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RECOGNITION AS A *DE FACTO* REQUIREMENT FOR STATEHOOD

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Abstract
Recognition as one of the controversial topics in international law has not been compromised yet. The reason that makes the issue problematic is based on the differences of states' political interests. Despite legal requirements simply mentioned in the Montevideo Convention for statehood, recognition has been still used as a political weapon by powerful states to eliminate others. In this sense, it will be questioned how much recognition is a de facto element for statehood.

Keywords: Recognition, Statehood, Declaratory theory, Constitutive theory

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Introduction

States as the main subjects of International community have been in relation with one another both economically and politically throughout history. And this situation has led to the emergence of International law for the regulation of those relations namely international relations and the achievement of peace. In this sense, states are 'international persons'[1] and they are entitled the same amount of legal 'capacities and functions' without taking into account their 'size or power'.[2] Additionally, a community in order to possess 'the status of a state', which is known as statehood,[3] is generally expected to be recognised by other states. The creation of states as an ongoing process can be occurred in various ways but it will be only seen as a consequence of 'diminution or disappearance of existing states' from now on.[4]It shows that creation of new states is not only the today's question and it will also be the matter of future. The question of recognition of new states will, therefore,inherently cause some debates.

The issue of recognition in international law is one of the links and also controversial points between law and politics.The reason of this controversy primarily is that law and politics, whose relations might be 'causal', 'definitional' and 'normative',[5] are interlocked one another and thus, it is hard to make a distinction between subjects and arguments that they cover. In spite of the fact that recognition of statesinvolves a legal aspect, it mainly stems from political actions of states which might show an alteration.[6] In other words, while the aim of recognition is based on political interests of states, the results of it are on legal grounds.[7] Hence, once a community become a state in international law by recognition or the other ways which will be explained ahead, it can be a possessor of rights and duties.[8]

This paper argues that "recognition" is an additional criterion displaying interests of states rather than being a *de jure* requirement for statehood. First, this paper will explain of whatstatehood and recognition are. Second, recognition of states as a *de facto* requirement will be discussed in the light of different scholars' opinionsby assessing the two theoriescalled the "constitutive" and "declaratory". Lastly, the role of recognition in terms of statehood will be analysed in the context of 'the Grotian Moment'.

I. Statehood and Recognition in International Law

[1]Malcolm D Evans, *International Law* (2nd edn, Oxford University Press 2006) 219.

[2]Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 214.

[3]Evans (n 1) 219.

[4]Shaw (n 2) 198.

[5] Michael D Bayles, *Principles of Legislation: The Uses of Political Authority* (Wayne State University Press 1978) 137.

[6] Leonard M Hammer, *AFaucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Ashgate Publishing Limited 2007) 31.

[7]Peter Malanczuk, *Akehurst's Modern Introduction to International Law*(7th revised edn, Routledge 1997) 82.

[8]I A Shearer, *Starke's International Law* (11th edn, Butterworth & Co 1994) 117.

When a set of comparisons are made between early stage of international legal order and modern one, it is seen that a number of entities have been shown in international legal system and 'globalization' has also made a contribution to this process, yet states have kept their seats over this period as significant subjects of international law.[9]However, there is no an exact definition of 'state',[10] it is neither a real person nor a person with superior ability, 'state' means a 'jurisdiction person'.[11]In this regard, gaining a personality particularly by way of recognition has occupied a considerable place in international law so far.Even though domestic law formulated by law maker organs of states explicitly describesthe birth and the end of legal personality, international law does not have these kinds of centralised bodiesin order to determine international legal persons. Therefore, a political community meeting classical requirements for statehood may not be accepted as a state in international arena and this shows that recognition plays an important role for being a state.

A. A Brief Definition of Statehood

Prior to passing on to the question of recognition of states, identifying elements and the definition of states in international treaties and conventions would be useful, since they are the primary factors of international law.[12] First,the classical requirementsas mentioned above for statehood are determined in Article 1 of 1933 Montevideo Convention on Rights and Duties of States;

> *The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.*[13]

What 'a permanent population' as the first requirement for statehood is a group of people living in states and these states exist in order to settle relations of those people asintended.[14] It is not important that how many people live in a state,[15] it is, however, important to note that who or which groups of people are inhabitants of that state.[16] Domestic law of a state is accepted as an authority on 'nationality' in this context.[17] For instance, Vatican City is known as one of the smallest states with its population in the world.[18]

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[9]Shaw (n 2) 197.

[10]Shearer (n 8) 85.

