by Robert Badinter, discussing the independence and status of states of the successor to the S.F.R. Yugoslavia. Furthermore, many national courts have recognized international rights in states that accrued before international recognition of the entity as a new state, suggesting a rejection of the notion that the state did not exist before recognition.[6] Many commentators have held that state practice clearly favors the declaratory model, that is, that the entity exists as a state before recognition.

On the other hand, we have the alternate view which is that states only exist upon recognition and there is support for this perspective, although we may need to read between the lines to see it. Some authorities who claim to support the declaratory view appear to also endorse the constitutive theory in practice.[6] The Badinter Commission initially adopted declaratory language but seems to have applied a constitutive approach to balance major tensions between the various European states.

Milenko Kreća, the ad hoc Judge in the Genocide Convention case implied in his critical dissent that the Court was applying the constitutive theory. The Permanent Court of International Justice, the predecessor to the International Court of Justice, appeared to endorse the constitutive theory in two opinions: the Lighthouses case, where effectiveness was disregarded for the fiction of continued sovereignty of the Turkish Sultan, and the Rights of Nationals of the United States of America in Morocco case, regarding the continued sovereignty of Morocco although under the French Protectorate.

[6] ibid

Also the International Criminal Tribunal for the former Yugoslavia, the International Court of Justice's neighbor in The Hague is also supportive of the constitutive theory.[7]

In the Čelebići case, the I.C.T.Y. held that the conflict within the former Yugoslavia was only of an international nature after international recognition of the independent statehood of Croatia and Bosnia and Herzegovina. In the Tadić case also at the I.C.T.Y., Judge Li, in a separate opinion, criticized the majority for applying the constitutive theory. Judge Li argued that the conflict should have been seen as international from the moment of Slovenia's and Croatia's declarations of independence, not because of recognition by others.

In addition to these decisions of international tribunals or commissions, the act of recognition seems to increasingly be attributed with constitutive effect within the international legal system. States such as Croatia, Eritrea, and Central and Eastern European states arising from Woodrow Wilson's dismemberment of the Habsburg and Ottoman Empires, have survived extinction or been revived from extinction by the international community.

Bosnia-Herzegovina and Croatia arguably did not fully satisfy the criteria for declaratory recognition, so the recognition of those entities as new states may have had constitutive effect despite the supposed intended application of the declaratory theory. For some microstates, their relatively recent admission to the U.N., as well as recognition by other states, may have clarified their position in international law, crystallized their rights, and assisted in their constitution, regardless of the intended effect of their recognition.

[7] ibid

We can also see situations where the existence of emerging states was blocked by other, more powerful states, which would only be possible if statehood was in the control of existing states. Also, we can see situations where states, that had lost all factual qualification as such, were maintained as essentially legal fictions by the international community. This suggests that recognition both constitutes and maintains the legal personality of other states whose reality would suggest that they no longer existed, or existed in a fictitious state.

Although this finding is usually argued because of the illegality of the occupation of the state, if statehood was truly declaratory, then the ending of effective control and independence would necessarily mean the extinction of the state.

These cases are significant because they evidence that entities only receive international rights and obligations when they are recognized by other states as states. It is commonly observed that "only states sit on the United Nations Security Council, only states petition the International Court of Justice and only states participate in the Nuclear Non-Proliferation Treaty regime." Recognition of statehood changes the range of actions available to an entity and also changes the expectations of the international community regarding the behavior of the new state.

It would appear that the support for the declaratory theory is partly legal and partly the more politically correct position. The constitutive theory does still attract some legitimacy; possibly partly due to the way it appears to be applied surreptitiously by tribunals. The difficulty with the either/or approach is that there is an interrelation of the two sides of the question. The declaratory theory concentrates on the internal factual

situation and the constitutive theory concentrates on the external legal rights and duties. They both miss a portion of the analysis.

Furthermore, the two sides of the issue interact between themselves. By having rights a collective group may become more cohesive and may begin to have an internal political dialogue. Recognition alone does not create the internal factual situation of statehood, but may help to inspire such coalescence. Nationalism is not unknown in many apparently highly artificial states. However, recognition of the factual situation merely acknowledges facts and does not mean there are necessarily international rights, although it can lead to it.

Every act of recognition must necessarily contemplate both aspects, but generally one will be the predominant legitimizing force (though it could conceivably change retrospectively). When we choose between the recognition theories proposing the existence of the state prior to or only following recognition, we are choosing to concentrate our definition of the state on one of these two aspects of the state and, from that source, derive the other. It is to this conclusion that the re-emergence of the constitutive theory leads us.

The work of Abhimanyu[8] has also been acknowledged. In his work, the author discusses as to what extent is the recognition of a state undermined by charges of corruption? The author then viewed thus, "as an analytical exercise it is interesting to think through the implications of corruption on the recognition of statehood in international law"[9].

[8] Abhimanyu, G. J. (2014) Recognition of States in International Law, the *European Journal of International Law*
[9] ibid

According to this author statehood and recognition are distinct legal concepts, but in practice recognition can be dispositive of whether an entity is a state. In light of the importance of recognition for the creation and existence of states, the possibility of corruption influencing the recognition process is disconcerting. In the case of Taiwan, "dollar diplomacy" is an established phenomenon, and allegations similar to those raised against Guatemalan president Portillo seem to be surfacing in El Salvador as well. Nor does it seem implausible that other instances of recognition, of and by other states, may have been similarly motivated.

To be clear, the issue discussed here is not recognition based on inducement or incentive to the recognizing state, but recognition based on inducement or incentive to key officials in the recognizing state. States routinely make binding political and legal decisions based on political and economic, tangible and intangible, inducements and incentives: defence deals, monetary aid, concession agreements and diplomatic manoeuvres just a few examples.

The issue that forms the subject of this post is whether the validity of an act of recognition can be impugned on the grounds that it was induced through the corruption of key government officials? Is it possible for Guatemala, or China to argue that the original act of recognition is invalid by reason of President Portillo's corruption? This question of possible invalidity has two aspects. First, does the act of recognition bind the recognizing state, notwithstanding the fact that it was a result of a mala fide exercise of powers by a key government official? Second, does the act of recognition vest an irrevocable right or

status in the recognized state, such that notwithstanding the taint of corruption on the act of recognition, it cannot be invalidated?

The first question deals with the effect of the act of recognition on the recognizing state. I would argue that such recognition, even if motivated by the corruption of a particular official, retains its validity. To begin with, it is well established that "the conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions"[10]. Further, analogies from other areas of international law support this conclusion. In the matter of 'full powers' for the conclusion of treaties, the actions of persons who appear to represent the state with the state's consent bind the state. Similarly, the concepts of immunity *rationae* personae and *rationae materiae*, in protecting senior government officials from prosecution by other states, assume that the senior officials of a state act in the name of the state and bind the state by their actions.

Conversely, it might perhaps be possible to analogize from the doctrine of 'odious debt' that actions taken by corrupt government leaders in the recognizing state, in their own interest, against the interest of the people they represent, when the recognized state knows that the actions benefit the officials and not the recognizing state, should not bind the recognizing state. There are two problems with this argument: first, it is unclear whether the odious debt doctrine applies outside of government debts, strictly construed; second, in relation to the recognition of states, it would be rather onerous to prove

[10] Art. 7, ILC's Draft Articles on State Responsibility

damage to the interests of the people of the recognizing state and knowledge by the recognized state of this damage.

Therefore, the recognizing state probably cannot seek to void its recognition because it was induced by individual corruption. To be clear, Guatemala is not restrained from separately revoking its recognition of Taiwan; it is, however, constrained from arguing that its original recognition was invalidated by the corruption of President Portillo. This is a narrow distinction in theory, but a broad distinction in practice. For instance, the difference between revocation and invalidation will have an effect on the scope of involvement of third states. If the validity of the original act of recognition is capable of being impugned, it may be possible for third states (for instance, China in this case) to challenge the recognition. But if the original act of recognition can only be revoked and not challenged, then it is only Guatemala that can revoke the recognition.

The second question deals with the effects of the recognition on the recognized state. Is it possible for the recognized state to argue that the act of recognition vests an irrevocable right or status? At least two possible arguments to this effect come to mind.

First, it could be argued that such a revocation amounts to denial of self-determination, but this argument is not persuasive. The right to self-determination does not include an unqualified right to independent statehood. Moreover, the impact of a singular instance of revocation of recognition on the self-determination of a recognized state would probably be difficult to determine, and would require an analysis of how many states have recognized the state, what the effect of a single revocation would be, whether that revocation would produce a knock-on effect, and so on. A second, more plausible,

argument focuses on the violation of sovereign equality. Once an entity meets the criteria of statehood, and is recognized as such, the ability of individual states, or the international community, to revoke recognition and statehood would infringe the fundamental right of sovereign equality. International law does provide for such ability in limited circumstances, for instance through directives of the UNSC, but those circumstances are very limited, and restricted to situations involving threats to international peace and security.

Neither of these arguments is ultimately persuasive. The recognition of states in international law is a political act; there is no duty in international law to recognize a state, nor a right to be recognized. Similarly, the revocation of recognition is a political act. However, if these two arguments, or other similar arguments, were to be accepted, they would have the effect of preventing the revocation of recognition of statehood. And that is contrary to the accepted position in international law.

The author then concluded that an act of recognition of statehood induced by the personal corruption of individuals in the recognizing state is valid in international law. But it is difficult for the recognized state to argue that the recognition is permanently irrevocable, and it is possible tor the recognizing state to separately revoke its recognition.

The work of Crawford[11] has further been acknowledged in this study, according to the author, at the beginning of the 20th century, there were some fifty acknowledged States. By 2005, this number rose to exactly 192 States. The emergence of so many new States

[11] James R. Crawford **(**2010), The Creation of States in International Law, Oxford Scholarship Online, accessed on the 13th April, 2015

represents one of the major political developments of the 20th century. It has changed the character of international law and the practice of international organizations, and has been one of the more important sources of international conflict. But the fact that some development is of importance in international relations does not entail that it is regulated by international law. Fundamentally, the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law. The work investigates whether, and to what extent, the formation and existence of States is regulated by international law, and is not simply a 'matter of fact'.

The author suggested that the 'great debate' over the character of recognition has done nothing but confuse the issues, that it is mistaken to categorize recognition as either declaratory or constitutive in accordance with some general theory. He quoted Brownlie as saying, "in the case of 'recognition', theory 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, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis."

He maintained that one can sympathize with these views, but at a fundamental level a choice has to be made. The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State—to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical

constitutive position, which implies a different answer, is unacceptable. But this does not mean that recognition does not have important legal and political effects. Recognition is an institution of State practice that can resolve uncertainties as to status and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or 'recognize' entities the status of which is doubtful: depending on the degree of unanimity and other factors this may be evidence of a compelling kind. Even individual acts of recognition may contribute towards the consolidation of status: in Charpentier's terms, recognition may render the new situation opposable to the recognizing State.

According to him, in some situations, the term 'recognition' may also be used to describe acts that are properly speaking constitutive of a particular State; for example, a multilateral treaty establishing a new State will at the same time extend the signatories[12]' recognition of that State. But the constitutive acts here are those involving the establishment of the State, the stipulation of its constitution, the definition of its borders, etc. Collective recognition is ancillary and is not a substitute for action by the competent authorities.

The conclusion must be that the status of an entity as a State is, in principle, independent of recognition, although the qualifications already made suggest that the differences between declaratory and constitutive schools are less in practice than has been depicted. But this conclusion assumes that there exist in international law and practice workable

[12] Ibid, p.28

criteria for statehood. If there are no such criteria, or if they are so imprecise as to be practically useless, then the constitutive position will have returned, as it were, by the back door.

John M. B. Balouziyeh[13] highlights General Assembly Resolution A/67/L.28 on the Status of Palestine at the United Nations was adopted on November 29, 2012 by a vote of 138 in favor to nine against and forty one abstentions. According to him, the Resolution, which has upgraded the status of the Palestinian Authority from a United Nations permanent observer entity to that of a non-member observer State, raises several questions under international law? For example, what place does the Resolution have in the creation of binding international law? Has Palestine been officially conferred statehood as a result of the Resolution? What rights does Resolution A/67/L.28 grant Palestine that Palestine did not previously hold? In response to these questions, this article will discuss the Resolution and its place in customary international law and general principles of law.

He was of the view that Resolutions issued by the General Assembly are not *per se* legally binding. The General Assembly, unlike the Security Council, only issues binding resolutions in the area of budgetary matters regarding the allotment and collection of dues. Therefore, the Resolution A/67/L.28 will have a largely symbolic effect without any real, immediate impact on the on-the-ground situation in Palestine.

[13] John M. B. Balouziyeh**,** *Palestinian Statehood under International Law* in: LexisNexis, Legal Newsroom International Law accessed on 7th Jan., 2016

However, he maintains that while General Assembly resolutions are not legally binding on United Nations member States, they can contribute to the creation of binding international law. Resolutions of the General Assembly are a means through which States express their opinions about the status of international questions. A resolution that receives widespread support may therefore shape the content of customary international law, a source of international law. When a legal principle becomes customary international law, it becomes binding on States to the extent that they do not repeatedly and publicly announce opposition to the principle.

Moreover, the resolutions and declarations of international organizations, including the United Nations, may constitute *opinio juris*, one of the five sources of international law. While *opinio juris* is not itself a source of law, it serves as a "subsidiary means for the determination of rules of law" under article 38 of the Statute of the International Court of Justice.

Therefore, while Resolution a/67/l.28 is not itself binding, it may contribute to and shape the content of binding international law.

An overwhelming majority of 138 States (seventy three percent of those present) voted in favor of Resolution a/67/l.28, with nine against and forty one abstentions. The vote thus upgraded the Palestinian Authority's status at the United Nations from a "permanent observer entity" to a "non-member observer State." However, this upgrade in Palestine's status at the United Nations does not necessarily equate full-fledged membership in the international community. The recognition of statehood is a rather complex area of international law subject to competing tests and theories.

There are two theories that provide guidance as to the legal recognition of an entity's sovereignty in the international community: (i) the declarative theory; and (ii) the constitutive theory.

The declarative theory is the prevailing theory for the recognition of State sovereignty. It holds that an entity is recognized as a State when it satisfies the following objective criteria for Statehood, which were laid down in article 1 of the Montevideo Convention of on the Rights and Duties of States (1933): (i) permanent population; (ii) defined territory; (iii) effective government; and (iv) capacity to enter into relations with other States.

Palestine's status as a "State" suffers several defects under the declarative theory test. First, Palestine's territory is subject to much dispute, with some proponents of a Palestinian state arguing that Palestine encompasses the territory of the West Bank and Gaza Strip, and other advocates arguing that Palestine encompasses all of modern day Israel, which they contend is not a legitimate State. The question of a "defined territory" is thus subject to much dispute. Moreover, the Palestinian Authority does not have exclusive authority over any of the aforementioned territory: much of the West Bank is co-administered with Israel and the Gaza Strip is administered by Hamas.

The second issue that Palestine faces under the declarative theory is that of an effective government. In order to qualify as a State, an entity must have a government with effective control over the territory in question. There is currently no single entity that is in effective control of the whole territory of Palestine. The ruptures in the relationship between Hamas in the Gaza Strip and Fatah in the West Bank is the main reason many

critics including the United States argue that there is no Palestinian government with consolidated control over all of Palestine's territory.

If Palestine were unable to meet the elements of the declarative theory test, it may be able to turn to the constitutive theory of state recognition, which holds that an entity is a State when recognized as such by the international community. "Recognition" refers to the formal acknowledgement by other States that an entity is a State.

Under this theory, the General Assembly Resolution is highly relevant to the question of Palestinian statehood. The vote of 138 nations affirming Palestinian statehood reflects the voluntary and independent political decision of States that is critical to the constitutive theory test. Since the majority of the international community recognizes it as a State, Palestine may invoke the legal construct of the constitutive theory in its bid for statehood. However, the constitutive theory is problematic in many respects. First, the theory is weakened by the problem that may arise when some but not all States recognize an entity as a State. What is to come of the nine nations that voted against Palestinian statehood and the forty one abstentions, constituting a total of twenty seven percent of General Assembly members that were present during the vote?

"Partial" statehood does not exist in the international legal order, and the constitutive theory does not provide an answer to the anomaly of partial State recognition. The *Institut de Droit International*, recognizing this and other weaknesses of the constitutive theory, has declared in its 1936 Resolutions concerning the Recognition of New States and New Governments that the existence of new States with all connected legal effects "is not affected by the refusal of one or more States to recognize." This Resolution

essentially restricts the impact that recognition has when clothing an entity with statehood.

The above author concluded that although the Resolution does not constitute binding international law, it does bring Palestine one step further towards statehood under both the constitutive and declarative theories. The vote shows that Palestine has significant recognition by the international community as a State, thus fulfilling the criterion of the constitutive theory, which while being flawed is still adhered to by some contemporary theorists. Moreover, with Palestine's formal recognition by 138 countries, it will be able to effectively enter into relationship with other States, which is one of the four elements of the declarative theory test. Thus, while the General Assembly Resolution is not dispositive of Palestine's statehood, it is evidence of a growing recognition of Palestine as a State.

According to Vezbergaite[14] State recognition is perhaps one of the oldest practices in international relations. While recognition is one of the most vexed concepts in international law that has been extensively analyzed and debated, the topic has been traditionally understudied in International Relations (IR). IR scholars find the recognition as tedious topic, because these scholars see states as self-constituted and self-contained bodies—states are a matter of fact and thus state sovereignty (statehood) is a matter of fact. In this paper, we suggest that relationship between recognition and statehood is

[14] Vezbergaite, I. (2015), *International Recognition and Its Implications for the Statehood*, International Relations and Diplomacy, Sabancı University, Istanbul, Turkey Vol. 3, No. 11, 786-793

more complicated than current legal or IR theories hold and we submit that international recognition is one of the constituents of statehood. This proposition challenges to current theoretical models, as it suggests that statehood is actually a creation of international politics rather than a mere fact on ground. The work reviews the legal and IR perspectives on recognition of states, including reasons for granting recognition/non-recognition and consequences of recognition to the statehood. The author develops critique over the current approach of IR and legal theories. According to the author, while legal theorists painstakingly attempt to isolate "law of recognition" from politics and unsuccessfully attempt to build the normative framework that is universally applicable for all situations, the IR theories fail to grasp the process of state-birth and the role of recognition to the statehood of an entity. He then submits that recognition is a political act that has hardly to do with any legal norms. He, however, maintains that recognition is a crucial tool in the system of states where the recognition of an entity by critical mass of states results into that entity' s entry into the system as a state.

L. Oppenheim[15] one of the leading contemporary International Law Jurist who also wrote many books on the topic examined and elaborated on the recognition of state but his works ended in 60s. This means that events and happening in the 1970 upward were not covered by his work. For example many states and desire currently conferred with statehood did not emerge as such the need and desire of recognition of state is not desperate aspiration like the current situation now.

[15] Oppenheim, L. (1967) *International Law a Treatise* Vol. 18th edition (edit) Lauterpacht Longmens

Starke[16] writing on state and government recognition elaborately discussed on the principle of recognition, theories, types, his work was a commendable one but his works also ended in 1960s which means various happening and development after the 1960s were not covered by his works for example the status of new state with emerging out from another state to not being recognized by the colonial state like the situation between China and Taiwan.

Gardiner[17] wrote on the recognition but the author gave much emphasis on statehood and its requirement without touching much on the recognition, his work on recognition.

Umozurike[18] wrote though anchored on recognition is not helpful in understanding fully what recognition entail because it touches only the elementary aspects of recognition like legal effect, types and the doctrine but the work did not discuss most of the important aspect of recognition, it is nothing other than hint on the topic.

Shaw[19] wrote on recognition, but what the author did was more like a case study of Europe and UK because he gave much emphasis on U.K. in his work not minding other jurisdiction and he only touches some aspect of recognition in his discussion which one of them is the one this research is focusing on.

Hingorani[20] contribution adequately covered major aspects of the topic recognition, the author clearly examined recognition and identified the theories and

[16] Starke, J.G. (1967) *Introduction to International Law*, Butterworth , London,
[17] Gardner, R.K. (2003) *International Law*, Henry Ling Limited, London,
[18] Umozurike, U.O. (1993) *Introduction to International Law*, Spectrum Law Publication, Ibadan,
[19] Shaw, M.N. (2005) *International Law*, 5th edition, Cambridge University Press, United Kingdom,
[20] Hingorani, R.C. (1993) *Modern International, Law*, 3rd Edition, Oxford Publication Ltd., U.K.,

argument of other scholars on the topic but the problem of his work is that he could not address the challenges as identified by his work.

James Crawford[21] another international law jurist whose contribution is very adequate and his work is very voluminous but the problem of his work is more like compare and contrast and much emphasis was given on the requirement of statehood and comparing it with recognition, more also the most of his work hinge on criteria of statehood and less on recognition.

From this review it is clear that scholars have written a lot of literature in this field which will serve as a foundation for the present effort. However, most of those books are good in the considering of the standard criteria of the principles laid down by constitutive international and regional instruments but they are not recent to reflect the current change in the pattern of practice of state recognition within the international community. This research work may hopefully contribute toward addressing new and emerging issues as it relates to recognition of a state.

1.8 Research Methodology

The methodology of this research is based on doctrinal method. The doctrinal method is conducted in the libraries, using library materials. Two main sources are used to accomplish this task, to wit:

[21] Crawford, J. *The Criteria for Statehood in International Law*. Downloaded from http://hybill.oxfordjournals.ogr/ at Depaul University Accessed on 5/12/2012

a. Primary source, which comprises, statutes, rules and regulations, and case laws, were used.
b. Secondary sources, which consists textbooks, journals, articles, Magazines, news papers, periodicals, website material, etc were used.

The above sourced materials were used to answer the research questions raised.

1.9 Organizational Layout of the Research

This thesis is divided into five chapters. The first chapter captioned general introduction, background and scope of the research. It also identified the problems with which this researcher intends to investigate and also reviewed some literature related to the field with a view to appreciating the extent to which other scholars have studied the area and find out the lacunae in the literature reviewed.

Chapter two of the thesis deals with definition of key terms and historical antecedents of recognition of states under international legal order.

Chapter three examines the various types of recognition, ways of acquiring recognition. It further deals with significance, nature, Scope and effect of recognition and the chapter also analyzes the theories of recognition.

Chapter four examines the political and legal effect of recognition, the qualification for recognition the chapter also examines the effect of non-recognition.

Chapter five which is the concluding and last chapter of the research presents the summary of entire work, provides some findings and some recommendations.

CHAPTER TWO

CONCEPTUAL CLARIFICATION OF KEY TERMS

2.1 Introduction

In the course of this work some fundamental concepts and key words are used which needs to be clarified and further highlighted. This chapter aimed at defining those concepts in conformity with the research and clarified some vital terms used. Thus, under this chapter, the term "International Law", "Statehood" and "State Recognition" are defined and their concepts in international law explained.

2.2 Concept of the Term "International Law"

International law can refer to three disciplines of law, i.e. public international law, private international law or conflict of laws and the law of supranational organizations; for the purpose of this law of research however, our major concern is public international law. "The body of laws governing relations between nations"[22], "International Law is the term commonly used for referring to the system of implicit and explicit agreements that bind together nation-states in adherence to recognized values and standards, differing from other legal systems in that it concerns nations rather than private citizens. ..."[23], "A complex network of principles, treaties, judicial decisions, customs, practices, and writings of experts that are binding on States in their mutual relations."[24]

[22] Shaw, M.N. (2008), *International Law*, 6th ed., Cambridge University Press, Cambridge, p. 2
[23] ibid
[24] ibid

The common point of the definitions is that, International Law deals with the states and states activities. Addition to the States and the State's activities International Law has a wide range of interests, as Shaw indicates "Public International Law covers relations between states... and regulates the operations of the many international institutions" Nevertheless, "the states were the original and remain the primary actors in the international legal system."[25] Public international law concerns relationships between sovereign states[26]. The sources of this branch of the law are custom, practice and treaties between sovereign nations, such as the Geneva conventions[27]. It has a special status as law because there is no international police and, to some extent, courts (e.g. the International Court of Justice as the primary United Nations judicial organ) lack the capacity to penalize non-compliance or disobedience.[28]

One of many definitions has been provided in the case of *Trendtex Trading Corp. vs. Central Bank of Nigeria* where it was held that:

> International law is the aggregate of rules governing relations between states in the process of their conflict and cooperation designed to safeguard their peaceful co-existence, expressing the will of the ruling classes of these states and defended in case of need by coercion applied by states individually or collectively[29].

Per Lord Denning, L. J. also defines international law thus, *"The sum of rules or usage which civilized states have agreed shall be binding upon them in their dealings with on*

[25] ibid
[26] Free Encyclopedia, op cit
[27] Ladan, M. T. (2007) *Materials and Cases on Public International Law*, A. B. U. press limited, Zaria, Kaduna, Nigeria, , p. 1.
[28] Kozhevnikov, (1961) *International Law*, p. 7
[29] (1977), All E. R. pt. 881 at 901-2.

another" [30]. The rules of international law are brought about mainly by treaties. Such treaty agreements bind only those states that are party to them, except if they incorporate rules of customary international law. International law can therefore be said to be a law with its own peculiar characteristics[31].

2.2 Concept of State in International Law

A **state** is an organized political community living under a single system of government.[32] Speakers of American English often use state and government as synonyms, with both words referring to an organized political group that exercises authority over a particular territory.[33] States may or may not be sovereign. For instance, federated states that are members of a federal union have only partial sovereignty, but are, nonetheless, states. Some states are subject to external sovereignty or hegemony where ultimate sovereignty lies in another state. The term "state" can also refer to the secular branches of government within a state, often as a manner of contrasting them with churches and civilian institutions[34].

Many human societies have been governed by states for millennia, but many have been stateless societies. The first states arose about 5,500 years ago in conjunction with the rapid growth of urban centers, the invention of writing, and the codification of new forms of religion. Over time a variety of different forms developed, employing a variety of justifications for their existence (such as divine right, the theory of the social contract, etc.). In the 21st century the modern nation-state is the predominant form of state to which people are subject.

[30] Quoted In : Ladan, M. T. opcit, p. 2.
[31] Umozurike, U. O. op cit p. 37.
[32] Concise Oxford English Dictionary (9th ed.), Oxford University Press, 1995.
[33] Merriam-Webster Dictionary (Merriam-Webster, Incorporated), 2015
[34] https://mises.org/pdf/anatomy.pdf

There is no academic consensus on the most appropriate definition of the state.[35] The term "state" refers to a set of different, but interrelated and often overlapping, theories about a certain range of political phenomena.[6] The act of defining the term can be seen as part of an ideological conflict, because different definitions lead to different theories of state function, and as a result validate different political strategies.[7] And according to Jeffrey and Painter, "if we define the 'essence' of the state in one place or era, we are liable to find that in another time or space something which is also understood to be a state has different 'essential' characteristics".[36]

The most commonly used definition is Max Weber's,[37] which describes the state as a compulsory political organization with a centralized government that maintains a monopoly of the legitimate use of force within a certain territory.[38] General categories of state institutions include administrative bureaucracies, legal systems, and military or religious organizations.[39]

According to the Oxford English Dictionary, a state is “an organized political community under one government; a commonwealth; a nation, such a community forming part of a federal republic, especially the United States of America". Confounding the definitional problem is that "state" and "government" are often used as synonyms in common conversation and even some academic discourse. According to this definitional schema, the states are nonphysical persons of

[35] Cudworth et al., 2007: p. 1
[36] Painter, Joe; Jeffrey, Alex (2009). *Political Geography* (2nd ed.). London: SAGE Publications Ltd. p. 21.
[37] Dubreuil, Benoít (2010). *Human Evolution and the Origins of Hierarchies: The State of Nature*. Cambridge University Press. p. 189. Shaw, Martin (2003). War and genocide: organized killing in modern society. Wiley-Blackwell. p. 59.
[38] Cudworth et al., 2007: p. 95 ; Salmon, 2008: p. 54
[39] Earle, Timothy (1997). *"State, State Systems*". In Barfield, Thomas. The Dictionary of Anthropology. Wiley-Blackwell. p. 445.

international law, governments are organizations of people.[40] The relationship between a government and its state is one of representation and authorized agency.[41]

States may be classified as sovereign if they are not dependent on, or subject to any other power or state. Other states are subject to external sovereignty or hegemony where ultimate sovereignty lies in another state.[42] Many states are federated states which participate in a federal union. A federated state is a territorial and constitutional community forming part of a federation.[43] Such states differ from sovereign states, in that they have transferred a portion of their sovereign powers to a federal government.

A state can be distinguished from a government. The government is the particular group of people, the administrative bureaucracy that controls the state apparatus at a given time.[44] That is, governments are the means through which state power is employed. States are served by a continuous succession of different governments.[45] States are immaterial and nonphysical social objects, whereas governments are groups of people with certain coercive powers.[46]

Each successive government is composed of a specialized and privileged body of individuals, who monopolize political decision-making, and are separated by status and organization from the population as a whole. Their function is to enforce existing laws, legislate new ones, and

[40] Robinson, E. H. (2013). *The Distinction Between State and Government.* The Geography Compass 7(8): pp. 556-566.
[41] Crawford, J. (2007) The Creation of States in International Law, Oxford University Press.
[42] The New Oxford American Dictionary (2nd ed.) (Oxford: Oxford University Press), 2005,
[43] The Australian National Dictionary: Fourth Edition, pg 1395. (2004) Canberra
[44] Bealey, Frank, ed. (1999). *"government"*, The Blackwell dictionary of political science: a user's guide to its terms. Wiley-Blackwell. p. 147. ; Sartwell, 2008: p. 25 ; Flint & Taylor, 2007: p. 137
[45] Flint & Taylor, 2007: p. 137
[46] Robinson, E. H. (2013). *The Distinction between State and Government.* The Geography Compass 7(8): pp. 556-566.

arbitrate conflicts. In some societies, this group is often a self-perpetuating or hereditary class. In other societies, such as democracies, the political roles remain, but there is frequent turnover of the people actually filling the positions.[47]

States can also be distinguished from the concept of a "nation", where "nation" refers to a cultural-political community of people.

The earliest forms of the state emerged whenever it became possible to centralize power in a durable way. Agriculture and writing are almost everywhere associated with this process: agriculture because it allowed for the emergence of a class of people who did not have to spend most of their time providing for their own subsistence, and writing or the equivalent of writing, like *Inca quipus* because it made possible the centralization of vital information.[48]

The first known states were created in Ancient Egypt, Mesopotamia, India, China, the Inca civilization, and others, but it is only in relatively modern times that states have almost completely displaced alternative "stateless" forms of political organization of societies all over the planet.[71] Roving bands of hunter-gatherers and even fairly sizable and complex tribal societies based on herding or agriculture have existed without any full-time specialized state organization, and these "stateless" forms of political organization have in fact prevailed for all of the prehistory and much of the history of the human species and civilization.[49]

Initially states emerged over territories built by conquest in which one culture, one set of ideals and one set of laws have been imposed by force or threat over diverse nations by a civilian and

[47] Barclay, Harold (1990). *People Without Government: An Anthropology of Anarchy*. Left Bank Books. p. 31.
[48] Giddens, Anthony. (1987). *Contemporary Critique of Historical Materialism. 3 vols. Vol. II: The Nation-State and Violence*. Cambridge: Polity Press.
[49] klaus kästle. *"Countries of the World"*. Nationsonline.org. Retrieved 2013-02-20. Accessed 20/11/2015.

military bureaucracy.[71] Currently, that is not always the case and there are multinational states, federated states and autonomous areas within states.

Since the late 19th century, virtually the entirety of the world's inhabitable land has been parceled up into areas with more or less definite borders claimed by various states. Earlier, quite large land areas had been either unclaimed or uninhabited, or inhabited by nomadic peoples who were not organized as states. However, even within present-day states there are vast areas of wilderness, like the Amazon Rainforest, which are uninhabited or inhabited solely or mostly by indigenous people. Also, there are states which do not hold de facto control over all of their claimed territory or where this control is challenged. Currently the international community comprises around 200 sovereign states, the vast majority of which are represented in the United Nations.

2.3 Concept of Sovereignty

Sovereignty is understood in jurisprudence as the full right and power of a governing body to govern itself without any interference from outside sources or bodies. In political theory, sovereignty is a substantive term designating supreme authority over some polity.[50] It is a basic principle underlying the dominant Westphalia model of state foundation. Derived from Latin through French *souveraineté,* its attainment and retention, in both Chinese and Western[51] culture, has traditionally been associated with certain moral imperatives upon any claimant.

[50] Bateman, C.G. (15 February 2011). "*Nicaea and Sovereignty: Constantine's Council of Nicaea as an Important Crossroad in the Development of European State Sovereignty".* University of British Columbia. pp. 54–91.
[51] Núñez, Jorge Emilio. "About the Impossibility of Absolute State Sovereignty: The Middle Ages". *International Journal for the Semiotics of Law*

The concept of sovereignty has been discussed throughout history, from the time before recorded history through to the present day.[52] It has changed in its definition, concept, and application throughout, especially during the Age of Enlightenment. The current notion of state sovereignty contains four aspects consisting of territory, population, authority and recognition.[53] According to Stephen D. Krasner, the term could also be understood in four different ways:

i. domestic sovereignty – actual control over a state exercised by an authority organized within this state,[54]
ii. interdependence sovereignty – actual control of movement across state's borders, assuming the borders exist,[55]
iii. international legal sovereignty – formal recognition by other sovereign states,[56]
iv. Westphalian sovereignty – lack of other authority over state than the domestic authority (examples of such other authorities could be a non-domestic church, a non-domestic political organization, or any other external agent).[57]

Often, these four aspects all appear together, but this is not necessarily the case – they are not affected by one another, and there are historical examples of states that were non-sovereign in one aspect while at the same time being sovereign in another of these aspects.[58] According to Immanuel Wallerste in, another fundamental feature of sovereignty is that it is a claim that must be recognized by others if it is to have any meaning: "Sovereignty is more than anything else a matter of legitimacy that requires reciprocal recognition. Sovereignty is a hypothetical trade, in which two potentially conflicting sides, respecting de facto realities of power, exchange such recognitions as their least costly strategy."[59] The Roman jurist Ulpian observed that:

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[52] Biersteker, Thomas; Weber, Cynthia (1996). *State Sovereignty as Social Construct*. Cambridge Studies in International Relations **46**. Cambridge University Press.
[53] Krasner, Professor Stephen D. (2001). *Problematic Sovereignty: Contested Rules and Political Possibilities*. pp. 6–12.
[54] Wallerstein, Immanuel (2004). *World-Systems Analysis: An Introduction*. Duke University Press. p. 44.
[55] ibid
[56] ibid
[57] ibid
[58] ibid
[59] Bateman, C.G. op cit p.91

i. The imperium of the people is transferred to the Emperor.
ii. The Emperor is not bound by the law.
iii. The Emperor's word is law. Emperor is the law making and abiding force.

Ulpian was expressing the idea that the Emperor exercised a rather absolute form of sovereignty, although he did not use the term expressly.

Classical Ulpian's statements were known in medieval Europe, but sovereignty was an important concept in medieval times.[1] Medieval monarchs were not sovereign, at least not strongly so, because they were constrained by, and shared power with, their feudal aristocracy. Furthermore, both were strongly constrained by custom.

Sovereignty existed during the Medieval Period as the de jure rights of nobility and royalty, and in the de facto capability of individuals to make their own choices in lifeAround, the issue of feminine sovereignty was addressed in Geoffrey Chaucer's Middle English collection of Canterbury Tales, specifically in The Wife of Bath's Tale. A later English Arthurian romance, The Wedding of Sir Gawain and Dame Ragnell, uses much of the same elements of the Wife of Bath's tale, yet changes the setting to the court of King Arthur and the Knights of the Round Table. The story revolves around the knight Sir Gawain granting to Dame Ragnell, his new bride, what is purported to be wanted most by women: sovereignty.

Sovereignty reemerged as a concept in the late 16th century, a time when civil wars had created a craving for stronger central authority, when monarchs had begun to gather power onto their own hands at the expense of the nobility, and the modern nation state was emerging. Jean Bodin, partly in reaction to the chaos of the French wars of religion, presented theories of sovereignty calling for strong central authority in the form of absolute monarchy. In his 1576 treatise Les Six

Livres de la République. Bodin argued that it is inherent in the nature of the state that sovereignty must be:

i. Absolute: On this point he said that the sovereign must be hedged in with obligations and conditions, must be able to legislate without his (or its) subjects' consent, must not be bound by the laws of his predecessors, and could not, because it is illogical, be bound by his own laws.
ii. Perpetual: Not temporarily delegated as to a strong leader in an emergency or to a state employee such as a magistrate. He held that sovereignty must be perpetual because anyone with the power to enforce a time limit on the governing power must be above the governing power, which would be impossible if the governing power is absolute.

Bodin rejected the notion of transference of sovereignty from people to the ruler (also known as the sovereign); natural law and divine law confer upon the sovereign the right to rule. And the sovereign is not above divine law or natural law. He is above (i.e. not bound by) only positive law, that is, laws made by humans. The fact that the sovereign must obey divine and natural law imposes ethical constraints on him. Bodin also held that the lois royales, the fundamental laws of the French monarchy which regulated matters such as succession, are natural laws and are binding on the French sovereign. How divine and natural law could in practice be enforced on the sovereign is a problematic feature of Bodin's philosophy: any person capable of enforcing them on him would be above him.

Despite his commitment to absolutism, Bodin held some moderate opinions on how government should in practice be carried out. He held that although the sovereign is not obliged to, it is advisable for him, as a practical expedient, to convene a senate from whom he can obtain advice, to delegate some power to magistrates for the practical administration of the law, and to use the Estates as a means of communicating with the people.

With his doctrine that sovereignty is conferred by divine law, Bodin predefined the scope of the divine right of kings.

During the Age of Enlightenment, the idea of sovereignty gained both legal and moral force as the main Western description of the meaning and power of a State. In particular, the "Social Contract" as a mechanism for establishing sovereignty was suggested and, by 1800, widely accepted, especially in the new United States and France, though also in Great Britain to a lesser extent.

Thomas Hobbes, in Leviathan borrowed Bodin's definition of sovereignty, which had just achieved legal status in the "Peace of Westphalia", and explained its origin. He created the first modern version of the social contract (or contractarian) theory, arguing that to overcome the "nasty, brutish and short" quality of life without the cooperation of other human beings, people must join in a "commonwealth" and submit to a "Soveraigne Power" that is able to compel them to act in the common good. This expediency argument attracted many of the early proponents of sovereignty. Hobbes strengthened the definition of sovereignty beyond either Westphalian or Bodin's, by saying that it must be.

i. Absolute: because conditions could only be imposed on a sovereign if there were some outside arbitrator to determine when he had violated them, in which case the sovereign would not be the final authority.
ii. Indivisible: The sovereign is the only final authority in his territory; he does not share final authority with any other entity. Hobbes held this to be true because otherwise there would be no way of resolving a disagreement between the multiple authorities.

Hobbes' hypothesis—that the ruler's sovereignty is contracted to him by the people in return for his maintaining their physical safety—led him to conclude that if and when the ruler fails, the people recover their ability to protect themselves by forming a new contract.

Hobbes's theories decisively shape the concept of sovereignty through the medium of social contract theories. Jean-Jacques Rousseau's definition of popular sovereignty with early antecedents in Francisco Suárez's theory of the origin of power provides that the people are the legitimate sovereign. Rousseau considered sovereignty to be inalienable; he condemned the distinction between the origin and the exercise of sovereignty, a distinction upon which constitutional monarchy or representative democracy is founded. John Locke, and Montesquieu are also key figures in the unfolding of the concept of sovereignty; their views differ with Rousseau and with Hobbes on this issue of alienability.

The second book of Jean-Jacques Rousseau's Du Contrat Social, ou Principes du droit politique (1762) deals with sovereignty and its rights. Sovereignty, or the general will, is inalienable, for the will cannot be transmitted; it is indivisible, since it is essentially general; it is infallible and always right, determined and limited in its power by the common interest; it acts through laws. Law is the decision of the general will in regard to some object of common interest, but though the general will is always right and desires only good, its judgment is not always enlightened, and consequently does not always see wherein the common good lies; hence the necessity of the legislator. But the legislator has, of himself, no authority; he is only a guide who drafts and proposes laws, but the people alone, that is, the sovereign or general will, has authority to make and impose them.