[11]Hans Kelsen, *Principles of International Law*(Robert W Tucker ed, 2nd edn, Holt Rinehart and Winston 1966) 182.

[12]Malanczuk (n 7) 75.

[13]Montevideo Convention on Rights and Duties of States 1933, art 1.

[14]Evans (n 1) 231-32.

[15]Ibid 232.

[16]Malanczuk (n 7) 76.

[17]Ibid 76.

[18] 'Countries of the World' <http://www.worldatlas.com/aatlas/populations/ctypopls.htm#.UpCQN9Ik1SI> accessed 23 November 2013.

'A defined territory' is a requirement of being a state like having a permanent population.[19] Nonetheless, this does not mean that a defined and established border is an indispensable factor for statehood in international law.[20] Despite the fact that a state has problems with its contiguous countries with regard to boundaries of it, its 'legal personality'may not be damaged.[21] For example, Israel state, which involves in a dispute with its Arab neighbourhood as to the control of boundaries, is regarded as a state by the United Nations (UN) and several states.[22]

Thirdly, 'government' is needed for a state to effectively provide the control over its territory.[23] This factor plays a vital role not only for continuity of national legal order but also for the protection of independence of a state in international legal order as pointed out by Malanczuk.[24]

The last and the most prominent element for statehood is 'a capacity to enter into relations with other states'.[25] This is the difference between states having 'recognised capacity' and other states not governing external relations on their own, for example 'a member of a federation'.[26]

In addition to the classical requirements, there is another criterion called self-determination. It means that a state can shape its own destiny without any intervention of other states.Malanczuk argues that self-determination is a supplementary element together with recognition for statehood[27] and the UN has recognised the right of self-determination.[28]

B. Recognition of States

As a term recognition is an indicator of eagerness to have intercourse with a new state as a judicial person in international law.[29] Likewise, meeting the traditional conditions of being a state by 'a political community' is essential for statehood in the first place and after this stage, the current states are required to recognise this new state as a 'duty' in international law.[30] However, it is argued whether recognition is an arbitrary decision of states or duty for the existing states.[31]Lauterpacht, for example, claims that recognition has a constitutive character[32] which will be debated later.

[19]Evans (n 1) 232.

[20]Shaw (n 2) 199.

[21]Ibid 199.

[22]Ibid 199-200, citing Ian Brownlie,*Principles of public international law*(7th edn, Oxford University Press 2008) 71.

[23]Ibid 200.

[24]Malanczuk (n 7) 77.

[25] Shearer (n 8) 86.

[26] Ibid 86.

[27]Malanczuk (n 7) 80.

[28]Shearer (n 8) 111.

[29]Malanczuk (n 7) 83.

[30] H Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 6.

[31]Kelsen (n 11) 390.

[32]Lauterpacht (n 30).

There have been a number of points and views to be considered concerning recognition of states from early stage of international law to today in practise and theory, and to clarify the issue of recognition,it is necessary to briefly touch these points, some theories and primitive examples as to recognition.

As indicated above, the starting point of debates with regard to recognition of states is lack of a central legislature of international legal system. To put it another way,states are both directors and players of international law and there is no one state regulating international law on its own. Within this context, while a person asa subject of national law has no right to recognise or confirm others legal personality, a state is able to play an important role on others personality in international law. Furthermore, recognition of a state has not certain and single way, it may be seen in the form of implication.[33] Nevertheless, it should not be understood thata member state of an International organisation should recognise the other members or the other participants of that organisation.[34]For example, state A and state B are members of X international organisation which carry on a business in the field of import and export. The two states are free to recognise one another and they are not entailed by X international organisation for recognition. Moreover, state recognition is the fact which has an influence not only on relations between the recognising state and the new state but also on internal law of the new state.[35]

Apart from the facts and overview of state recognition, it is beneficial to look at the early period of it. The United Netherlands by declaring their independence was recognized by Spain in 1648 and this was the first example in the history of recognition.[36] Although the matter of recognition would have been encountered in practice in the middle age, those examples may stay out of recognitionsince international law had been established later on. The early examples of recognition as above cited had arisen from political interest just as present ones. Hence, the issue of state and government recognition becoming a problem have been waiting a solution in practice and theory.[37] As mentioned before, there is more than one view with regard to recognition of state.Recognition as a criterion for statehood will be analysed according to the Constitutive and Declaratory Theory in the following section.