Rousseau, in his 1763 treatise Of the Social Contract argued, "the growth of the State giving the trustees of public authority more and means to abuse their power, the more the Government has to have force to contain the people, the more force the Sovereign should have in turn in order to contain the Government," with the understanding that the Sovereign is "a collective being of

wonder" resulting from "the general will" of the people, and that "what any man, whoever he may be, orders on his own, is not a law" and furthermore predicated on the assumption that the people have an unbiased means by which to ascertain the general will. Thus the legal maxim, "there is no law without a sovereign."[60]

An important factor of sovereignty is its degree of absoluteness.[3][4] A sovereign power has absolute sovereignty when it is not restricted by a constitution, by the laws of its predecessors, or by custom, and no areas of law or policy are reserved as being outside its control. International law; policies and actions of neighboring states; cooperation and respect of the populace; means of enforcement; and resources to enact policy are factors that might limit sovereignty. For example, parents are not guaranteed the right to decide some matters in the upbringing of their children independent of societal regulation, and municipalities do not have unlimited jurisdiction in local matters, thus neither parents nor municipalities have absolute sovereignty. Theorists have diverged over the desirability of increased absoluteness.[61]

A key element of sovereignty in a legalistic sense is that of exclusivity of jurisdiction, specifically, the degree to which decisions made by a sovereign entity might be contradicted by another authority. Along these lines, the German sociologist Max Weber proposed that sovereignty is a community's monopoly on the legitimate use of force; and thus any group claiming the same right must either be brought under the yoke of the sovereign, proven illegitimate, or otherwise contested and defeated for sovereignty to be genuine.[62] International

[60] Stallybrass, William Teulon Swan (1918). "A society of states: Or, Sovereignty, independence, and equality in a league of nations".

[61] Lassa Oppenheim, International Law 66 (Sir Arnold D. McNair ed., 4th ed. 1928)

[62] Newton, Kenneth. Foundations of comparative politics: democracies of the modern world. Cambridge: Cambridge University Press, 2005.

law, competing branches of government, and authorities reserved for subordinate entities (such as federated states or republics) represent legal infringements on exclusivity. Social institutions such as religious bodies, corporations, and competing political parties might represent de facto infringements on exclusivity.

De jure and de facto

De jure, or legal, sovereignty concerns the expressed and institutionally recognized right to exercise control over a territory. De facto, or actual, sovereignty is concerned with whether control in fact exists. Cooperation and respect of the populace; control of resources in, or moved into, an area; means of enforcement and security; and ability to carry out various functions of state all represent measures of de facto sovereignty. When control is practiced predominately by military or police force it is considered coercive sovereignty.

State sovereignty is sometimes viewed synonymously with independence, however, sovereignty can be transferred as a legal right whereas independence cannot. A state can achieve de facto independence long after acquiring sovereignty, such as in the case of Cambodia, Laos and Vietnam.[63] Additionally, independence can also be suspended when an entire region becomes subject to an occupation such as when Iraq had been overrun by the forces to take part in the Iraq War of 2003, Iraq had not been annexed by any country, so its sovereignty during this period was not contested by any state including those present on the territory. Alternatively, independence can be lost completely when sovereignty itself becomes the subject of dispute. The pre-World War II administrations of Latvia, Lithuania and Estonia maintained an exile existence

[63] Talmon, Stefan (1998). Recognition of Governments in International Law. Oxford Monographs in International Law Series. Oxford University Press. p. 50.

and considerable international recognition whilst the entities were annexed by the Soviet Union and governed locally by their pro-Soviet functionaries. When in 1991 Latvia, Lithuania and Estonia re-enacted independence, it was done so on the basis of continuity directly from the pre-Soviet republics.[64] Another complicated sovereignty scenario can arise when regime itself is the subject of dispute. In the case of Poland, the People's Republic of Poland which governed Poland from 1945 to 1989 is now seen to have been an illegal entity by the modern Polish administration. The post-1989 Polish state claims direct continuity from the Second Polish Republic which ended in 1939. For other reasons however, Poland maintains its communist-era outline as opposed to its pre-World War II shape which included areas now in Belarus, Czech Republic, Lithuania, Slovakia and Ukraine but did not include some of its western regions that were then in Germany.[65]

At the opposite end of the scale, there is no dispute regarding the independence of Republic of Abkhazia, Republic of South Ossetia or the Republic of Kosovo (see List of states with limited recognition) since the factually governing bodies are neither part of a bigger state, nor are they subjected to supervision. The sovereignty i.e. legal right to govern however is disputed in all three cases as the first two entities are claimed by Georgia and the third by Serbia.

Internal sovereignty is the relationship between a sovereign power and its own subjects. A central concern is legitimacy: by what right does a government exercise authority? Claims of legitimacy might refer to the divine right of kings or to a social contract i.e. popular sovereignty.

[64] ibid
[65] , Lauri (2003). Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR. M. Nijhoff Publishers. p. 193.

With Sovereignty meaning holding supreme, independent authority over a region or state, Internal Sovereignty refers to the internal affairs of the state and the location of supreme power within it.[66] A state that has internal sovereignty is one with a government that has been elected by the people and has the popular legitimacy. Internal sovereignty examines the internal affairs of a state and how it operates. It is important to have strong internal sovereignty in relation to keeping order and peace. When you have weak internal sovereignty organization such as rebel groups will undermine the authority and disrupt the peace. The presence of a strong authority allows you to keep agreement and enforce sanctions for the violation of laws. The ability for leadership to prevent these violations is a key variable in determining internal sovereignty.[67] The lack of internal sovereignty can cause war in one of two ways: first, undermining the value of agreement by allowing costly violations; and second, requiring such large subsidies for implementation that they render war cheaper than peace.[68] Leadership needs to be able to promise members, especially those like armies, police forces, or paramilitaries will abide by agreements. The presence of strong internal sovereignty allows a state to deter opposition groups in exchange for bargaining. It has been said that a more decentralized authority would be more efficient in keeping peace because the deal must please not only the leadership but also the opposition group. While the operations and affairs within a state are relative to the level of sovereignty within that state, there is still an argument between who should hold the authority in a sovereign state.

This argument between who should hold the authority within a sovereign state is called the traditional doctrine of public sovereignty. This discussion is between an internal sovereign or an

[66] Heywood, Andrew. "Political Theory". pg. 92. Palgrave Macmillan. Retrieved 25 June 2011.
[67] Wolford, Rider, Scott, Toby. "War, Peace, and Internal Sovereignty" (PDF). pg.1. Retrieved 19 June 2011.
[68] Wolford, Rider, Scott, Toby. "War, Peace, and Internal Sovereignty" (PDF). pg.3. Retrieved 19 June 2011.

authority of public sovereignty. An internal sovereign is a political body that possesses ultimate, final and independent authority; one whose decisions are binding upon all citizens, groups and institutions in society. Early thinkers believe sovereignty should be vested in the hands of a single person, a monarch. They believed the overriding merit of vesting sovereignty in a single individual was that sovereignty would therefore be indivisible; it would be expressed in a single voice that could claim final authority. An example of an internal sovereign or monarch is Louis XIV of France during the seventeenth century; Louis XIV claimed that he was the state. Jean-Jacques Rousseau rejected monarchical rule in favor of the other type of authority within a sovereign state, public sovereignty. Public Sovereignty is the belief that ultimate authority is vested in the people themselves, expressed in the idea of the general will. This means that the power is elected and supported by its members; the authority has a central goal of the good of the people in mind. The idea of public sovereignty has often been the basis for modern democratic theory.[69]

Within the modern governmental system, internal sovereignty is usually found in states that have public sovereignty and rarely found within a state controlled by an internal sovereign. A form of government that is a little different from both is the UK parliament system. From 1790 to 1859 it was argued that sovereignty in the UK was vested neither in the Crown nor in the people but in the "Monarch in Parliament". This is the origin of the doctrine of parliamentary sovereignty and is usually seen as the fundamental principle of the British constitution. With these principles of parliamentary sovereignty majority control can gain access to unlimited constitutional authority, creating what has been called "elective dictatorship" or "modern autocracy". Public sovereignty

[69] Heywood, Andrew. "Political Theory". pg. 93. Palgrave Macmillan. Retrieved 21 June 2011.

in modern governments is a lot more common with examples like the USA, Canada, Australia and India where government is divided into different levels.[70]

External sovereignty concerns the relationship between a sovereign power and other states. For example, the United Kingdom uses the following criterion when deciding under what conditions other states recognize a political entity as having sovereignty over some territory.

External sovereignty is connected with questions of international law – such as: when, if ever, is intervention by one country onto another's territory permissible?

Following the Thirty Years' War, a European religious conflict that embroiled much of the continent, the Peace of Westphalia in 1648 established the notion of territorial sovereignty as a norm of noninterference in the affairs of other nations, so-called Westphalian sovereignty, even though the actual treaty itself reaffirmed the multiple levels of sovereignty of the Holy Roman Empire. This resulted as a natural extension of the older principle of cuius regio, eius religio leaving the Roman Catholic Church with little ability to interfere with the internal affairs of many European states. It is a myth, however, that the Treaties of Westphalia created a new European order of equal sovereign states.[71]

In international law, sovereignty means that a government possesses full control over affairs within a territorial or geographical area or limit. Determining whether a specific entity is sovereign is not an exact science, but often a matter of diplomatic dispute. There is usually an expectation that both de jure and de facto sovereignty rest in the same organization at the place

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[70] Heywood, A. (2011). "Political Theory", Palgrave Macmillan. pp. 94–95.

[71] Andreas Osiander, "Sovereignty, International Relations, and the Westphalian Myth", International Organization Vol. 55 No. 2 (Spring 2001), pp. 251–287

and time of concern. Foreign governments use varied criteria and political considerations when deciding whether or not to recognize the sovereignty of a state over a territory. Membership in the United Nations requires that the admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."[72]

Sovereignty may be recognized even when the sovereign body possesses no territory or its territory is under partial or total occupation by another power. The Holy See was in this position between the annexation in 1870 of the Papal States by Italy and the signing of the Lateran Treaties in 1929, a 59-year period during which it was recognized as sovereign by many states despite possessing no territory – a situation resolved when the Lateran Treaties granted the Holy See sovereignty over the Vatican City. Another case, sui generis, though often contested is the Sovereign Military Order of Malta, the third sovereign entity inside Italian territory after San Marino and the Vatican City State and the second inside the Italian capital since in 1869 the Palazzo di Malta and the Villa Malta receive extraterritorial rights, in this way becoming the only "sovereign" territorial possessions of the modern Order, which is the last existing heir to one of several once militarily significant, crusader states of sovereign military orders. In 1607 its Grand masters were also made Reichsfürst (princes of the Holy Roman Empire) by the Holy Roman Emperor, granting them seats in the Reichstag, at the time the closest permanent equivalent to a UN-type general assembly; confirmed 1620). These sovereign rights were never deposed, only

[72] "UN Chart, Article 2".

the territories were lost. 100 modern states still maintain full diplomatic relations with the order[73] now de facto "the most prestigious service club", and the UN awarded it observer status.[74]

The governments-in-exile of many European states for instance, Norway, Netherlands or Czechoslovakia during the Second World War were regarded as sovereign despite their territories being under foreign occupation; their governance resumed as soon as the occupation had ended. The government of Kuwait was in a similar situation vis-à-vis the Iraqi occupation of its country during 1990–1991.[75] The government of Republic of China was recognized as sovereign over China from 1911 to 1971 despite that its mainland China territory became occupied by Communist Chinese forces since 1949. In 1971 it lost UN recognition to Chinese Communist-led People's Republic of China and its sovereign and political status as a state became disputed and it lost its ability to use "China" as its name and therefore became commonly known as Taiwan.

The International Committee of the Red Cross is commonly mistaken to be sovereign. It has been granted various degrees of special privileges and legal immunities in many countries, that in cases like Switzerland are considerable, which are described[76]. The Committee is a private organization governed by Swiss law.

[73] Bilateral diplomatic relations of the Sovereign Military Order of Malta
[74] United Nations General Assembly Session 48 Resolution 265. Observer status for the Sovereign Military Order of Malta in the General Assembly **A/RES/48/265**
[75] Nolan, Cathal J. (2002). The Greenwood Encyclopedia of International Relations. Volume 4. Greenwood Publishing Group. p. 1559
[76] By formal agreement between the Swiss government and the ICRC, Switzerland grants full sanctity of all ICRC property in Switzerland including its headquarters and archive, grants members and staff legal immunity, exempts the ICRC from all taxes and fees, guarantees the protected and duty-free transfer of goods, services, and money, provides the ICRC with secure communication privileges at the same level as foreign embassies, and simplifies Committee travel in and out of Switzerland. On the other hand Switzerland does not recognize ICRC issued passports.

Just as the office of head of state can be vested jointly in several persons within a state, the sovereign jurisdiction over a single political territory can be shared jointly by two or more consenting powers, notably in the form of a condominium.

Likewise the member states of international organizations may voluntarily bind themselves by treaty to a supranational organization, such as a continental union. In the case of the European Union members states this is called "pooled sovereignty".

A community of people who claim the right of self-determination based on a common ethnicity, history and culture might seek to establish sovereignty over a region, thus creating a nation-state. Such nations are sometimes recognized as autonomous areas rather than as fully sovereign, independent states.

Different interpretations of state sovereignty in the United States of America, as it related to the expansion of slavery and fugitive slave laws, led to the outbreak of the American Civil War. Depending on the particular issue, sometimes both northern and southern states justified their political positions by appealing to state sovereignty. Fearing that slavery would be threatened by results of the federal election, eleven slave states declared their independence from the federal Union and formed a new confederation.[77] The United States government rejected the secessions as rebellion, declaring that secession from the Union by an individual state was unconstitutional, as the states were part of an indissolvable federation.

A number of modes of acquisition of sovereignty are presently or have historically been recognised by international law as lawful methods by which a state may acquire sovereignty over

[77] McPherson, James, Battle Cry of Freedom, (1988) pp. 40, 195, 214, 241

territory. The classification of these modes originally derived from Roman property law and from the 15th and 16th century with the development of international law. The modes are:[78]

i. Cession is the transfer of territory from one state to another usually by means of treaty;
ii. Occupation is the acquisition of territory that belongs to no state, or terra nullius;
iii. Prescription is the effective control of territory of another acquiescing state;
iv. Operations of nature is the acquisition of territory through natural processes like river accretion or volcanism;
v. Creation is the process by which new land is reclaimed from the sea such as in the Netherlands.
vi. Adjudication and
vii. Conquest
viii. Justifications

There exist vastly differing views on the moral basis of sovereignty. A fundamental polarity is between theories that assert that sovereignty is vested directly in the sovereign by divine or natural right and theories that assert it originates from the people. In the latter case there is a further division into those that assert that the people transfer their sovereignty to the sovereign (Hobbes), and those that assert that the people retain their sovereignty[79].

2.4 Concept of Act of Recognition of Statehood

This concept refers to an action by which an existing state formally acknowledges the political status of another entity. The concept Act of Recognition of Statehood (hereafter Act of Recognition) refers to the action by which one existing state

1. formally acknowledges the political status of another entity as a state; and
2. takes upon itself the legal consequences of this recognition under international law in its relations with the new state.

[78] Malanczuk, Peter. Akehurst's Modern Introduction to International Law. International politics/Public international law. Routledge. pp. 147–152.
[79] Matteo Laruffa, "The European Integration and National Interests: from an intergovernmental model to a Constitutional Agreement"(Hungarian Academy of Social Sciences, Budapest, 3 July 2014)

In order to accede to the status of a sovereign State, a political entity requires both: the positive attitudes of existing states, i.e. de jure recognition[80]; and "effectiveness" of the new state, i.e. de facto control over its territory and population.[81]

2.4.1 Formal Acknowledgement of Statehood

Formal recognition results from either explicit declaration or from an implicit action, such as the establishment of diplomatic relations with the new state:

Based on political considerations, a state may adopt one of several types of formal recognition[82] vis-à-vis a new state: Recognition[83] – complete acceptance of an entity's factual status as a state.

Conditional Recognition[84] – Nascent State – recognition that the permanent political status of a political entity will be statehood but it will only be realized when certain conditions are met, as in the cases of East Timor or the PLO/PA.

Non-recognition – one state may choose not to recognize another state due to hostility. In cases where a state does not recognize another state, it may expressly declare that a particular act by no means implies formal recognition.[85]

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[80] Malcolm Shaw. International Law. Cambridge University Press, 2003, p. 185.

[81] A political entity's status of statehood depends upon its effectiveness and the attitude of existing states. For further information, seeraelms of statehood. See also: Antonio Cassese. International Law in a Divided World, 1988, p. 77-79.

[82] Institut de Droit International: Resolutions Concerning the Recognition of New States and New Governments. The American Journal of International Law, Vol. 30, No.4, Supplement: Official Documents (Oct. 1936), 185-187.

[83] Shaw, op cit p. 387, 390.

[84] ibid., also refers to the possibility of conditional recognition, i.e. to recognition that may be withdrawn if the entity fails to fulfill certain conditions. All such precedents date back to the late 19th and early 20th centuries. There are no modern day examples of conditional recognition.

2.4.2 Collective Recognition versus Act of Recognition

Collective Recognition by the international community of a political entity as a state may be expressed by:

i. Acceptance to the United Nations as a Member State the ultimate and irrevocable act of Collective Recognition; Acceptance to other regional, international and supranational organizations may not meet the criteria of Collective Recognition e.g. the PLO has been accepted to a number of international organizations, but has not been collectively recognized as a state.
ii. Recognition by a critical mass of the international community i.e. by a significant number of existing states or by leading relevant states. A status of statehood cannot be undone, although it may be transformed into alternative political structures. For example, Czechoslovakia, the Soviet Union and Yugoslavia were unitary states which dissolved into multiple states; East and West Germany reunified; Eritrea seceded from Ethiopia; and the EU may receive a seat at the UN Security Council alongside other states. An act of Recognition by one state may come before or after collective recognition: when an act of recognition precedes collective recognition, the international community must follow with collective recognition or the act of recognition does not take effect.
iii. When an act of recognition follows collective recognition, the act of recognition only impacts on bilateral relations and the conduct of the recognizing state. [9] For example, the US Act of Recognition of Panama as an independent state in 1903 was effective since it was followed by Collective Recognition by the international community. Conversely, neither South Africa's Act of Recognition of ten Bantustan tribal states in 1976 nor Turkey's Act of Recognition of the Turkish Republic of Northern Cyprus in 1983 were effective as they were not followed by Collective Recognition of the international community. In addition, although the PLO's 1988 declaration of independence (See Algiers Declaration) was recognized by 94 states, the PLO never received collective recognition as a state i.e. status of Palestinian statehood. Western Sahara is also recognized by over 50 states as being an independent state i.e. the Sahrawi Arab Democratic Republic, but has not received collective recognition and remains on the UN list of Non-Self-Governing Territories. For example, Egypt's act of recognition of Israel in 1978 transformed Egyptian-Israeli bilateral relations and Egypt's own conduct towards Israel.[86]

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[85] Such non-recognition was maintained for many years by Arab countries vis-à-vis Israel and by Israel vis-à-vis the PLO.

[86] 1978 Camp David Accords – Section C 'Associated Principles', Par. 2.Furthermore, Jordan's Act of Recognition of Israel (10/24/94) had a similar effect. See: Israel-Jordan Treaty of Peace – Article 2 'Mutual recognition': "Recognize and respect each other's sovereignty, territorial integrity and political independence."

2.4.3 Legal Consequences of Act of Recognition

The act of recognition signifies that the existing state takes upon itself to treat the recognized entity as a sovereign state and thus: Their bilateral relations will be subject to norms of international law governing relations between states whether in conflict or peace. It accepts that the recognized state has inherent rights possessed by every independent state from the moment it accedes to statehood. Infringement upon the inherent rights of the recognized state must be based on international law. It expects that the recognized state will undertake its inherent duties which are obligations of every independent state. The practice of recognition may be viewed as emanating from two distinct theories:

i. Declaratory – The act of recognition is just an acceptance by states of a reality on the ground, meaning that de facto the state has already come into being.
ii. Constitutive – An act of recognition by one state only cannot constitute another state, but collective recognition endows an entity with its status of statehood[87].

2.5 Concept of Recognition of Governments

The most common situation in which an authority's legitimacy is tested is when there has been a change of government irrespective of the normal constitutional procedure. In such a situation, all governments must, in one way or another,[88] determine whom they will recognize as the representatives of the state whose government has suddenly changed. Whether through express recognition or establishment of diplomatic relations,[89] the recognition of the government of a

[87] Malcolm Shaw. International Law. Cambridge University Press, 2003, p. 185.
[88] Stefan Talmon, Recognition of Governments: An Analysis of the New British Policy and Practice, 63 BRIT. Y.B. INT'L L. 231, 246 (1992.
[89] Since express recognition of governments has more or less fallen into disuse, at least as far as European states are concerned, the determination of the authority as representing the foreign state concerned must be sought in the establishment of diplomatic relations or the conclusion of a treaty (or in any other behaviour which entails a tacit recognition). Regarding the British recognition policy, see generally Colin Warbrick, The New British Policy on Recognition of Governments, 30 INT'L & COMP. L.Q. 568 (1981).

foreign state involves a test of legitimacy. Should an authority be deemed illegitimate, it will not be recognized as representing the state of which it claims to be at the helm.

Since the end of the Cold War,[90] recognition of governments that have overthrown a democratically elected government is nearly always systematically refused.

Recognition has sometimes been granted to "putschist" authorities, but it is noticeable that in these instances the new government had pledged to organize elections within a reasonable time and/or had overthrown an autocratic regime. The examples of the coups in Pakistan, Togo, Ivory Coast, and Nigeria, to name only a few, are telltale, as the putschist governments there did not rest on electoral processes but were recognized due to their announced commitment to democracy.[91]

In the age of democracy, it is also noteworthy that the legitimacy of a democratically elected government generally off-sets its lack of effectiveness. For instance, the new democratic governments of Panama and Angola were recognized despite an obvious lack of effectiveness, an element that is normally a prerequisite for international recognition.[92]

In all the above-mentioned instances, the legitimacy test has focused on the legitimacy of origin and not on the way in which the government wields power. This means that little attention is paid to the legitimacy of exercise when the question of recognition arises. This lack of attention to the legitimacy of exercise has not been without problems in regards to illiberal democracies.

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[90] In the past, recognition policies of states have entailed the resort to various yardsticks used to assess legitimacy of government. For a long time, non-dynastic governments have not been recognized. It later became more common to subordinate recognition to constitutional criteria as illustrated by the recognition policies stemming from the 1907 and 1923 Washington Conventions or the Seward, Tobar, Wilson or Betancourt doctrines.

[91] Barry Bearak, Democracy in Pakistan: Can a General Be Trusted?, N.Y. 1999, at A10; Norimitsu Onishi, Nigeria's Military Turns Over Power to Elected Leader, N.Y. TIMES, May 30, 1999,

[92] Tinoco Case (Gr. Brit. v. Costa Rica), 1 RIAA 369 (1923).

b. Accreditation of Delegates

The practice pertaining to the accreditation of delegates within international organizations also involves an examination of governments' legitimacy. Each international organization has to approve the credentials of the delegates sent by member states. In theory, the approval of credentials is originally to be confined to a technical operation aimed at validating the power of delegates without engaging in any political appraisal.

In practice, however, accreditation proceedings have been used to deny standing to some governments. This is exemplified by the UN General Assembly's refusal to approve the credentials of the delegates of South Africa and Hungary.

It must be pointed out that in some cases of accreditation a test of legitimacy is somewhat inescapable. This arises when two contestants claim to represent a single state (usually due to a civil war). In such a scenario, the organization is forced to determine which the actual representative is. It is therefore bound to engage in an assessment of the relative legitimacy of the warring representatives.[93]

In such situations, it would be much less problematic to rely exclusively on the effectiveness criterion to determine which of the competing parties constituted the legitimate authority to be granted standing within the organization. The practice of the United Nations and its specialized agencies has, however, demonstrated resort to other criteria.

Although democracy as such has not been relied on by the General Assembly to determine member states' representatives, it must be pointed out that the United Nations has nevertheless used a test of legitimacy based on origin. Indeed, in credential controversies, the General Assembly has usually resorted to the criterion of constitutionality. This is well illustrated by the

[93] 113. Matthew Griffin, Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It, 32 N.Y.U. J. INT'L L. & POL. 725, 728-32 (1999-2000)

accreditation of the delegates of Kuwait, Afghanistan, Haiti, and Sierra Leone, where delegates of the constitutional governments were accredited. The constitutionality of a government bears upon the origin of its power as the constitution classically contains the rules of how power is transferred from one government to the ensuing one. If a government is deemed legitimate because it has gained power in a manner prescribed by the constitution of the state concerned, only the origin of its power is considered. Focusing on the constitutionality of governments, legitimacy tests carried out in credentials controversies have thus revolved around the legitimacy of origin without any consideration for the way in which the claimants have exercised their power.

So far, the democratic character of a government does not seem to have played a crucial role in any of the credentials controversies which have gripped the United Nations, such as the controversies related to Kuwait and Afghanistan.[94] This is probably due to the fact that neither of the competing governments could point to any democratic characteristics in the credentials controversies that have arisen thus far in the United Nations. Their legitimacy therefore had to be buttressed in some other manner. In the rare cases where it would have been possible to defuse a credentials crisis on the basis of democratic criteria, the United Nations put the emphasis on the constitutional character of the government, as illustrated by the approval of Aristide's credentials (Haiti) and Kabbah's credentials (Sierra Leone).

While most credentials controversies have thus been worked out on the basis of the legitimacy of origin, there is one case where credentials were refused because of the way power was exercised. This was the case when South Africa was denied standing in the General Assembly because of its apartheid policy. There is little doubt that the decision not to approve the credentials of the

[94] U.N.G.A., Report of the Credentials Committee, U.N. DOC. A/45/674 (Oct. 29, 1990) and U.N. Doc. A/45/891 (Dec. 20, 1990);

South African delegates pertained to the discriminatory and racist exercise of power in South Africa. The example of South Africa, however, is unique. There are no other instances where the delegates of a government have been denied standing because of the way they exert power. This case demonstrates that it is conceivable for the UN General Assembly to regard a government as illegitimate because of its illegitimate exercise of power.

c. Intervention by Invitation

A government threatened by a wide-ranging popular uprising or a rebel group may call upon an allied foreign country to provide military support. This scenario is called an intervention by invitation, and the legitimacy of exercise has played a crucial role in such scenarios.

States have not always responded to requests for military assistance of foreign, non-democratic governments that they had previously regarded as legitimate. France's policies towards its former colonies are illustrative. In situations of civil war involving two competing governments, requests by non-democratic governments have generally been ignored by France. The requests of Bokassa (1979), Dacko (1981), and Patassé (2003) in the Central African Republic, as well as those of Hissene Habre in Chad (1992) and Henri Konan Bédié (2000) and Laurent Gbagbo (2002) in Ivory Coast seem to have been dismissed by France because these regimes were responsible for massive violations of human rights. They had each conducted sweeping crackdowns to stifle opposition, resulting in blatant violations of human rights. These governments had previously been recognized as legitimate.

But, when military intervention was requested, France discounted their legitimacy of origin and focused on the way in which they had been exercising their power. France expressly stated in some of these cases that it had dismissed the request for intervention because of the massive violations of human rights of the requesting government. From the vantage point of the

legitimacy of exercise, these governments could not be considered legitimate. It can thus be reasonably argued that in the aforementioned situations consideration of the legitimacy of exercise led to disqualification of these governments as the recognized representatives of the states concerned.

In practice, the legitimacy of exercise has played a significant role in intervention by invitation. The legitimacy of origin has also had some role in these situations. Indeed, as illustrated by interventions in Sierra Leone and Haiti, the legitimacy of origin of a government can sometimes offset its lack of effectiveness. In these cases, the foreign interventions were based on requests by ineffective but democratically elected governments. Likewise, the United States based its 1989 intervention in Panama on the request of an elected government that had no claim to effective control.[95]

In situations of intervention by invitation, it seems clear that the legitimacy of origin and the legitimacy of exercise have played discrete roles. This demonstrates the relevance of the distinction between these two types of legitimacy and the inadequacy of a monolithic conception of legitimacy.

b. Disqualification of Governments: the Legitimacy of Exercise

The exercise of power has, on the other hand, been the basis for the disqualification of a government previously considered the legitimate representative of a state. A legitimately elected government can lose its legitimacy and be barred from speaking and acting on behalf of the state because its exercise of power conflicts with substantive elements of democracy.

This is well illustrated by the aforementioned practice in regard to invitations for intervention.

[95] Fighting in Panama; Panama Task Forces: Who They Were, What They Did, N.Y. TIMES, Dec. 21, 1989, at A20. See also the statement of the US President cited in Marian Nash Leigh, Contemporary Practice of the United States Relating to International Law, 84 AM. J. INT'L L. 536, 545-549 (1990)

Likewise, the U.N. General Assembly disqualified the government of South Africa due to the way in which the government was exercising its power, namely through its racist apartheid policy.

2.6 Concept of Legal Personality

To have legal personality means to be capable of having legal rights and obligations[96] within a certain legal system, such as entering into contracts, suing, and being sued.[97] Legal personality is a prerequisite to legal capacity, the ability of any legal person to amend (enter into, transfer, etc.) rights and obligations. In international law, consequently, legal personality is a prerequisite for an international organization to be able to sign international treaties in its own name.

Legal persons are of two kinds: natural persons also called physical persons and juridical persons also called juridic, juristic, artificial, or fictitious persons, lat. persona ficta – groups of individuals, such as corporations, which are treated by law as if they are persons.[98] While human beings acquire legal personhood when they are born, juridical persons do so when they are incorporated in accordance with law.

Artificial personality, juridical personality, or juristic personality is the characteristic of a non-living entity regarded by law to have the status of personhood.

A juridical or artificial person (persona ficta; also juristic person) has a legal name and has certain rights, protections, privileges, responsibilities, and liabilities in law, similar to those of a

[96] Elizabeth A. Martin (2003). Oxford Dictionary of Law (7th ed.). Oxford: Oxford University Press.
[97] Lewis A. Kornhauser and W. Bentley MacLeod (June 2010). "Contracts between Legal Persons". National Bureau of Economic Research. Retrieved 7 June 2013.
[98] H.A.L. Fisher, ed. (1911). "Moral Personality And Legal Personality 1". The Collected Papers of Frederic William Maitland. Cambridge University Press.

natural person. The concept of a juridical person is a fundamental legal fiction. It is pertinent to the philosophy of law, as it is essential to laws affecting a corporation.

Juridical personality allows one or more natural persons to act as a single entity for legal purposes. In many jurisdictions, artificial personality allows that entity to be considered under law separately from its individual members, for example in a company limited by shares, its shareholders. They may sue and be sued, enter contracts, incur debt, and own property. Entities with legal personality may also be subjected to certain legal obligations, such as the payment of taxes. An entity with legal personality may shield its members from personal liability.

In some common law jurisdictions a distinction is drawn between corporation aggregate such as a company, which has a number of members and a corporation sole, which is where a person's public office is deemed to have a separate personality from them as an individual. Both have separate legal personality. Historically most corporations sole were ecclesiastical in nature for example, the Archbishop of Canterbury is a corporation sole, but a number of other public offices are now formed as corporations sole.

The concept of juridical personality is not absolute. "Piercing the corporate veil" refers to looking at the individual natural persons acting as agents involved in a company action or decision; this may result in a legal decision in which the rights or duties of a corporation or public limited company are treated as the rights or liabilities of that corporation's members or directors.

The concept of a juridical person is now central to Western law in both common-law and civil-law countries, but it is also found in virtually every legal system.[99] Some examples of juridical persons include:

i. Cooperatives, business organization owned and democratically operated by a group of individuals for their mutual benefit
ii. Corporations are bodies corporate created by statute or charter. A corporation sole is a corporation constituted by a single member, in a particular capacity, and that person's successors in the same capacity, in order to give them some legal benefit or advantage, particularly that of perpetuity, which a natural person could not have had. Examples are a religious officiates in that capacity or The Crown in the Commonwealth realms. A corporation aggregate is a corporation constituted by more than one member.
iii. Municipal corporations are "creatures of statute." Other organizations may be created by statute as legal persons, including European economic interest groupings (EEIGs).
iv. Unincorporated associations, that is, aggregates of two or more persons, are treated as juridical persons in some jurisdictions but not others.
v. Partnerships, an aggregate of two or more persons to carry on a business in common for profit and created by agreement. Traditionally, partnerships did not have continuing legal personality, but many jurisdictions now treat them as having an independent legal personality.
vi. Companies, a form of business association that carries on an industrial enterprise, are often corporations, although companies may take other forms, such as trade unions, unlimited companies, trusts, and funds. Limited liability companies—be they a private company limited by guarantee, private company limited by shares, or public limited company—are entities having certain characteristics of both a corporation and a partnership. Different types have a complex variety of advantages and disadvantages.[100]
vii. Sovereign states are legal persons.
viii. In the international legal system, various organizations possess legal personality. These include intergovernmental organizations (the United Nations, the Council of Europe) and some other international organizations (including the Sovereign Military Order of Malta, a religious order).
ix. The European Union has legal personality since the Lisbon Treaty entered into force on 1 December 2009. That the EU has legal personality is a prerequisite for the EU to join the European Convention on Human Rights (ECHR).
x. Temples, in some legal systems, have separate legal personality[101]

[99] The Juristic Person. I, George F. Deiser, University of Pennsylvania Law Review and American Law Register, Vol. 57, No. 3, Volume 48 New Series. (Dec., 1908), pp. 131-142.
[100] Frisch D. (2011). Commercial Law's Complexity. George Mason Law Review.
[101] Williams v The Shipping Corporation of India (US District Court, Eastern District Virginia), 10 March 1980, 63 ILR 363

Not all organizations have legal personality. For example, the board of directors of a corporation, legislature, or governmental agency typically are not legal persons in that they have no ability to exercise legal rights independent of the corporation or political body which they are a part of.

2.6.1 Creation and History of the Doctrine

The concept of legal personhood for organizations of people is at least as old as Ancient Rome: a variety of collegial institutions enjoyed the benefit under Roman law.

The doctrine has been attributed to Pope Innocent IV, who seems at least to have helped spread the idea of persona ficta as it is called in Latin. In canon law, the doctrine of persona ficta allowed monasteries to have a legal existence that was apart from the monks, simplifying the difficulty in balancing the need for such groups to have infrastructure though the monks took vows of personal poverty. Another effect of this was that as a fictional person, a monastery could not be held guilty of delict due to not having a soul, helping to protect the organization from non-contractual obligations to surrounding communities. This effectively moved such liability to individuals acting within the organization while protecting the structure itself, since individuals were considered to have a soul and therefore capable of being guilty of negligence and excommunicated.[102]

In the common law tradition, only a person could sue or be sued. This was not a problem in the era before the Industrial Revolution, when the typical business venture was either a sole proprietorship or partnership, the owners were simply liable for the debts of the business. A feature of the corporation, however, is that the owners/shareholders enjoyed limited liability. The

[102] John Dewey, "The Historic Background of Corporate Legal Personality," Yale Law Journal, Vol. XXXV, April 1926, pp. 655-673

owners were not liable for the debts of the company. Thus, when a corporation breached a contract or broke a law, there was no remedy, because limited liability protected the owners and the corporation wasn't a legal person subject to the law. There was no accountability for corporate wrongdoing.

To resolve the issue, the legal personality of a corporation was established to include five legal rights—the right to a common treasury or chest (including the right to own property), the right to a corporate seal (i.e., the right to make and sign contracts), the right to sue and be sued (to enforce contracts), the right to hire agents (employees) and the right to make by-laws (self-governance).

Since the 19th century, legal personhood has been further construed to make it a citizen, resident, or domiciliary of a state (usually for purposes of personal jurisdiction). In Louisville, C. & C.R. Co. v. Letson[103], the U.S. Supreme Court held that for the purposes of the case at hand, a corporation is "capable of being treated as a citizen of the State which created it, as much as a natural person." Ten years later, they reaffirmed the result of Letson, though on the somewhat different theory that "those who use the corporate name, and exercise the faculties conferred by it," should be presumed conclusively to be citizens of the corporation's State of incorporation in the case of Marshall v. Baltimore & Ohio R. Co.[104]. These concepts have been codified by statute, as U.S. jurisdictional statutes specifically address the domicile of corporations.

[103] 2 How. 497, 558, 11 L.Ed. 353 (1844),
[104] 16 How. 314, 329, 14 L.Ed. 953 (1854)

2.7 Concept of the Subject of International Law

An entity is a subject of international law if it has "international legal personality". In other words, subjects must have rights, powers and duties under international law and they should be able to exercise those rights, powers and duties. The rights, powers and duties of different subjects change according to their status and functions. For example, an individual has the right of freedom from torture under international law and States have a duty under international law not to torture individuals or to send them to a country where there is a likelihood of that person being tortured. This right is a right under treaty law, for example, the International Covenant on Civil and Political Rights and under customary international law. The Convention against Torture and Cruel, Inhuman and Degrading Treatment places obligations on States not to torture and to extradite or prosecute those who torture.

Legal personality also includes the capacity to enforce one's own rights and to compel other subjects to perform their duties under international law. For example, this means that a subject of international law should be able to:

(1) Bring claims before international and national courts and tribunals to enforce their rights, for example, the International Court of Justice.
(2) Have the ability or power to come into agreements that are binding under international law, for example, treaties:
(3) enjoy immunity from the jurisdiction of foreign courts; for example, immunity for acts of State.
(4) Be subject to obligations under international law.

Remember that all subjects of international law do not have the same rights, duties and capacities. For an example, a diplomat has immunity before foreign courts because he is an agent of the sending State.

CHAPTER THREE

STATE RECOGNITION IN EARLY INTERNATIONAL LAW

3.1 Introduction

At the beginning of the twentieth century there were some fifty acknowledged States. Immediately before World War II there were about seventy-five. By 2005, there were almost 200—to be precise, 192.[105] The emergence of so many new States represents one of the major political developments of the twentieth century. It has changed the character of international law and the practice of international organizations. It has been one of the more important sources of international conflict.

But the fact that some development is of importance in international relations does not entail that it is regulated by international law. And it has long been asserted that 'The formation of a new State is … a matter of fact, and not of law.'[106] This position was supported by a wide spectrum of legal opinion. For example, one of the most common arguments of the declaratory theory (the theory that statehood is a legal status independent of recognition) is that, where a State actually exists, the legality of its creation or existence must be an abstract issue: the law must take account of the new situation, despite its illegality.[107] Equally, where a State does not exist, rules treating it as existing are pointless, a denial of reality. The criterion must be effectiveness, not legitimacy. On the other hand, according to the constitutive theory (the theory that the rights and duties pertaining to statehood derive from recognition by other States), the proposition that the existence of a State is a matter of fact seems axiomatic. If 'a State is, and becomes, an

[105] That is to say, 191 UN Members plus the Vatican City. This does not include Taiwan, Palestine or various claimant entities ; See Appendix I, p 725 for a complete list.
[106] Oppenheim (9th edn), vol 1, pp.120–3,
[107] Chen, *Recognition*, pp. 9-63

International Person through recognition only and exclusively',[108] and if recognition is discretionary, then rules granting to an unrecognized community a 'right to statehood' are excluded.

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: it thus, in a way, confuses 'fact' with 'law'.[109] For, even if effectiveness is the dominant principle, it must nonetheless be a *legal* principle. 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.[110] And the declaratory theorist's equation of fact with law also obscures the possibility that the creation of States might be regulated by rules predicated on other fundamental principles—a possibility that, as we shall see, now exists as a matter of international law. On the other hand, the constitutive theory, although it draws attention to the need for cognition, or identification, of the subjects of international law, and leaves open the possibility of taking into account relevant legal principles not based on 'fact', incorrectly identifies that cognition with diplomatic recognition, and 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.