II. Recognition in Constitutive Theory

Constitutive theory is the theory necessitating recognition as a fundamental requirement for statehood. In other words, a political community which want to be a state in international platform must be recognised by existing states. The rights and duties will be given to the new states once they are recognised.[38] This theory is based on Positivist approach that had dominated over the early period of international law.There is, however, one point that must be taken into consideration about

[33]Shaw (n 2) 462.

[34]NurullahYamali, 'What is Meant by State Recognition in International Law' Ministry of Justice of Turkey, 9. <http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf> accessed 20 November 2013.

[35]Shaw (n 2) 444.

[36]Malanczuk (n 7) 83.

[37]Hans Kelsen, 'Recognition in International Law Theoretical Observations' (1941) 35 AJIL 605

[38]Lauterpacht (n 30) 2.

recognition of state in terms of the constitutive theory: If the rights and obligations are only gained by virtue of recognition, a state not recognised by the present states may not be bound by international law and it could not be accused of such action like aggression.[39] Likewise, another controversial point in the context of the constitutive theory is that states are free to recognise a new state and some of them may recognise while others may not.[40]In this sense, 'partial personality' can be encountered as a problem.[41]

III. Recognition in Declaratory Theory

A state according to the Declaratory theory can become a subject of international law and it can acquire the rights and duties of international person when it meets the classical requirements of statehood.[42] To put it different way, some specific factual conditions rather than the consent of the existing states have the key effect on gaining international personality for a new state.[43] This theory which is based on the ground of the idea of natural law indicates that a state entirely exists as soon as it declares its existence and therefore recognition is just an affirmation for a new state. The declaratory theory is expressed in a set of international treaties. For example,article 3 of the Montevideo Convention (1933) says that "The political existence of the state is independent of recognition by the other states."[44] Besides, Charter of the Organisation of American State (A-41) also touchs on the subject by saying "The political existence of the State is independent of recognition by other States." in article 13.[45]1936 the Institut de Droit International[46] and Badinter Commission[47]lay stress on the Declaratory theory as well.The declaratory theory, therefore, has recently become more crucial.

IV. An Assessment on the Two Theories

Kelsen claims that recognition is the concept which covers two different features namely 'political act' and 'legal act'.[48]Political aspect of recognition is the result of political concerns of states and it has no legality.[49] It is, therefore, declaratory character. On the other hand, legal act of recognition asserts that state can only exist by virtue of law and hence it is constitutive

[39]Shaw (n 2) 446.

[40]Ibid 446.

[41]Ibid 446.

[42]Lauterpacht (n 30) 41.

[43]Shaw (n 2) 446.

[44]See n 13, art 3.

[45]Charter of the Organisation of American State (A-41), art 13.

[46]'Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments' (1936) 30 **AJIL**185-187

[47]'The Opinions of Badinter Arbitration Committe: A Second Breath for the Self-Determination of Peoples Opinion no 1' <http://207.57.19.226/journal/Vol3/No1/art13.html> accessed 03 December 2013.

[48]Kelsen (n 37).

[49]Ibid 605.

character.[50]Likewise, Lauterpachtargues that recognition is based on the Constitutive theory. In this sense, according to Lauterpacht, recognition is not an arbitrary decision of states, it is a legal issue.

When the two points of view are taken into account, it could be said that neither Kelsen nor Lauterpachthad definitely reached a consensus about the concept of recognition of state. While Lauterpacht is of the opinion that recognition is a matter of law, he actually asserts that if a political community meets the four classical conditions of statehood, the existing states can have a duty to recognisea new state. It is seen that the existing states firstly examine whether or not a new state fulfils the conditions and then they recognise this new state in their law.[51]As long as the classical conditions of statehood are met by a new state, this new state can be regarded as real state and recognition of this new state can be declaratory characterherein.The four main criteria are de jure requirements for statehood and if they are fully performed, the new state can declare its statehood.Otherwise, if there is any controversial point as to the new state, for example, the new state may not have effective control over its territory, therefore, recognition of this new state by the existing ones may bean evidence or reference point. In other words, if it were not for the support of the existing states, the new state cannot become an international person due to the fact that it cannot effectively control its territory.It is understood that recognition can have different significance level and according to different views. It is, therefore, not a de jure requirement.

Furthermore, despite the fact that recognition is the consequence of political concerns of states, the four classical requirements of statehood determined by the Montevideo Convention are vital factors and before meeting these criteria of statehood, recognition cannot be granted to the new states. Under these circumstances, recognition namely premature recognition is naturally not accepted and it, therefore, might be an interference in internal affairs of another state.[52]However, Bosnia-Herzegovina and Croatia are accepted as recognised states though they were unable to control their territory when they were recognised.[53] The recognition of Bosnia-Herzegovina and Croatia has shown that recognition is a kind of additional tool and it can be used in practice while the main criteria are not fulfilled.