Fundamentally the question is whether international law is itself, in one of its most important aspects, a coherent or complete system of law. One writer argued that, 'to argue that a State can become a subject of international law without the assent of the existing States, it is necessary to assume the existence of an objective system of law to which the new State owes its being.' The point is that if the State owes its

[108] Oppenheim op cit, pp. 130–1, §40.
[109] Lauterpacht, *Recognition*, pp.45–50
[110] Kelsen (1929) 4 *RDI* 613, p. 613;Waldock (1962) 106 *HR* 5, p. 146

existence to a system of law, then that existence is not, or not only, a 'fact'.[111] According to predominant nineteenth-century doctrine there were no rules determining what were 'States' for the purposes of international law; the matter was within the discretion of existing recognized States.[112] The international law of that period exhibited a formal incoherence that was an expression of its radical decentralization.[113]

But if international law is still, more or less, decentralized in terms of its basic structures, it is generally assumed that it is a formally complete system of law. For example this is taken to be the case with respect to the use of force[114] and nationality,[115] fields closely related to the existence and legitimacy of States. This work investigates the question whether, and to what extent, the formation and existence of States is regulated by international law, and is not simply a 'matter of fact'.

3.2 Statehood in early international law

It is useful to review the changing opinions on the topic since the seventeenth century. Grotius, for example, defined the State as 'a complete association of free men, joined together for the enjoyment of rights and for their common interest'.[116] His definition was philosophical rather than legal: the existence of States was taken for granted; the State, like the men who compose it, was automatically bound by the law of nations which was practically identical with the law of nature: 'outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations.'[117] So the existence of States as distinct

[111] Chen, *op cit*, pp.18–19:
[112] Oppenheim op cit, pp. 132–3
[113] Lauterpacht, *op cit*, pp.4–5; Brownlie (1963) 39 *BY* 284, p.284; (2nd edn), p. 73; (6th edn), p. 69.
[114] *Corfu Channel Case*, ICJ Rep 1949 p. 4, 35.
[115] *Nottebohm Case*, ICJ Rep 1955 p. 4.
[116] Grotius, *De Iure Belli ac Pacis* (1646), Bk I, ch I, §xiv.
[117] Dickinson, *Equality of States*, pp. 55–60; Kennedy (1986) 27 *Harv ILJ* 1, 5; Tuck, *Rights of War and Peace*, pp. 82–96.

subjects of that universal law posed no problem. Much the same may be said of Pufendorf, who defined the 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.'[118] Pufendorf agreed both with Grotius and Hobbes[119] that natural law and the law of nations were the same:

> Nor do we feel that there is any other voluntary or positive law of nations which has the force of law, properly so-called, such as binds nations as if it proceeded from a superior… [Convergences of State behaviour] belong either to the law of nature or to the 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 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.[120]

By contrast Vitoria, lecturing a century earlier, gave a definition of the State much more legal in expression and implication than either Grotius or Pufendorf, though one still based on scholastic argument:

> 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.[121]

Here we can detect the criteria of government and independence. Moreover, Vitoria is writing not a general moral–theological treatise but one with a specific purpose; his definition is also for a purpose, that is, to determine which entities may declare war. Nevertheless, it is fair to say that

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[118] Pufendorf, *De Iure Naturae et Gentium Libri Octo*, Bk VII, ch 2, p.13, para 672.
[119] *Ibid*, paras 4–5.
[120] Ibid, p.7
[121] Vitoria, *De Indis ac de Iure Belli Relectiones* (publ 1696, ed Simon); *De Iure Belli*, para 7, pp. 425–6.

the writers of the naturalist school were not concerned with the problem of statehood: any ruler, whether or not independent, was bound by the law of nations, which was merely the application of the natural law to problems of government.

The same may be said, although with some reservations and for different reasons, of the writers of the early positivist period, of which Vattel was the most influential. His *L*e *Droit des gens, ou principles de la loi naturelle, appliqués* à *la conduite et aux affaires des nations et des souverains* is an extraordinary amalgam of earlier views with deductions from the sovereignty and equality of States that tended to overturn those views. For Vattel, 'Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.'[122] The basic criterion is that such nations be 'free and independent of one another'.[123] But a distinction is now drawn between States, as defined, and 'sovereign States', even if the difference is still largely terminological:

Every Nation which governs itself, under whatever form, and which does not depend on any other 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 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.[124]

The novel element in this definition is the wide-reaching implications Vattel draws from the notion of the equality of States, the effect of which is to make each State the sole judge of its rights and obligations under the law of nations. Thus, '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

[122] Vattel *Le Droit des Gens* (1758), vol I, ch I, p. I.
[123] Ibid, p. 15.
[124] Ibid, p.8.

which results from applying the natural law to Nations … '[125] Although the positive law of nations may not, in principle, conflict with this necessary law, the latter is 'internal' to the State while the positive law is 'external', and other sovereigns are only entitled and able to judge the actions of other independent States by this external standard: '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 can not complain, since they have no right to dictate to it.'[126] Here a deduction from 'sovereignty' overturns what has previously been held to be the basis of the law of nations. But as yet, no further deduction is drawn from this independence or sovereignty to deny the juridical existence of new States; sovereignty is inherent in a community and is thus independent of the consent of other States: 'To give a Nation the right to a definite position in this great society, it need *only* be truly sovereign and independent … '[127]

The link between these earlier views and the nineteenth-century positivist view of statehood may be illustrated from Wheaton's classic *Elements of International Law*. Under the influence of Hegel,[128] Wheaton came to regard statehood for the purposes of international law as something different from actual independence:

> Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent. This principle applies as well to internal as to 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

[125] Ibid, p.9.
[126] Ibid, p. 20.
[127] Ibid, p.4
[128] Hegel, (1991), pp. 366–67.

> 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 … [I]f 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 …[129]

As was to be expected, this view was combined with a denial of the universality of international law[130] and of the law of nature as its foundation.[131]

It will be noted that, although Wheaton reproduces Vattel's 'internal/external' terminology, he puts it to a different use. For Vattel the 'internal' law was the law of nature, the necessary though imperfect element of the law of nations. Wheaton, having dispensed with the law of nature, means by 'internal' those aspects of the government of a State confined to its own territory and distinguished from 'foreign affairs'.[132] By Wheaton's time the positive law of nations was not concerned essentially with the latter; nor could there be any *necessary* obligations owed to States by virtue of their mere 'political existence'. The law of nations was becoming an artificial system studied in basically consensual areas of inter-State relations such as treaties, diplomatic relations and commerce. Basic relations between States as such (in particular, the legality of resort to war, and the very existence and survival of the State) were excluded from its scope.[133]

3.3 Some Aspects of State Practice in Early International Law

Despite its claims to universality, the early law of nations had its origins in the European State-system, which existed long before its conventional date of origin in the Peace of Westphalia

[129] Wheaton, *Elements of International Law, p.*6.
[130] ibid, p. 11
[131] Ibid, p. 5
[132] Ruddy, *International Law in the Enlightenment*, pp. 119–44;
[133] Röling, in: Miller and Feindrider, *Nuclear Weapons and the Law*, p. 181; Dinstein, *War, Aggression and Self-Defence* (3rd edn), p. 71.

(1648), ending the Thirty Years' War.[134] The effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy it recognized or established) at the expense of the Empire, and ultimately at the expense of the notion of the *civitas gentium maxima*—the universal community of mankind transcending the authority of States.[135]

Within that system, and despite certain divergences, writers of both naturalist and positivist schools had at first little difficulty with the creation of States. New States could be formed by the union of two existing States. More common was the linking of States in a personal union under one Crown (for example, Poland and Lithuania in 1385; Aragon and Castile in 1479; England and Scotland in 1603); such unions often became permanent. Equally, it was agreed that princes or rulers could create new States by division of existing ones. In Pufendorf's words, 'A king can convert one of his provinces into a kingdom, if he separates it entirely from the rest of the nation, and governs it with its own administration, and one that is independent from the other.'[136] New States could also be formed by revolution, as when Portugal (1640–8) and the Netherlands (1559–1648)[137] broke away from Spain. What was unclear was whether the revolutionary entity could be treated as an independent State before its recognition by the parent State. Pufendorf thought not, on the grounds that ' … if a man who, at the time, recognized the sovereignty of another as his superior, is to be able to become a king, he must secure the consent of that superior who will both free him and his dominions from the bond by which they were tied to him.'[138] Vattel was less categorical: a subject remained bound to the sovereign 'without other conditions than his observance of the fundamental laws', and thus, in most cases, secession was

[134] Koskenniemi (1990) 1 *EJIL* p. 4.
[135] Nussbaum, *Concise History of the Law of Nations*, pp. 115–18
[136] Pufendorf, *De jure Naturae et Gentium*, Bk VII, ch 3, (1688), p.11.
[137] Blok and Vetter (1986) 34 *Zeitschrift für Geschichtswissenschaft* 708.
[138] Pufendorf, *op cit*, p. 11.

contrary to the basic compact that was the foundation of the State. However, if a sovereign refused to come to the aid of part of the nation, it might provide for its own safety by other means.

It was for [this] reason that the Swiss as a body broke away from the Empire, which had never protected them in any emergency. Its authority had already been rejected for many years when the independence of Switzerland was recognized by the Emperor and by all the German States in the Treaty of Westphalia.[139]

The Swiss cantons, referred to by Vattel, retained tenuous links with the Empire until their complete independence was recognized at the Peace of Westphalia. Part IV of the Treaty of Osnabrück stated:

> And whereas His Imperial Majesty … did, by a Particular Decree … declare the said city of *Bazil*, and the other *Swiss* Cantons to be in possession of a *quasi*-full Liberty and Exemption from the Empire, and so no way subject to the Tribunals and Sentences of the said Empire, it has been resolved that this same Decree shall be held as included in this Treaty of Peace … '[140]

In practice other States tended to conduct relations on an international plane with the entity in revolt before its recognition by the parent State. The point was clearly established in this sense following the breakaway of the South American provinces from Spain in the 1820s.[141] The impression given by this brief review is that, despite the limited amount of State practice, nothing in early international law precluded the solution of the legal problems raised by the creation and existence of States. That impediment, as we shall see, arose later with the application by nineteenth-century writers of a thoroughgoing positivism to the concept of statehood and the theory of recognition.

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[139] *In;* Gentili, *On the Law of War* (1612), Bk I, ch XXIII, pp.185–7.
[140] 1 CTS 119.
[141] Frowein (1971) 65 *AJ* p. 568

3.4 Recognition and statehood in Early International Law

Recognition of states in international law is discussed under the following sub-headings:

i. The early view of recognition

Although the early writers occasionally dealt with problems of recognition, it had no separate place in the law of nations before the middle of the eighteenth century. The reason for this was clear: sovereignty, in its origin merely the location of supreme power within a particular territorial unit (*suprema potestas*), necessarily came from within and did not require the recognition of other States or princes. As Pufendorf stated: '… just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such … It would entail an injury for the sovereignty of such a king to be called in question by a foreigner.'[142] The doubtful point was whether recognition by the parent State of a new State formed by revolution from it was necessary, and that doubt related to the obligation of loyalty to a superior, which, it was thought, might require release: the problem bore no relation to constitutive theory in general. The position of recognition towards the end of the eighteenth century was as stated by Alexandrowicz: 'In the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period …'.[143]

When recognition did begin to attract more detailed consideration, about the middle of the eighteenth century, it was in the context of recognition of monarchs, especially elective

[142] Pufendorf, op cit, p. 9, para 689.
[143] Alexandrowicz , (1958) 34 *BY* 176, p. 176.

monarchs: that is, in the context of recognition of governments. Von Steck[144] and later Martens[145]discussed the problem and reached similar conclusions. Recognition, at least by third States in the case of secession from a metropolitan State, was either illegal intervention or it was unnecessary.[146] As one writer put it, '… in order to consider the sovereignty of a State as complete in the law of nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the *de facto* existence of sovereignty is sufficient.'[147] Thus, even after the concept of recognition had become a separate part of the law, the position was still consistent with the views held by the early writers. The writers of the early period of eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of States, this anti-naturalist trend was not yet allowed to extend to the field of recognition. [148]

ii. Positivism and Recognition in Early International Law

But this was a temporary accommodation. According to positivist theory, the obligation to obey international law derived from the consent of individual States. If a new State subject to international law came into existence, new legal obligations would be created for existing States. The positivist premise seemed to require consent either to the creation of the State or to its being subjected to international law so far as other States were concerned. It would be interesting to trace the evolution of international law doctrine from the essentially declaratory views of

[144] Steck, V. (1783) *Versuche über verschiedene Materien politischer und rechtlicher Kenntnisse*
[145] Martens, *A*(1789), *Compendium of the Law of Nations* p. 18.
[146] Ibid, p. 180
[147] Ibid, p. 189.
[148] Ibid, 191.

Martens and von Steck to the essentially constitutive ones of Hall and Oppenheim. The important point, however, is that the shift in doctrine did happen, although it was a gradual one, in particular because, while States commonly endorsed the positivist view of international law, their practice was not always consistent with this profession. Thus unrecognized States and native peoples with some form of regular government were given the benefit of, and treated as obliged by, the whole body of international law.[149] The problem was largely doctrinal, but doctrine was, nonetheless, influential.

3.5 Different Modes of Recognition of States under International Law

The recognition of state or a government implies readiness to treat that entity as a state within the meaning of state under international law. Recognition is separate from diplomatic relations, the former does not necessarily compel the later, as not having diplomatic relation does not imply non-recognition,[150] more often, the issue of recognition comes up where an emerging or rather new state or government has come into being and the facts of its being so are contested. Recognition of a state or government also arises in the acquisition of new territory, especially by the use of force and on the issue of insurgency or belligerency.[151]

A state that has a defined territory, a population and a government effectively in control should be recognized just as a government in effective control of its population should be recognized. In practice, though exceptionally, uncontroverted recognition is not always the case, thus recognition or non-recognition has most of the times been based on

[149] Smith, *GB* & *LN* vol I, pp. 14–18; Davidson (1994) 5 *Canterbury LR* p. 391.
[150] Umozurike, O. U. op cit, p. 59
[151] Ibid

political, economic or humanitarian grounds or even as a military strategy.[152] There is difference of opinion as to the legal effect of state recognition under international law. Some scholars like lauterpacht, kelsen, etc. holds that it has constitutive effect; that a state does not exist unless other states recognize it. In *Luther v. Sagor*[153] the court of first instance denied the legality of soviet confiscations because the government was not recognized by Britain.

By the time when the case went on appeal, the government becomes recognized and it thus acts as a state. Other scholars like Brownlie hold that recognition of state has declaratory effect, that it merely acknowledges and existing situation. The institute of international law concurs with this view in 1936 and maintained that recognition has a declaratory effect. The charter of the American States provide that, *"The political existence of the state is independent of recognition by other states, even before being recognized the state has the right to defend its integrity and independence".*[154] This theory is supported by the advisory opinion in the membership of the United Nations case.[155] The representatives of an unrecognized state are not accorded diplomatic immunity. An unrecognized state is neither *teira nullius* nor a nonentity. Recognition of a state may be de facto or de jure recognition. There are however important differences between de facto de jure recognition of state. There are mainly two theories relevant to recognition, the constitutive and the declaratory theory. The constitutive theory asserts

[152] Ibid, p. 59 – 60
[153] (1921) 1 KB 456
[154] Article 12 of the Organization of American States.
[155] ICJ Rep. (1948), p. 57

that States and governments do not legally exist until recognized by the international community and the declaratory theory adopts that States and governments gain in the international personality when they come into existence.

According the constitutive theory, creation of a new State depends on the acceptance of present States. The new State will have the rights and duties at the time of being recognized[156]. However, this theory has some queries, such as what will happen if some existing States recognize the new one and the others do not? And how it could be possible to put in force some restrains, like prohibition on aggression, against the unrecognized State?[157] The declaratory theory claims that a State will be formed free from the consents of the other States, just after she meet the international requirements. This approach is laid down in the first sentence of Article 3 of the Montevideo Convention (1933), "The political existence of the state is independent of recognition by the other states." The declaratory theory seems to be more adequate for practice than the other.[158] Since the recognition has a political side, in practice the States prefer a middle way between these two doctrines; in addition to classic qualifications to seek some basic requirements of international law for recognition. In the past, it was sufficient for a new State to fulfill the four criteria. In 1930s some States also looked for that a new State must obey some fundamental standards of the international community.[159] As an example for recent times, in the European Communities Declaration on the "Guidelines on the

[156]Kirchner, A. "Public International Law: Recognition of States and Governments", accessed on 02 July 2014
[157] Shaw, op cit, p.446
[158] ibid p.446
[159] Cassese, A. (2005), *"*International Law*"*, 2nd ed., Oxford University Press, Oxford, p.233

Recognition of New States in Eastern Europe and the Soviet Union" it is indicated that "'The Community and its member States adopt a common position on the process of recognition of these new States, which requires:

i. respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;

ii. Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE

iii. Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;

iv. Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;

v. Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its member States will not recognize entities which are the result of aggression.' At the end of the Declaration, as a conclusion, it is added that 'The commitment to these principles opens the way to recognition by the Community and its member States and to the establishment of diplomatic relations.' However, it will be

well-advised to repeat that, in practice recognition is used for to point out political approval or disapproval. Political assessments always effect the decision.

i. De Facto and De Jure Recognition

Akehurst argues that the distinction between *de facto* and *de jure* recognition is one of the most confused circumstances of recognition and at first hand he objects the expressions *de facto* and *de jure* recognition. According to him, they are technically in correct, since the words de jure or the de facto describes the government not the act of recognition. Indeed, the subject is about the legal status of the government. Similarly, Aust gives a definition of the *de facto* and *de jure* recognition by relying on the legal status of the government: "Recognition *de jure* means that the entity fully satisfies the applicable legal criteria; recognition *de facto* is only of the current position of the entity,

and is therefore usually provisional" De jure recognition is of course stronger, while de facto recognition is more tentative and more connected with effective control of the recognized state over its territory, as when the United Kingdom recognized the Soviet Union de facto in 1921, but de jure only in 1924.

The assessments or the definitions of the both concepts can be change in different situations but it is the fact that everything is relevant to the intention of the government concerned and the general context of fact and law.[160] *De facto* recognition can be thought as an attitude of wait and see, since it includes ambiguity. This method gives the

[160] Brownlie, op cit, p.91

recognizing state the opportunity of acting in accordance with the political facts and its interests.

ii. Premature Recognition

Since it is a political decision of States, in some circumstances, the recognition occurs before the criteria of statehood have been fulfilled by the new State. In such cases, the problem is to determine the premature recognition is an intervention in the internal affairs of another state or is an admissible recognition of a new state that has emerged or is emerging as a result of secession. Recognitions of Bosnia-Herzegovina and Croatia were the well-known examples of premature recognition in the near past as both states had not an effective control on their whole parts of territories at the time being recognized.

iii. Implied Recognition

Recognition is about intention and may be expressed or implied.[161] To understand how a State may recognize another State by implication it is necessary to look into the some certain circumstances. Lauterpacht states that, the establishing of diplomatic relations and maybe, to grant the exequatur or signing a bilateral treaty includes extensive relations between the two states justify the implication.

A congratulation message to a new State for obtaining sovereignty will bear recognition of that State, but unofficial contacts do not have the same result, just like the informal relations established between United States and Communist China in the 1960s and early

[161] ibid

1970s.[162] It does not mean recognition when two states both signed a multilateral treaty such as United Nations Charter. Israel and many Arab countries are UN members at the present but it does not change Arab non- recognition of the Israel State. On the other hand when a State affirms the membership in the UN of an entity, needless to say that recognition occurs. As an example, United Kingdom recognized the Former Yugoslav Republic of Macedonia by supporting its membership in the UN.

In practice the implied recognition is not preferred since the states want to have their control of recognition and in general they use a formal way for it.

iv. Conditional Recognition

Conditional recognition means that to recognize an entity as a State only when it fulfills some conditions. It was first seen in the Berlin Congress of 1878, Great Britain, France, Italy and Germany marked the recognition of Bulgaria, Serbia, Romania and Montenegro with the condition that these countries would not impose any religious disabilities on any of their subjects. It may cause some political problems but the non-observance of the condition would not invalidate the recognition, since the law does not attach value to any condition unless it depends upon agreements made by the particular parties.[163]

v. Collective Recognition

In 1971 the International Law Commission stated that collective recognition "means that States act collectively during the process of receiving information of the situation,

[162] Shaw, op cit, p.463
[163] ibid p.465

evaluating that information and reaching a decision, and communicating that decision"[164] This may be seen as a result of increased corporation between the States. The idea of act collectively has been a subject of a debate since the foundation of the League of Nations and the establishment of the United Nations. However, the States preferred to keep the control of recognition in their authorized bodies. As Shaw stated "The most that could be said is that membership of the United Nations constitutes powerful evidence of statehood"

3.6 Recognition of Governments

As mentioned above the third criteria of the statehood is an "effective government", therefore a decision to recognize a new State generally includes the recognition of government.[165] They might be seen as similar concepts; however, recognition of a government is different from recognition of a State. Recognition of government would be discussed where the change of the government is unconstitutional.[166] In practice, the effective control of the new government over the territory is a preferable criterion for the recognition but it requires being settled and likely to continue.

The other difference is that, the recognition of a State is about its legal personality on the other hand recognition of a government is relevant to the status of the administrative authority. Effective control has a common use but it is not the only approach for the recognition of government, the Tobar doctrine handles it in a different way. According to Tobar doctrine, an unconstitutional change of the government should be recognized only

[164] ibid, p.466
[165] Warbrick, op cit, p.253
[166] Shaw, op cit, p.454

when the people accept it. This was used by United States in Central America especially in order to protect stability.

In 1980 UK declared that, it would not recognize the governments apart from States. Shaw argues that correctly, "the reason of this declaration was the perception that recognition meant approval and was often embarrassing for instance in case of regimes violating human rights." This political change, to not recognize governments officially, was followed by the other countries after a short time.

3.7 Withdrawal of Recognition

Sometimes it is possible to withdrawn a granted recognition. Especially, it is easier for the *de facto* recognition since the position is different with the *de facto* recognition which includes an ambiguity for the future of the entity. If the government of the entity loses the effective control on its territory there will be no ground for recognition and it may be taken back. On the other hand *de jure* recognition is more difficult to withdraw because as mentioned above it is stronger than *de facto* recognition. *De jure* recognition may be the case only if the State is annexed or conquered by another State.

3.8 Non- Recognition

The doctrine of non- recognition, also known as the Stimson Doctrine of non-recognition, means to not grant recognition to the new entities or the some factual positions which are the result of any illegal actions such as using force.[167] It supported the

[167] Verma, S. K. "*An Introduction to Public* International Law", PHI Learning, 2004, p.110

principle that legal rights cannot obtain from an illegal situation. (*ex injuria jus non oritur*)[168]

The doctrine was brought forward by the United States Secretary of State, Mr. Stimson in 1932, relevant to the Japanese occupation of Manchuria. It was accepted by a resolution of the Assembly of the League of Nations. In the resolution it is stated that; "Considering that the principles governing international relations and the peaceful settlement of disputes between members of the League above referred to are in full harmony with the Pact of Paris, which is one of the corner-stones of the peace organization of the world, and under Art. 2 of which the High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature and whatever origin they may be, which may arise among them, shall never be sought except by pacific means; . . . proclaims the binding nature of the principles and provisions referred to above and declares that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty, or agreement, which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris. . . ."

However this intention did not reflect to the practice until the Second World War; "the Italian occupation of the Empire of Ethiopia and the German takeover of Czechoslovakia were recognized de facto over the years by Western Powers."[169] After 1945 it was again discussed and took place in some international instruments such as UN Charter (Article 2(4)), the draft Declaration on the Rights and Duties of States and Security Council

[168] Shaw, op cit,p.468
[169] ibid, p.468

resolution 242 (1967) on the solution to the Middle East conflict.[170] Especially draft Declaration on the Rights and Duties of States indicated that, every State has the duty to refrain from recognizing any territorial acquisition by another State where achieved by means of the threat or use of force or in any other manner inconsistent with international law and order. In this context, "in 1990, the Security Council adopted resolution 662, which characterized the Iraqi annexation of Kuwait "null and void" and called on all states and institutions not to recognize the annexation."

3.9 Legal Consequences of Recognition

"Recognition is a unilateral act of a State and one that has international legal consequences", for instance where State grant recognition to an entity, it accepts that they will have relations subject to international law on basis of State/State.61 In practice, like claimed by declaratory theory, the political existence of a State is not bound to the recognition of other States, therefore an unrecognized State has to act comply with the international law rules.[171] It means that, when the States sign an international agreement which is signed by a State they have not recognized, they will have the right to ask from that state to fulfill the responsibilities grow out of the agreement.[172]

After recognition, the recognizing States would respect to the rights of the new State which indicated in the International Law Commission Draft Declaration on Rights and Duties of States, 1949, such as "right to independence and hence to exercise freely, right

[170] ibid, p.469
[171] Ibid, p. 471
[172] ibid p.471

to exercise jurisdiction over its territory and over all persons, right to equality in law with every other State, right of individual or collective self-defense against armed attack"[173]

The participation in the international process is not the only result of recognition, at the same time the recognized State will be able to enjoy usual legal consequences of recognition such as privileges and immunities within the domestic legal order. As an example, Plessis lists some privileges and immunities within the municipal law of United Kingdom as follows:

i. Only a recognized state or government has *locus standi* in the UK courts

ii. Only a recognized state or government (or its agents), may plead immunity from suit. It cannot be sued without its consent.

iii. Only the legislative, executive or judicial acts of a recognized state or government will be given legal effect within the United Kingdom"[174]

Shaw adds one more "it will be entitled to possession in the recognizing state of property belonging to its predecessor."[175]

Conclusively, therefore, recognition is one of the most difficult and complicated topics in international law. It is complicated because it involves important political results and legal effects both in international and municipal law. Political assessments always effect the recognition decision. Where the States give a decision about recognition, of course they will weigh the advantages against the disadvantages of this decision. If it is looked

[173] Text adopted by the International law Commission at its first session, in 1949,

[174] Plessis, M.D. (2007) "Recognition Of States & Government", University Of Kwazulu-Natal Faculty Of Law, International Law (1), http://www.library.und.ac.za/Recognition_states_governments.doc , accessed on 07 July 2014

[175] Shaw, op cit, p.472

into the some cases relevant to recognition in international law, I think it can be understood clearly, to grant recognition completely depends on political considerations. In my point of view, the term “recognition of a State” means to decide whether it is capable for its needs or not.

There are basically two theories to explicate recognition; the constitutive and the declaratory theory. The constitutive theory asserts that States and governments do not legally exist until recognized by the international community and the declaratory theory adopts that States and governments gain in the international personality when they come into existence. I think the declaratory theory is more conformable to reason and parallel to the practice of international law and it is supported by the Montevideo Convention on Rights and Duties of States. However, I think it is very difficult to lay down a regulation on state activities, since they are not stable. They may change time to time. Rules Concerning recognition has the same character. Every case should be assessed in itself. International law is made by States and again breached by States. There is always an exception of rules in International law. The important thing is to find a legal cover and nowadays it does not seem to be so difficult. I think in the past States were more honest, it was easy to understand what they really intend to do but today the situation is different, an explanation or a behavior can be understood only after seeing the results. And it is called policy which the decision of recognition rely on.

Thus, both concepts discussed above are complementary concepts under international law. It is further understood from the facts set out in the above-outlined situations where people have the right to self-determination but have not yet realized it.

Unfortunately, many of the states involved in attempting to militarily obliterate the peoples with valid self-determination claims try to reduce these conflicts to "terrorism". So depending on which side of the fence you are on, group A is either a terrorist or a freedom fighter. Some of these regimes' friends either acquiesce or actively support this erroneous assertion.

Apart from the mud-slinging, the tragedy is that states are in open violation of their *jus cogens* and *erga omnes* obligations to defend the principle of self-determination. And also, very sadly, not enough people know sufficiently both the law of self-determination and the law of armed conflict to properly redirect the dialogue. The defenders of self-determination are in a very vulnerable position, charged with terrorism. The supporters of the groups fighting for the realization of national liberation may also be labeled or unduly burdened by laws against terrorism at the extremely serious expense of not only human rights but rights under the Geneva Conventions, other treaties and customary laws of armed conflict. A clear example of the above concepts was seen in Kosovo's struggle for recognition as a state, its sovereign independence and self-determination.

3.10 Statehood in Nineteenth-Century International Law

It is useful to attempt a summary of the position with regard to statehood and recognition in the late nineteenth century. There was of course no complete unanimity among text-writers: nevertheless what we find is an interrelated series of doctrines, based on the premise of positivism, the effect of which was that the formation and even the existence of States was a

matter outside the accepted scope of international law. Oppenheim's *International Law* provides the clearest as well as the most influential expression of these interrelated doctrines.

The main positions relevant here were as follows:

(1) International law was regarded as the law existing between civilized nations. In 1859 the British Law Officers spoke of international law 'as it has been hitherto recognized and now subsists by the common consent of Christian nations'.[176] Members of the society whose law was international law were the European States between whom it evolved from the fifteenth century onwards and those other States accepted expressly or tacitly by the original members into the society of nations[177]—for example the United States of America and Turkey.[178]

As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations. Those States which are members are either original member because the Law of Nations grew up gradually between them through custom and treaties, or they are members as having been recognized by the body of members already in existence when they were born.[179]

(2) States as such were not necessarily members of the society of nations. Recognition, express or implied, made them members and bound them to obey international law.[180] States not so accepted were not (at least in theory) bound by international law, nor were the 'civilized nations' bound in their behaviour towards them, as was implied by their behaviour with regard to Africa and China.[181]

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[176] Smith, *ibid, p.*14.
[177] Oppenheim, op cit, (1st edn), vol 1, p. 17,; (8th edn), p. 18, §12
[178] Art VII of the Treaty of Paris In : *European Commission of the Danube*, PCIJ ser B no 14 (1927), 40,
[179] Oppenheim, op cit (1st edn), vol 1, p. 17,; (8th edn), vol 1, p. 125, §71. See also 9th edition, vol 1, p. 14, §5.
[180] Ibid (1st edn), vol 1, p. 17, , p. 108,; (9th edn), vol 1, p.14, , p. 128,.
[181] ibid (1st edn), vol 1, 34, (8th edn), vol 1, 50,;(9th edn), vol 1, 87,

(3) Only States then, or rather only those entities recognized as States and accepted into international society, were bound by international law and were international persons. Individuals and groups were not subjects of international law and had no rights as such under international law. 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law'.[182]

(4) The binding force of international law derived from this process of seeking to be recognized and acceptance. Thus new States which come into existence and are admitted into the international community thereupon become subject to the body of rules for international conduct in force at the time of their admittance.[183]

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.[184] US Secretary of State Webster put it as follows:

> Every nation, on being received at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states…[185]

This satisfied the positivist canon that could discover the obligation to obey international law only with the consent of each State.

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[182] Ibid (1st edn), vol 1, p. 18. By 'States' Oppenheim presumably meant 'recognized States'.
[183] Ibid (1st edn), vol 1, p. 17,; (9th edn), p. 14,
[184] Ibid (1st edn), vol 1, p. 110,
[185] Letter to Mr Thompson, Minister to Mexico, 15 April 1842 in: *Moore's Digest*, vol I, s 1, pp. 5–6.

(5) Accordingly how an entity became a State was a matter of no importance to international law, which concentrated on recognition as the agency of admission into 'civilized society'—a sort of juristic baptism, entailing the rights and duties of international law. Unrecognized entities had not consented to be bound by international law, and neither had the existing community of recognized States accepted them or agreed to treat them as such. Nascent States (States '*in statu nascendi*') were not international persons. How they acquired territory, what rights and duties they had or owed to others as a result of events before they were recognized, these were irrelevant to international law: they were matters 'of fact and not of law'. The formation of a new State is, as will be remembered from former statements, a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new States become a member of the Family of Nations and subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law, and it matters not how this territory is acquired before the recognition.[186] Oppenheim later reformulated the position thus:

> When a new state comes into existence, its title to its territory is not explicable in terms of the traditional "modes" of acquisition of territory…The new state's territorial entitlement is more to do with recognition; for, as soon as recognition is given, the new state's territory is recognized as the territory of a subject of international law; although, questions of succession and of the legal history of the territory may also be involved where particular boundaries, or the precise extent of the territory, are doubtful or disputed[187]; A state proper is in existence when a people is settled in a territory under its own sovereign government.[188]

[186] Oppenheim op cit (1st edn), vol 1, p.264; (8th edn), vol 1, p.544,
[187] Ibid, In the 9th edition, vol 1, p.677,
[188] ibid (9th edn), vol 1, p. 120,

Likewise Phillimore opined thus, 'The question as to the origin of States belongs rather to the province of Political Philosophy than of International Jurisprudence.'[189] Hence the acquisition of territory by a new State was not regarded as a mode of acquisition of territory in international law, though revolt was a method of losing territory. 'Revolt followed by secession has been accepted as a mode of losing territory to which there is no corresponding mode of acquisition.'[190]

[189] Phillimore, *Commentaries on International Law* (2nd edn), vol I, 79.
[190] Oppenheim, op cit (1st edn), vol 1, pp. 297–8,; (9th edn), vol 1, p. 717, ibid (9th edn), vol 1, p. 717,

CHAPTER FOUR

STATE RECOGNITION IN MODERN INTERNATIONAL LAW

4.1 Introduction

Under the modern law of statehood and its relation with recognition, the effect of positivist doctrine was to place all the emphasis, in matters of statehood, on the question of recognition. Indeed the courts of many States still refuse to determine for themselves any questions of statehood, even where the matter is between private parties, and even where the results are unfortunate, the Second Circuit of the US Court of Appeals held that, absent recognition, notified to the court by the executive branch, Hong Kong could not be treated as a State for jurisdictional purposes, and a corporation organized under the laws of Hong Kong, thus 'stateless', was unable to maintain an action in US federal court, [191] On the ground that status is necessarily determined by executive recognition.[192] They will sometimes be able to avoid the harmful effects on private rights of the political act of recognition by means of construction.[193] The executive may leave the matter for the courts to decide.[194] But as a matter of the common law, at least, where the international status of any entity is squarely in issue executive certification is binding.[195]

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[191] *Matimak Trading Co v Khalily*, 118 F 3d 76 (2nd Cir, 1997,: *Southern Cross Overseas Agencies, Inc v Wah Kwong Shipping Group Ltd*, 181 F 3d 410 (3rd Cir 1999, Becker, CJ). The Supreme Court resolved the matter in favour of federal jurisdiction: *JP Morgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd*, 536 US 88, 122 S Ct 2054 (Souter J 2002).

[192] *Yrisarri v Clement* (1825) 2 C & P 223, 225.

[193] *Luigi Monta of Genoa v Cechofracht Co Ltd* [1956] 2 QB 522 (term 'government' in a charter party); *Kawasaki Kisn Kabashiki Kaisha of Kobe v Bantham Steamship Co Ltd* [1939] 2 KB 544 ('war'), 9 ILR 528. For an extreme case of 'construction' see *The Arantzazu Mendi* [1939] AC 256, 9 ILR 60, criticized by Lauterpacht, *op cit*, pp. 288–94.

[194] *Duff Development Co v Kelantan Goverment* [1924] AC 797, 825 (Lord Sumner); *Salimoff v Standard Oil Co*, 262 NY 220 (1933)

[195] *Luther v Sagor* [1921] 3 KB 532; *Carl Zeiss Stifftung v Rayner and Keeler Ltd* (No 2) [1967] 1 AC 853, 953–4 *Caglar v HM Inspector of Taxes*, 1996 *Simon's Tax Cases* 150; 108 ILR 150. The American position was historically less rigid in; *Wulfsohn v RSFSR*, 234 NY 372 (1923); *Sokoloff v National City Bank*, 2 ILR 44, 239 NY

This has led courts to seek to distinguish between the 'external' and 'internal' consequences of non-recognition. In *Hesperides Hotels*, Lord Denning asked whether the law of the 'Turkish Federated State of Cyprus' could be applied to a tort claim even though the Foreign and Commonwealth Office had certified that the United Kingdom did not recognize that entity as a State:

> The executive is concerned with the *external* consequences of recognition, vis-à-vis other states. The courts are concerned with the *internal* consequences of it, vis-à-vis private individuals. So far as the courts are concerned, there are many who hold that the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it—in its impact on individuals—as justice and common sense require: provided always that there are no considerations of public policy against it.

The distinction has also been expressed as one between private international law and the law or practice of foreign relations:

> Private international law is designed to find the most appropriate law … and it is not concerned with adjusting the mutual relationship of sovereigns. Therefore, foreign law applied under private international law principles should not be limited to the law only of a recognized State or Government; effectiveness of foreign law should not depend on recognition.[196]

Indeed legislation has sometimes had to be passed authorizing courts to treat unrecognized entities as 'law areas' for various purposes, in order to separate non-recognition from its consequences.[197] However desirable it may be that the courts of a State should speak on matters

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158 (1924); *Bank of China v Wells Fargo Bank & Union Trust Co*, 209 F2d 467 (1953). US courts often defer to executive determinations (e.g., *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts Inc*, 917 F 2d 278, 291–3 (Ind, 1990) 108 ILR 488; but not always: *Efrat Ungar v Palestine Liberation Organization*, 402 F3d 274, 280 (1st Cir, 31 March 2005,

[196] District Court of Kyoto, Judgment of 7 July 1956.

[197] the Foreign Enlistment Act 1870 (UK); Foreign Corporations Act 1991 (UK); Foreign Corporations (Application of Laws) Act 1989 (Cth). These Acts, though general in terms, were passed to deal with the situation of Taiwan, an

of statehood with the same voice as the government of that State; in the international sphere the intimate connection established by nineteenth-century doctrine between recognition and statehood has done much harm. A tension is thereby created between the conviction that recognition is at some level a legal act in the international sphere,[198] and the assumption of political leaders that they are, or should be, free to recognize or not to recognize on grounds of their own choosing.[199] If this is the case, the international status and rights of whole peoples and territories will seem to depend on arbitrary decisions and political contingencies.

Therefore, in more recent international practice, several additional criteria have been identified as prerequisites for statehood. The recognition policy of many states and the positions taken by contemporary jurists indicate that the traditional criteria for statehood are being extended to include additional elements. Thus, for example, the recognition policy of the European Community (now the European Union) with respect to the former republics of Yugoslavia and the Soviet Union conditioned recognition not only on the satisfaction of the traditional criteria for statehood, but on the fulfillment of a long list of other requirements. Indeed, it has become accepted to investigate several other features of a putative state before considering its eligibility for recognition.

The additional contemporary criteria for statehood require that an entity seeking recognition demonstrate that it has not been established as the result of illegality, that it is

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issue dealt with by the US through special legislation, the Taiwan Relations Act, 22 USC s. 3301; See *New York Chinese TV Programs, Inc v UE Enterprises, Inc*, 954 F 2d 847 (2d Cir 1992), *cert denied*, 506 US 827 (1992); *Millen Industries Inc v Coordination Council for N American Affairs*, 855 F 2d 879 (1988), 98 ILR 61. Other jurisdictions have simply accepted Taiwan acts and laws without legislative mandate: *Romania v Cheng*, 1997 Carswell NS 424 (Nova Scotia SC); *Chen Li Hung v Tong Lei Mao* [2000] 1 HKC 461. On Taiwan see further Chapter 5 and Chapter 10.

[198] Among earlier writers, Kelsen (1941) 35 *AJ* 605; Schwarzenberger, *International Law*, vol I, pp. 127–36, 134 .

[199] the statements of Sir Percy Spender, Australian Minister for Foreign Affairs, cited in O'Connell (ed), *International Law in Australia*, 32; and US Ambassador Warren Austin, SCOR 3rd yr 294th mtg, 16. and MJ Peterson (1982) 34 *World Politics* 324.

willing and able to abide by international law, that it constitutes a viable entity, and that its claim to statehood is compatible with the right to self-determination.

4.2 Theories of Recognition of States in Modern International Law

Before examining State practice on the matter, it is necessary to refer again to the underlying conflict over the nature of recognition. A further effect of nineteenth-century practice has been to focus attention more or less exclusively on the act of recognition itself, and its legal effects, rather than on the problem of the elaboration of rules determining the status, competence and so on of the various territorial governmental units.[200] To some extent this was inevitable, as long as the constitutive position retained its influence, for a corollary of that position was that there could be no such rules. Examination of the constitutive theory is, therefore, first of all necessary.