Moreover, Kelsen maintains that the creation of states is a factual action making an effect in international community, but every "naked facts" cannot be assessed within legal framework.[54]Even though those facts have an influence on international plane, there must be legal act of them to be accepted as a legal issue. For instance, politicians or commanders as head of new states, which are not recognised yet, may enter into connection with officials of some other existing states in the name of recognition and also these relations may remain on the agenda for a long time in international community. However, unless the two parties put these relations in writing or the existing one accepts the new one as a state in this process, the relations between the two states are unable to go beyond political act.

[50]Ibid 609.

[51]Lauterpacht (n 30) 24.

[52]Shaw (n 2) 461.

[53]Yamali (n 34) 9.

[54] L Kunz, 'Critical Remarks on Lauterpacht's "Recognition in International law"'(1950)44 AJIL NO 4, 713-714

Another important point Kelsenhad underlined by his Pure Theory of Law the purpose of which is to concentrate on only law,[55]is that political or sociological facts must not be included into the matter of legal doctrine and law must be regarded as a science by itself. The theory is the main pillar of Kelsen's point of view in terms of recognition of states. Even though recognition stems from political decisions of states, it should necessarily possess legal feature in parallel with international law. In the world where the relations between subjects of international law become complex and fragile, it is essential to determine what states are and what is vital for statehood.It is seen from this point that recognition is one of complexities by its political impact.It is, thus, still *de facto* criterion for being a state.

Furthermore, in practice some international treaties mentioned above find recognition unnecessary and they explicitly stress that recognition is not a binding element for statehood. In parallel with these developments, the declaratory theory has become more popular in international arena in the context of the creation of state. For example, after the first world war, together with the peace agreements, declarations of independence of new Eastern and Central Europe states were accepted adequate for their statehood by their courts.[56]

Both the Declaratory and Constitutive theory accept that the four main criteria of statehood have *de jure* feature and these are indispensable elements. However, the point what the two theories do not share the same opinion is recognition. In this sense, recognition as the sub-part of one of the four *de jure* criteria will be evaluated in the next section.

V. Statehood From Another Approach

The question of recognition has been discussed by many scholars whether it is as a factor for statehood or not in international law.For instance, Malanczuk assesses recognition as an additional criterion[57] while Kelsen defines it not only political but also a legal act.[58] Likewise, Lauterpacht argues that recognition has a constitutive character and it is definitely a legal issue.[59]In addition to these arguments, Sterio considers the matter of recognition from a different angle by having regard to the foregoing in her article. According to Sterio, the reasons why states are recognised or not by the existing states and why a common sense cannot be acknowledged are globalisation[60]and rapid changes in international law. In this sense, the Grotian Moment is a theory which describes the process of how international law has evolved and what fundamental changes are still being encountered. [61]

The period after signature of the Montevideo convention has witnessed many changes untill the present day in international law. The role and structure of states are, of course, dependent upon

[55]'The Pure Theory of Law' <http://plato.stanford.edu/entries/lawphil-theory/> accessed 28 November 2013.

[56]Shaw (n 2) 448.

[57]Malanczuk (n 7) 80.

[58]Kelsen (n 37).

[59]Lauterpacht (n 30).

[60] Milena Sterio, 'A Grotian Moment: Changes in the Legal Theory of Statehood' [2011] Denv. J. Int'I L. &Pol'y 209, 210.

[61]Ibid 210.

these changes and new political decisions. These decisions are naturally able to affect the legal theory of statehood. It is, therefore, the classical requirementsdetermined by the Montevideo Convention for statehood are not adequate no longer. Thus, new factors must be adopted for statehood.[62]In this sense,Sterio claims that, a political community which would like to be a state has need of recognition by the existing states which have a voice in relevant region and the other states which are effective in the world order.[63]At this point, it should be borne in mind that statehood is entirely a legal theory and the four main criteria are *de jure* requirements for statehood. Recognition is, however, a political act.[64] In other words, recognition is not a common agreement which is mainly encountered in practice and thereforeit is a *de facto* criterion for statehood.