4.2.1 The constitutive theory

The tenets of the strict constitutive position, as adopted by Oppenheim and others, have been referred to already[201]. Many of the adherents of that position are also positivist in outlook.[202] On the other hand, it is possible to reconcile the declaratory theory with some versions of positivism, and many writers have adhered both to positivism and the declaratory theory.[203] Moreover, Lauterpacht, who was not a positivist, was one of the more subtle proponents of a form of the constitutive position.[204] He expressed the most persuasive argument for that position in the following way:

> The full international personality of rising communities … cannot be automatic … As its ascertainment requires the prior determination of difficult circumstances of fact and law, there must

[202] Lauterpacht *op cit*, pp. 38–9.
[203] Chen, *op cit*, p. 18.
[204] Lauterpacht, *op cit*, p.2

> be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty.[205]

In other words, in every legal system some organ must be competent to determine with certainty the subjects of the system. In the present international system, that can only be done by the States, acting individually or collectively. Since they act in the matter as organs of the system, their determinations must have definitive legal effect.

It should be stressed that this argument is not generally applicable in international law. Determining the legality of State conduct or the validity of the termination of a treaty often involves 'difficult circumstances of fact and law', but it has never been suggested that the views of particular States are 'constitutive'. If individual States were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual States without any prospect of resolution. Yet it is, and should be, more than this—a system with the potential for resolving problems, not merely expressing them.

It may be argued that determining the subjects of international law is so important that, exceptionally, there must exist some method of conclusive determination for this purpose. Yet there is nothing conclusive or certain (as far as other States were concerned) about a conflict between different States as to the status of a particular entity, and there is no reason why they should be bound either by the views of the first State to recognize or of the last to refuse to do so. Does the fact that Belize was not recognized by Guatemala,[206] Macedonia by Greece[207] or

[205] ibid, 55
[206] (1992) 63 *BY* 633–4; 243 *HC Debs*, vol 243, WA, col 5, 9 May 1994.

Liechtenstein by Czechoslovakia and its successors[208] mean that these entities did not exist, were not States, and had no rights at the time?

Moreover, questions of status do not seem qualitatively different, either in theory or practice. International law has relatively few subjects, and the status of most of them is not open to doubt. By contrast problems relating, for example, to the legality of the use of force occur frequently and are often difficult and controversial. It is not suggested that individual State pronouncements on that subject are 'constitutive' of legality, for the recognizing State or more generally.

Two further arguments add decisive support to the rejection of the constitutive position. First, if State recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void. Yet the nullity of certain acts of recognition has been accepted in practice, and rightly so;[209] otherwise recognition would constitute an alternative form of intervention, potentially always available and apparently unchallengeable. Lauterpacht himself allowed the possibility of an *invalid* act of recognition,[210] but if that is the case then the test for statehood must be extrinsic to the act of recognition. And that is a denial of the constitutive position.

A second difficulty with the constitutive position is its relativism. As Kelsen points out, it follows from constitutivist theory that '… the legal existence of a state … has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.'[211] No doubt international relations are full of contingency, but to those who do not share Kelsen's premises this seems a violation of common sense.[212] Lauterpacht, who

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[207] Craven (1995) 16 *AYIL*, p. 199.
[208] Review of the Implementation of OSCE Commitments in the Economic and Environmental Dimension, Statement to Agenda Point OSCE document EF.DEL/12/04, 4 June 2004.
[209] *Restatement (Third) Foreign Relations Law of the US*, s. 202, Comment f,
[210] Lauterpacht, *op cit*, p. 234
[211] Pauly, in: Diner and Stolleis (eds), *Hans Kelsen and Carl Schmitt*, 45, pp. 46–7.
[212] Verhoeven, *op cit*, pp. 714–15.

accepts the relativity of recognition as inherent in the constitutive position, nevertheless refers to it as a 'glaring anomaly',[213] a 'grotesque spectacle' casting 'grave reflection upon international law'.[214] Moreover, in his view 'it cannot be explained away … by questionable analogies to private law or to philosophical relativism.'[215] But if a central feature of the constitutive position is open to such criticism the position itself must be flawed.[216]

Aside from other objections,[217] Lauterpacht's own position is dependent on a straightforward assertion about State practice:

> … much of the available evidence points to what has here been described as the legal view of recognition. Only that view of recognition, coupled with a clear realization of its constitutive effect, permits us to introduce a stabilizing principle into what would otherwise be a pure exhibition of power and a negation of order …[218]

But State practice demonstrates neither acceptance of a duty to recognize,[219] nor a consistent constitutive view of recognition. Moreover, Lauterpacht's argument, which in the passage cited was plainly *de lege ferenda*,[220] assumes the insufficiency of the declaratory view of recognition.

4.2.2 The declaratory theory

According to the declaratory theory, recognition of a new State is a political act, which is, in principle, independent of the existence of the new State as a subject of international law.[221] In Charpentier's terminology, statehood is opposable to non-recognizing States.[222] This position has

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213 Lauterpacht, *op cit*,, p. 67.
214 ibid, p.78.
215 ibid.
216 Green *op cit* p. 34.
217 Lauterpacht, *op cit*, pp.74–5, pp.191–2, pp.52–4.
218 ibid, pp.77–8.
219 (1951) 4 *ILQ* pp.387–8
220 Lauterpacht, *op cit*, p.78.
221 Chen, *op cit*,
222 Charpentier, *op cit*, pp.15–68, pp.160–7.

the merit of avoiding the logical and practical difficulties involved in constitutive theory, while still accepting a role for recognition as a matter of practice. It has the further, essential, merit of consistency with that practice, and it is supported by a substantial body of opinion. The following passage of Taft CJ's in the *Tinoco Arbitration* is frequently cited as the classic statement of the declaratory position:

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by enquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned … Such non-recognition for any reason … cannot outweigh the evidence disclosed … as to the *de facto* character of Tinoco's government, according to the standard set by international law.[223]

But this was a case of recognition of governments, and it is arguable that while recognition of governments may be declaratory in effect, recognition of new States goes further. Where an authority in fact exercises governmental functions within an area already accepted as a State, there seems to be nothing for recognition to constitute, at least at the level of international personality. But the establishment of a new State involves the demarcation of a certain area as a 'State-area' for the purposes of international relations, with consequent legal effects. In such a

[223] Moore *Hopkins Claim* (1927) 21 *AJ* 160, p.166. The matter was put even more strongly by Commissioner Wadsworth in *Cuculla v Mexico*, Mex-US Cl Com (1868) ; *Wulfsohn v RSFSR*, 138 NE 24, 25 (1923); app diss 266 US 580 (1924):

case it might be argued that recognition, at least in the non-formal sense of 'treating like a State', is central rather than peripheral to international capacity.[224]

But neither legal opinion nor State practice draws from this the conclusion that the several acts of recognition by other States constitute the entity being recognized or are conclusive as to its status. As a German–Polish Mixed Arbitral Tribunal stated in reference to the existence of the new State of Poland: '… the recognition of a State is not constitutive but merely declaratory. The State exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the States from which it emanates.'[225] Less well known in this context is the Report of the Commission of Jurists on the Åland Islands. The passage of the Report dealing with the independence of Finland enumerated the various recognitions given to Finland, but went on to say that:

these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State … The same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times … In addition to these facts which bear upon the external relations of Finland, the very abnormal character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign State did not exist.[226]

Evidently the Commission, while accepting the legal value of recognition as evidence, were not prepared to accept it as conclusive, but instead referred to the 'conditions required for the formation of a sovereign State'.[227]

[224] Le Normand, p.268, cited by Chen, *op cit* p.14.
[225] *Deutsch Continental Gas Gesellschaft v Polish State* (1929) 5 ILR 11, p.13.
[226] LNOJ, Sp Supp 4 (1920), p.8.
[227] LN Council Doc B7: 21/68/106 (1921), p.23.

On this matter the Arbitration Commission established to advise the European Peace Conference on Yugoslavia was categorical. In its first opinion, on 29 November 1991, the Commission stated that 'the effects of recognition by other States are purely declaratory.'[228] This was reiterated in further opinions.[229] It has, however, been suggested that the actual practice of States respecting the dissolution of Yugoslavia may have been constitutive in effect; indeed debate continues to rage between those who attribute the troubles of Yugoslavia to premature recognition and those who blame European governments for not intervening earlier and more decisively.[230] It is difficult to reach a conclusion on this without examining in detail the bases for some of the particular claims to statehood. But overall the international approach to the dissolution of Yugoslavia, unhappy as it has been, does not support the constitutive theory,[231] still less demand that we adopt it as a general matter. The International Court in the *Bosnian Genocide case,* though not addressing the matter of recognition directly,[232] may be seen, by implication, to have favoured the view that statehood and its attendant rights exist independently of the will of other States. The Federal Republic of Yugoslavia (FRY) had argued that the Court was not competent to adjudicate questions under the Genocide Convention, because the FRY and Bosnia-Herzegovina had not recognized one another at the time proceedings were instituted. The Court dismissed this argument on the basis that (as mutual recognition had subsequently been given in the Dayton Accord)[233] any defect was merely procedural and could be repaired simply by refiling the claim, which would relate back to alleged acts of genocide occurring prior to

[228] Opinion 1, Badinter Commission, 29 November 1991, 92 ILR p.165.
[229] Opinions 8 and 10: 92 ILR p.201 (4 July 1992);
[230] Crawford, *Selected Essays,* pp.213–21.
[231] Thus Macedonia was not recognized for some years (due to political problems with Greece), yet it was treated by all as a State. Serbia and Montenegro was not recognized as the continuation of the old SFRY, and most States had limited diplomatic relations with it as a result. But its statehood was never in doubt.
[232] ICJ Rep 1996 p 595, 613.
[233] General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM75.

1995.[234] The result is consonant with the declaratory view: the rights of Bosnia-Herzegovina (under the Genocide Convention or otherwise) were opposable to the FRY from the time the former became a State, whether or not the FRY had yet recognized it as such.

Among writers the declaratory doctrine, with differences in emphasis, predominates. Brownlie states the position succinctly: 'Recognition, *as a public act of state,* is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if an entity bears the marks of statehood, other states put themselves at risk legally, if they ignore the basic obligations of state relations.'[235]

Moreover, States do not in practice regard unrecognized States as exempt from international law;[236] indeed failure to comply with international law is sometimes cited as a justification for non-recognition. And they do in fact carry on relations, often substantial, with such States, extending even to joint membership of inter-State organizations such as the United Nations.[237] Recognition is usually intended as an act, if not of political approval, at least of political accommodation.[238]

4.3 The Legal Framework for Recognition of Statehood in International Law

There are two ways of looking at the definition of statehood: the declarative and constitutive approaches. The declarative theory of statehood encompasses the principle that if an entity fulfils certain criteria, it is a state, regardless of whether or not other states recognize it. These criteria are set out in the international, Regional as well as domestic instruments for recognition of states.

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[234] ICJ Rep 1996 p 595, 612–13.
[235] O'Connell, *International Law* (2nd edn), vol I, pp.128–34; Fawcett, *The Law of Nations* (2nd edn), 49, p55.
[236] The Protocol of the London Conference, 19 February 1831.
[237] Hackworth, 1 *Digest*, pp.327–63.
[238] Lachs (1959) 35 *BY* 252, 259.

4.3.1 International Instruments for State Recognition

The Montevideo Convention on the Rights and Duties of 1933 has been the basic instrument which clearly provides criteria upon which other states may use to recognize a new state. It requires a new state to have the following characteristics before it can qualify to be recognized by other states:

1. A permanent population;
2. A defined territory;
3. A government; and
4. The capacity to enter into relations with other states.

The other approach to statehood is the constitutive approach, which defines a state with reference to whether or not it has been recognized by other states. Some legal commentators suggest that a combination of both of these parameters can result in an entity becoming a state. This makes sense, considering that a Montevideo 'tick-box' approach would delegitimize many present-day states. Current practice suggests that recognition 'cures' states of any deficiencies in fulfilling the Montevideo criteria. For example Palestine signed letters of accession to 15 international treaties and conventions, including the ICCPR and the Geneva Conventions, on 2 April 2014. This was described in the accompanying press release of the Negotiation Affairs Department of the Palestinian Liberation Organization (PLO) as 'an ability which Palestine gained following its upgrade to observer state status at the UN General Assembly in November 2012.'

Bearing in mind this context, it can be appropriately described as a 'highly significant development for the recognition of Palestine as a state' that the accession of the state of Palestine to the Geneva Conventions and Protocols was formally accepted by Switzerland on 10 April 2014. To date, Palestine has been recognized as a state by more than 130 countries, and as mentioned above, in November 2012 was given non-member observer state status by the UN General Assembly. It also fulfils at least three of the Montevideo criteria: it has a permanent population, a government and the capacity to enter into relations with other states. While Palestine's government is not in full effective control over the entirety of its territory, this is not a specific requirement of the Montevideo criteria. Furthermore, other states such as the Democratic Republic of Congo have fulfilled the criteria in spite of not having effective control over their territory at the time of recognition, on the basis that they possess the right to self-determination.

By applying the accepted constitutive and declarative approaches to statehood recognition, it appears uncontroversial to conclude that Palestine has the requisite features and widespread support to be legitimately recognized as a state. Palestinian statehood recognition gives Palestine the significant power to sign and ratify the Rome Statute of the ICC. The International Court of Justice has held in the Genocide Convention case that it adheres to the declaratory view, in the sense that the failure to maintain effective control over territory does not extinguish the legal entity in the eyes of the United Nations[239]. It has also held in the South West Africa cases that the state as an entity with rights and obligations does not cease to exist. This opinion on the declaratory theory was also supported by the Arbitration Commission of the European

[239] Bosn. & Herz. v. Serb. & Mont. Prelim. Objs., 1996 I.C.J. Reps. 595 (July 11).

Communities Conference on Yugoslavia, chaired by Robert Badinter, discussing the independence and status of states of the successor to the S.F.R. Yugoslavia.[240]

Several international legal instruments have been adopted enshrining specific and separate rights for members of minorities and therefore based on the explicit recognition of their cultural identity. Those instruments vary in scope and, for the time being at least, most are European conventions. They include the OSCE's 1990 Copenhagen Document, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the 1992 European Charter for Regional or Minority Languages, the Copenhagen Criteria laid down by the EU in 1993 as membership conditions for new candidates from Eastern Europe and requiring the protection of minorities, or again the Framework Convention for the Protection of National Minorities of 2 February 1995.

Similarly, the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), created a legal fiction that anthropomorphized incorporated associations like NGOs, Political Action Committees (PACs), Super PACs, and corporations in persons. Establishing a legal personality equivalent to the control group without accounting for divergent characteristics has already presented a cautionary tale about the unintended consequences of introducing new funding sources and new interest groups into an already complicated web of interests. Any similar personification of incorporated entities in the international community must necessarily consider how that personification will affect the political culture of the existing international institutions[241]. However, as a restatement of

[240] Conference on Yugoslavia Arbitration Commission, Opinion Nos. 1, 8, 10 31 I.L.M. 1488, 1494, 1521-1523, 1525-1526 (1992)

[241] Harris, D.J. (ed) 2004 "Cases and Materials on International Law" 6th Ed., Sweet and Maxwell, London, p. 99.

customary international law, the Montevideo Convention merely codified existing legal norms and its principles and therefore does not apply merely to the signatories, but to all subjects of international law as a whole.[242]

Therefore, in more recent international practice, several additional criteria have been identified as prerequisites for statehood. The recognition policy of many states and the positions taken by contemporary jurists indicate that the traditional criteria for statehood are being extended to include additional elements. Thus, for example, the recognition policy of the European Community (now the European Union) with respect to the former republics of Yugoslavia and the Soviet Union conditioned recognition not only on the satisfaction of the traditional criteria for statehood, but on the fulfillment of a long list of other requirements. Indeed, it has become accepted to investigate several other features of a putative state before considering its eligibility for recognition.

The additional contemporary criteria for statehood require that an entity seeking recognition demonstrate that it has not been established as the result of illegality, that it is willing and able to abide by international law, that it constitutes a viable entity, and that its claim to statehood is compatible with the right to self-determination.

4.3.2 Regional instruments on State Recognition

A governmental structure that was exercising effective control of a state, irrespective of the means it used to seize power, would enjoy legal standing in international fora. Likewise, the democratic legitimacy of the government was not a prerequisite for the recognition of a state, nor

[242] Lauterpacht, H. (2012). Recognition in International Law. Cambridge University Press, London, p. 419.

was it a condition for participation in an international organization, whether of universal (UN) or regional character (European Community, Organization of African Unity).

The European Union, in the principal statement of its Badinter Committee, follows the Montevideo Convention in its definition of a state: by having a territory, a population, and a political authority. The committee also found that the existence of states was a question of fact, while the recognition by other states was purely declaratory and not a determinative factor of statehood. Switzerland, although not a member of the European Union, adheres to the same principle, stating that "neither a political unit needs to be recognized to become a state, nor does a state have the obligation to recognize another one. At the same time, neither recognition is enough to create a state, nor does its absence abolish it."[243]

The Pact of the League of Arab States went even further by imposing an obligation to recognize a state and hence its government, whether or not it was legitimate. According to [244]that instrument: “every member state of the League shall respect the form of government obtaining in the other states of the League, and shall recognize the form of government obtaining as one of the rights of those states, and shall pledge itself not to take action tending to change that form.”

This approach has also been upheld by the International Court of Justice (ICJ) in the *Western Sahara* Advisory Opinion of 1975, as well as in the 1986 case, *Nicaragua v. United States*. In *Western Sahara,* the ICJ emphasized that: “no rule of international law, in the view of the Court, requires the structure of a state to follow any particular pattern, as is evident from the diversity of the forms of state found in the world today”. UN Secretary-General Boutros Boutros-Ghali

[243] Switzerland's Ministry of Foreign Affairs, DFA, Directorate of International Law: "Recognition of States and Governments," 2005

[244] Article 8 of the Pact of the League of Arab States

stressed that democratic legitimacy of a regime and respect for democratic principles are a prerequisite for active participation in the organs of an international organization[245].

4.3.3 Domestic Instruments on State Recognition

The 1999 Constitution, as domestic instrument also provides for recognition and enforcement of international treaties to which Nigeria is a party[246]. This signifies that Nigeria as a state recognizes the existence of states that are members to United Nations, Commonwealths of Nations and such other countries with which it enters any multi-lateral or by-lateral agreements.

4.4 An Overview of the Practice of State Recognition in International Law

In international law the practice of State Recognition varies from state to state. On this note, selected instant variations are discussed below:

i. The Republic of China (ROC)

According to the Montevideo Convention of 1933, the most cited source for the definition of statehood, a state must possess a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. The ROC meets all these criteria as it possesses a government exercising effective jurisdiction over well-defined territories with over 23 million permanent residents and a full fledged foreign ministry.

[245] UN Doc. A/51/761 (1996) ;see also, Art. 7 Treaty on the European Union; Art. 25 African Charter on Democracy, Elections and Governance; Art. 45 ECOWAS Protocol on Democracy and Good Governance.
[246] Section 12 of the 1999 Constitution of the Federal Republic of Nigeria, 2011 as amended.

The position of the Republic of China had been that it was a *de jure* sovereign state. "Republic of China," according to the ROC government's definition, extended to both mainland China (Including Hong Kong and Macau) and the island of Taiwan.[247] Because of anti-communist sentiment at the start of the Cold War, the Republic of China was initially recognized as the sole legitimate government of China by the United Nations and most Western nations.

The United States of America is one of the main allies of Taiwan and, since the Taiwan Relations Act passed in 1979, the United States has sold arms and provided military training to the Republic of China Armed Forces.[248] This situation continues to be a point of contention for China, which considers US involvement disruptive to the stability of the region. In January 2010, the Obama administration announced its intention to sell $6.4 billion worth of military hardware to Taiwan. As a consequence, China threatened the United States with economic sanctions and warned that their cooperation on international and regional issues could suffer.[249] The official position of the United States is that China is expected to "use no force or threaten to use force against Taiwan" and that Taiwan is to "exercise prudence in managing all aspects of Cross-Strait relations." Both are to refrain from performing actions or espousing statements "that would unilaterally alter Taiwan's status."[250] The United States maintains the American Institute in Taiwan.

The United States, Canada, the United Kingdom, Republic of India, Pakistan and Japan have formally adopted the One China policy, under which the People's Republic of China is

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[247] "The Official Position of the Republic of China (Taiwan) on China's Passing of the Anti-secession (Anti-Separation) Law" (Press release). Mainland Affairs Council, ROC Executive Yuan. 29 March 2005.

[248] Stephen J. (16 April 1999), "The Taiwan Relations Act After 20 Years: Keys to Past and Future Success", The Heritage Foundation, Retrieved 19 July 2009.

[249] "Fact Sheet". Canadian Trade Office in Taipei. Retrieved 6 October 2014.

[250] Shirley A. K. and Wayne M. M. (4 January 2013). "U.S.-Taiwan Relationship: Overview of Policy Issues" (PDF). Congressional Research Service. p. 4.

theoretically the sole legitimate government of China. However, the United States and Japan acknowledge rather than recognize the PRC position that Taiwan is part of China. In the case of Canada[251] and the UK, bilateral written agreements state that the two respective parties take note of Beijing's position but do not use the word support. The UK government position that "the future of Taiwan be decided peacefully by the peoples of both sides of the Strait" has been stated several times. Despite the PRC claim that the United States opposes Taiwanese independence, the United States takes advantage of the subtle difference between "oppose" and "does not support". In fact, a substantial majority of the statements Washington has made says that it "does not support Taiwan independence" instead of saying that it "opposes" independence. Thus, the US currently does not take a position on the political outcome, except for one explicit condition that there is a peaceful resolution to the differences between the two sides of the Taiwan Strait.[252] The United States bi-partisan position is that it doesn't recognize the PRC's claim over Taiwan, and considers Taiwan's status as unsettled.[253] All of this ambiguity has resulted in the United States constantly walking on a diplomatic tightrope with regard to cross strait relations.

The ROC maintains formal diplomatic relations with 21 UN member states, mostly in Central America and Africa. Additionally, the Holy See also recognizes the ROC, a largely non-Christian/Catholic state, due partly to the Catholic Church's traditional opposition to communism, and also to protest what it sees as the PRC's suppression of the Catholic faith in mainland China. However, Vatican diplomats were engaged in talks with PRC politicians at the time of Pope John Paul II's death, with a view towards improving relations between the two countries. When asked, one Vatican diplomat suggested that relations with Taiwan might prove

[251] Spencer, R. (16 May 2005). "Vatican ready to sacrifice Taiwan for China". London: Daily Telegraph.

[252] Shirley A. K. and Wayne M. M. op cit p. 4.

[253] "The Vatican's Cold Shoulder". Wall Street Journal. 20 December 2007. Retrieved 14 January 2008.

"expendable" should PRC be willing to engage in positive diplomatic relations with the Holy See.[254] Under Pope Benedict XVI the Vatican and PRC have shown greater interest in establishing ties, including the appointment of pro-Vatican bishops and the Pope canceling a planned visit from the Dalai Lama.[255]

In March 2004, Dominica switched recognition to the PRC in exchange for a large aid package.[256] However, in late 2004, Vanuatu briefly switched recognition from Beijing to Taipei,[257] followed by a return to its recognition of Beijing.[258] On 20 January 2005, Grenada switched its recognition from Taipei to Beijing, in return for millions in aid (US$1,500 for every Grenadian).[259]

On 26 October 2005, Senegal broke off relations with the Republic of China and established diplomatic contacts with Beijing.[260] The following year, on 5 August 2006, Taipei ended relations with Chad when Chad established relations with Beijing.[261] On 7 June 2007, Costa Rica broke off diplomatic ties with the Republic of China in favour of the People's Republic of China.[262] In January 2008 Malawi's foreign minister reported Malawi decided to cut diplomatic recognition of the Republic of China and recognize the People's Republic of China.[263]

The latest country to break off formal diplomatic relations with Taiwan was Gambia. On 4 November 2013, the Government of Gambia announced its break up with Taiwan, but the Foreign Affairs Ministry of China denied any ties with this political movement, adding that they

[254] Painter, J. (30 March 2004). "Taiwan's 'Caribbean headache'". BBC.
[255] Vurobaravu, F. (24 November 2004). "Parliament debates Vanuatu-Taiwan deal". Vanuatu Daily Post.
[256] "Vanuatu gov. reshuffled after Taiwan controversy". China Radio International. 11 December 2004.
[257] "Grenada picks China over Taiwan". BBC. 21 January 2005.
[258] Su, J. (15 May 2005). "Nauru Switches its Allegiance Back to Taiwan from China". Taipei Times.
[259] "Senegal picks China over Taiwan". BBC. 26 October 2005.
[260] "Taiwan re-establishes diplomatic relations with St. Lucia". International Herald Tribune. 30 August 2007.
[261] "Taiwan loses Costa Rica's support". BBC News. 7 June 2007. Retrieved 7 June 2007.
[262] "Gambia breaks relations with surprised Taiwan; China says it wasn't in contact with government". Washington Post. 14 November 2013.

[263] Klapper, B. (23 May 2006). "Taiwan fails in 10th bid for WHO observer status". Associated Press.

weren't considering on building a relation with this African nation.[264] Many political leaders who have maintained some form of One-China Policy have committed slips of the tongue in referring to Taiwan as a country or as the Republic of China.

United States presidents Ronald Reagan and George W. Bush have been known to have referred to Taiwan as a country during their terms of office. Although near the end of his term as U.S. Secretary of State, Colin Powell said that Taiwan is not a state, he referred to Taiwan as the Republic of China twice during a testimony to the U.S. Senate Foreign Relations Committee on 9 March 2001.[265] In the People's Republic of China Premier Zhu Rongji's farewell speech to the National People's Congress, Zhu accidentally referred to Mainland China and Taiwan as two countries.[266]

There are also those from the PRC who informally refer to Taiwan as a country.[267] South Africa delegates once referred to Taiwan as the "Republic of Taiwan" during Lee Teng-hui's term as President of the ROC.[268] In 2002, Michael Bloomberg, the mayor of New York City, referred to Taiwan as a country.[269] The former US Secretary of Defense Donald Rumsfeld stated in a local Chinese newspaper in California in July 2005 that Taiwan is "a sovereign nation". The People's Republic of China discovered the statement about three months after it was made. In a controversial speech on 4 February 2006, Japanese Foreign Minister Taro Aso called Taiwan a country with very high education levels because of previous Japanese colonial rule over the island.[270] One month later, he told a Japanese parliamentary committee that Taiwan's democracy is considerably matured and liberal economics is deeply ingrained, so it is a law-abiding country.

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[264] Yeh, L. (12 July 2002). "Taiwan's Lions Club gets another temporary name". Taipei Times. p. 3.

[265] "US scrambles as Powell learns the art of 'diplospeak'". Agence France-Presse. 15 March 2001.
[266] "China and Taiwan 'two countries': Zhu". Taipei Times. 6 March 2003. p. 3.
[267] Gluck, C. (17 August 2005). "Taiwan struggles with Chinese dissidents". BBC.
[268] Su Tseng-chang (3 June 1994). DPP, Archived from the original on 23 February 2006. Retrieved 16 July 2006.
[269] "NY mayor stands up for Taiwan". Taipei Times. 2 May 2002.
[270] "Good schools due to Japan: Aso". Taipei Times. 6 February 2006. p. 2.

In various ways, it is a country that shares a sense of values with Japan." At the same time, he admitted that "I know there will be a problem with calling [Taiwan] a country".[271]Later, the Japanese Foreign Ministry tried to downplay or reinterpret his remarks.

In February 2007, the Royal Grenada Police Band played the National Anthem of the Republic of China in an inauguration of the reconstructed St George's Queen's Park Stadium funded by the PRC. Grenada had broken off diplomatic relations with Taiwan just two years prior in favor of the PRC.[272]

When the Kuomintang visited Mainland China in 2005, the government-controlled PRC media called this event a "visit," and called the KMT one of "Taiwan's political parties" even though the Kuomintang's full name remains the "Chinese Nationalist Party." Interestingly in Mainland China, there is a legal party called the Revolutionary Committee of the Kuomintang that is officially one of the nine "consultative parties," according to the PRC's Chinese People's Political Consultative Conference. On the Foreign Missions page of the Saudi Arabian Ministry of Foreign Affairs for China, the embassy of the People's Republic of China was referred to as the 'Republic of China'.[273]

On 24 October 2006, Dr. Roger C. S. Lin led a group of Taiwanese residents, including members of the Taiwan Nation Party, to file a Complaint for Declaratory Relief in the United States District Court for the District of Columbia. According to their lawyer, Mr. Charles Camp, "the Complaint asks the Court to declare whether the Taiwanese plaintiffs, including members of the Taiwan Nation Party, have certain rights under the United States Constitution and other US laws".[274] Their central argument is that, following Japanese renunciation of all rights and

[271] "Japan's Aso calls Taiwan a 'country'". Taipei Times. 10 March 2006. p. 1.
[272] "Grenada investigates anthem gaffe". *BBC News*. 4 February 2007.
[273] "China". Mofa.gov.sa. Retrieved 6 December 2011.
[274] "Law Offices of Charles H_ Camp News". Retrieved 28 January 2007.

claims to Taiwan, Taiwan came under U.S. jurisdiction based on it being the principal occupying power as designated in the Treaty of Peace with Japan and remains so to this day. This case was opposed by the United States government. The District Court agreed with United States government on 18 March 2008 and ruled that the case presents a political question; as such, the court concluded that it had no jurisdiction to hear the matter and dismissed the complaint.[275] This decision has been appealed by plaintiffs[276] and the appeals court unanimously upheld the district court ruling.[277] The PRC and Taiwan have agreed to increase cooperation in the area of law enforcement. Mainland police will begin staffing a liaison office in Taipei in 2010.[278]

ii. Abkhazia and South Ossetia

Abkhazia and South Ossetia are two partially recognized breakaway republics in the Caucasus, claiming independence from Georgia. Following the 2008 South Ossetia War between Russia and Georgia they were recognized by 6 and 5 UN member states respectively, though Vanuatu subsequently withdrew its recognition of Abkhazia in 2013 as did Tuvalu of both in 2014. The two regions recognize each other, and also have some recognition from other non-UN member states. Georgia and the majority of countries of the world do not recognize them as independent. Georgia officially considers them as sovereign territory of the Georgian state under Russian military occupation. After hearing the aforementioned appeals from both the Abkhazian and South Ossetian leadership, on 25 August 2008, the Federation Council and State Duma passed motions calling upon President Dmitry Medvedev to recognize the independence of both states and establish diplomatic relations. On 26 August 2008, President Medvedev signed

[275] ibid
[276] "Civil Action No. 2006-1825 LIN et al. v. UNITED STATES OF AMERICA". Retrieved 16 April 2008.
[277] "USCA Court case Statement of Facts". Retrieved 1 January 2009.
[278] "Roger Lin v. United States of America". Retrieved 5 April 2014.

decrees recognizing the independence of Abkhazia and South Ossetia as sovereign states, and made the following statement:

> A decision needs to be taken based on the situation on the ground. Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence.

iii. Kosovo's Declaration of Independence

The Assembly of Kosovo, under temporary administration of the United Nations (UNMIK) since 1999, unilaterally declared independence as the "Republic of Kosovo" on 17 February 2008. The Republic of Kosovo was instantly recognized by the United States and the EU-3 and now has been recognized by 108 United Nations member states. Kosovo's declaration of independence on 17 February 2008 and its divided international acceptance prompted speculation that there could be implications for the frozen South Caucasus situation.

iv. The Newly Independent State of South Sudan

It would be remiss of us not to note the birth of South Sudan as the world's newest State. South Sudan gained independence from the Republic of Sudan[279] and was admitted to the United Nations. Independence was the result of a referendum held earlier this year in which 99% of the South Sudanese population voted for independence. South Sudan is the second African

[279] 9 July 2011

State after Eritrea to split from its parent state after such a referendum which in both cases has followed a lengthy conflict.

v. Other Countries struggling to be Granted State Recognition under Current International Legal Order

There are many places in the world which believe that they should be granted statehood. Somaliland, for example, has a stable, legitimate and democratically elected government, impressive economic development, a constitution and government institutions and even issues its own passports and visas. It declared its independence from Somalia in 1991, but despite the fact that Somalia has been operating in a state of anarchy since then, no state has recognized Somaliland as a state under international law. Other territories that are fighting for or negotiating for their independence include Kosovo and Western Sahara. However, the Palestinian Territories present one of the most complex and longstanding struggles for self-determination.

Israel is a recognized state and has UN membership, but at present Palestine officially remains an occupied, stateless nation. It is however in a unique position within the UN. While not a member state, it has permanent observer status, but unlike other observers it has been allowed six places for delegates at the General Assembly (usually observers have only two). In addition, despite membership to UNESCO usually being reserved for member states only, Palestine has had its application for membership in principle to UNESCO approved. And, as of December 2011, 128 of the 193 UN member states have formally recognized the 'State of Palestine'. In September 2011 Palestine made an application to become a member state of the UN, but membership requires a two thirds majority with no veto from any of the permanent five members.

As one of the permanent members, the US's political alignment with Israel means it is expected to oppose the bid. Israel also opposes the application, and although European states sympathizes with the Palestinians, it is thought that they share the US view that a successful bid could harm US-led Israeli-Palestinian peace talks and will do little to quell the violence, or change the current structures of occupation.

Group movements for self-determination may cross international borders, as with the calls for an independent Kurdistan made up of land from Iraq, Turkey, Syria and Iran. Movements may be also contained within the borders of one state, like calls for the independence of Scotland. They may be violent struggles or may consist entirely of non-violent political action as in Scotland.[280]

Often, only the unwillingness of certain powerful states to recognize their claims keeps these territories and groups from statehood. These decisions often reflect geopolitical realities, rather than the claimant's actual argument or the state characteristics that it displays.

'Secession' is the result of a successful movement for national self-determination that typically claims territory or ethnic integrity to fracture an existing sovereign state.[281] This results in a newly independent state – as illustrated recently by South Sudan's newfound independence.[282] The right to self-determination under international law is outlined in the UN Charter Article 1(2).[283] This position of prominence demonstrates a conscious shift within the international legal order towards individuals as the focal point of international law[284].

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[280] Sterio M. (2011) 'A Grotian Moment: Changes in the Legal Theory of Statehood', *39 Denver Journal of International Law and Policy*, Vol. 209, pp.209-237.
[281] Jacquin, J. *Nationalism and Secession in the Horn of Africa: A Critique of Ethnic Interpretation*, London University Press, London, 1999, p16.
[282] Scott K. (2014) 'South Sudan and the right to secede: How to do better', *South Sudan News Agency* (January 13 2014). accessed 28 January 2014.
[283] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 1(2).
[284] French D. *Statehood and Self-determination: Reconciling Tradition and Modernity in International Law*, Cambridge University Press, Cambridge, 2013, p.74

4.5 Issues and Challenges of State Recognition in International Law

Against the above backdrop, issues were raised such as whether before anew state can be recognized it has to fulfill the set criteria as contained in the Montevideo convention, rules of customary international law or states practice. Other issues such as the adoption of constitutive and declarative approaches to statehood recognition were raised. All these issues are discussed but it is the view of this current paper that they has done nothing but confuse the criteria, that it is mistaken to categorize recognition as either declaratory or constitutive in accordance with some general theory. According to Brownlie:

> in the case of 'recognition', theory 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, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis.[285]

Some continental writers have tended to regard recognition as combining both declaratory and constitutive elements.[286] One can sympathize with these views, but at a fundamental level a choice has to be made. The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State—to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law. The answer must be no, and the categorical constitutive position, which implies a different answer, is unacceptable.[287]

But this does not mean that recognition does not have important legal and political effects.[115] Recognition is an institution of State practice that can resolve uncertainties as to status

[285] Brownlie op cit p.27
[286] ibid
[287] ibid

and allow for new situations to be regularized. That an entity is recognized as a State is evidence of its status; where recognition is general, it may be practically conclusive. States, in the forum of the United Nations or elsewhere, may make declarations as to status or 'recognize' entities the status of which is doubtful: depending on the degree of unanimity and other factors this may be evidence of a compelling kind.

In some situations, the term 'recognition' may also be used to describe acts that are properly speaking constitutive of a particular State; for example, a multilateral treaty establishing a new State will at the same time extend the signatories' recognition of that State. But the constitutive acts here are those involving the establishment of the State, the stipulation of its constitution, the definition of its borders, etc. Collective recognition is ancillary and is not a substitute for action by the competent authorities.[288]

[288] Ibid, p.28

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

This thesis deals with an analysis of the concept of state recognition in International Law. It was examined in the like manner and was aimed at making an analysis on the basis, nature and scope of state recognition in International Law.

The research work deals with the history of the early theories, as well as, the modern approach of state recognition. It was aimed at showing the advantages, disadvantages and to some extent, the defects of the olden rules and theories of state recognition in International Law, or for the purpose of shaping the effective structure of the law, which is the primary objective of every research work.

Therefore, the first chapter gives the general overview of the work by supplying the aim and objectives of the research as well as the scope and limits of the work. Some of the resounding literatures that were used are also reviewed therein for their profound importance and contribution to the research work.

The second chapter tackles the definition of key terms and clarification of concepts. It deals with the concept of state recognition in International Law.

The third chapter highlights the early principles and theories of state recognition in International Law. In that course, writing of international and domestic authors of international law that expresses their views and opinions on the concept of state recognition has been acknowledged and cases, both foreign and domestic were

considered. Criticisms, advantages as well as disadvantages of these theories were also brought to light.

The forth chapter of the dissertation deals with the modern principles and theories of state recognition in International Law. This aimed at bringing out the reforms that were attempted to cure the defects caused by the olden principles theories. Under this segment, issues and challenges of modern process of state recognition in International Law has been discussed. Some entities and states that were currently recognized by other states were brought into light to illustrate the working and application of the modern process of state recognition in International law.

Finally, the last chapter is a general conclusion under which major aspects of the study were re-appraised. Findings and recommendations for reforming, enhancing and developing, as well as shaping the image of the laws of state recognition were made.

5.2 Findings:

This dissertation makes the following findings:

i. It has been found that in more recent international practice, several additional criteria have been identified as prerequisites for statehood. The recognition policy of many states and the positions taken by contemporary jurists indicate that the traditional criteria for statehood are being extended to include additional elements. Thus, for example, the recognition policy of the European Community (now the European Union) with respect to the former republics of Yugoslavia and the Soviet Union conditioned recognition not only on the

satisfaction of the traditional criteria for statehood, but on the fulfillment of a long list of other requirements. Indeed, it has become accepted to investigate several other features of a putative state before considering its eligibility for recognition.

ii. The modern the theories on recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis. The modern character of recognition has done nothing but confuse the issues, that it is mistaken to categorize recognition as either declaratory or constitutive in accordance with some general theory.

iii. Under the International Law, there is no specific procedure for the constitution of a new state; its recognition is a political liberty act, oriented mainly by the country's own political goals. The fact that some countries deny to recognize the newborn state means only that such countries do not want to maintain relations with the new state i.e. it is an internal policy issue.

5.3 Recommendations:

Based on the findings made above, the following recommendations were made:

i. It has been recommended that although the early principle of state recognition under international law is restrictive compared with the modern process which is more of political than legal both in its character and application, the early principle should not be discarded entirely but it should be applied with some modifications, as the modern process ended up in confusing the modes and mechanisms of state recognition that enhancing it. For instance, apart from conditions to be fulfilled under the early

principle, i.e. population, defined territory, government and maintaining international relations with other states, issues encompassed by the current practice should be included.

ii. It has further been recommended that for the international legal order to be respected, the recognition of a newborn state should only occur with the consent of its territorial state, as it happened in East Timor and South Sudan cases; the international law must not support separatist movements against a legitimately established Government; and the modern theory of state recognition under international law should clearly distinguish between declaratory and constitutive recognition.

iii. International actors would be wise to remember the warning in the preamble of the UDHR that people will turn to rebellion against tyranny and oppression unless they are protected by the rule of law. They should therefore, make every effort to promote the full respect of the right of peoples to self-determination by national governments. In order to avoid the emergence of legitimate secessionist claims, states must recognize legitimate grievances by their national minorities, and address them appropriately, including by providing some form of political autonomy, if appropriate, but certainly by ensuring political participation, as well as social, economic and cultural protections.

Based on the discussions made in the proceeding chapters, we were able to come to the conclusion that the concept of state recognition under International Law has proved conceptually one of the most difficult and problematic area of International Law. We also have realized that much of the modern academic discussions and most of the case laws from different counties do not hold the same view in respect of state recognition. In this

regard, lawyers and judges were to some extent always confused whenever it comes to the issue state recognition under International Law, which leads to most of the judges declining jurisdiction whenever it comes to the issue state recognition under International Law. This calls for a review of the concept and its applicability which is more of political than legal in most of its perspectives.

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