Despite the fact that the four traditional criteria are vital in order for being a state in international law, one of criteria may be lost after the states have been qualified as states but these states do not lose anything from their qualifications.[65] It is then understood that the main purpose of states is to acquire statehood and once they pass the first stage by having the four criteria they are accepted as states with rights and duties in international law. This is because statehood is a sort of 'shield' for entities.[66] In this sense, recognition as an additional criterion or as a de facto requirement might be likely granted by having intercourse withregional and global powers in order to obtain statehood shield. It has been shown that there is no clear difference between those fundamental criteria of statehood since each of them is a result of political concerns of states. For example, population is not defined by specific number. The only difference between those criteria and recognition is that the ones mentioned in the Montevideo Convention have legal value though recognition has not been mentioned as a constituent element in the convention. In other words, all of them including recognition have *de facto* feature but the convention make the four of them *de jure* since they have been adopted as legal criteria over the last half century.

According to Sterio, the forth criterion of statehood namely "capacity to enter into relations with the other states" consists of three sub-criteria in reality.[67] Recognition as the first sub-criterion justifies the idea that all states in international plane have not the same level sovereignity.[68] Some of them have more power over the others and they affect the world order. It therefore shows that as long as a new political community is close to a regional and global power, it most likely gains statehood. Acquiring statehood by way of political relations in international law, is an indicatorof how much recognition is a *de facto* element for statehood. As can be seen that if the criteria of statehood are written in international treaty they are known as legal criteria and unless recognition

[62]Ibid 209-10.

[63]Ibid 210.

[64]Ibid 215, citing Jeffrey L Dunoff, Steven R Ratner & David Wippman, *International Law: Norms, Actors, Process* (3rdedn, 2010) 138.

[65]Ibid 216.

[66]Ibid 216.

[67]Ibid 210.

[68] Ibid 220, citing Michael J Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignity Waiver"-Revolutionary International Legal Theory or Return to Rule by the Great Powers?'(2005) 10 UCLAJ.INT'L L. &FOR.AFF.361, 365-66.

gains a seat in any international treaty it will stay a *de facto* criterion. In this context, the Montevideo Convention would be regenerated by including recognition in order to standardise requirements of statehood. However, accepting recognition as a *de jure* requirement for statehood may result in a chaos and rigidity states relations.

In a nutshell, to simplify the relation between statehood and recognition, it would be useful to analyse the case of Northern Cyprus. Northern Cyprus namely Turkish Republic of Northern Cyprus(TRNC) is a *de facto* state which is only recognised by the Republic of Turkey.[69] Even though the TRNC fulfils the four traditional criteria of statehood, which are legal elements, it is not recognised as a *de jure* state by the other states since political reasons.[70] According to the Declaratory theory, meeting the four criteria is adequate for statehood and the TRNC should be a *de jure* state in this context. However, if recognition that is a significant element for the Constitutive theory is considered in terms of Sterio's argument,the TRNC may not likely be a *de jure* state. In other words, if recognition is legally accepted as a sup-part of the fourth criterion of statehood, the TRNC must enter into connection with a regional and global power. The Republic of Turkey can be regarded as a regional associate for the TRNC in this regard but finding a global associate is really controversial issue. As can be seen, statehood may be acquired by way of recognition, it is, however, not valid for all states. Thus, the approach of Grotian Moment is a middle way for recognition of states when the two recognition theories are compared.

[69]Ibid 227-28.

[70]Ibid 226.

Conclusion

Statehood is a legal acquisition for states which are basic entities of international legal order and itcan be gained by virtue of meeting the four traditional criteria namely, a permanent population; a defined territory; government; and capacity to enter into relations with the other states.Despite the fact that statehood is a legal concept, political facts play essential roles in the acquisition of statehood. It, therefore, has resulted in many disputes. Moreover, there are two theories concerning statehood: The Declaratory and Constitutive theory.According to the Declaratory theory, satisfying these four elements is sufficient for statehood, therefore a political community performing the four criteria can declare its independence and become a state. On the other hand, the Constitutive theory argues that accomplishing these four criteria is just the first stage for being a state. In addition to this, a political community must be recognised by the existing states.When considered from this point of views, it has been tried to explain through this paper that recognition, which is an explicit indicator of political power of states over the new ones, is a *de facto* element for statehood.

When features of state are considered in the context of the theories mentioned above, granting statehood to a new state might be distinguished from one view to another. Moreover, although international treaties which are legally binding have been produced for the regulations of statehood statues of states, it should be taken into consideration that the only thing that does not change is change itself. Therefore, as noted in the view of the Grotian Moment, while establishing the rules of being a state, changes in international legal order should be kept up with. Furthermore, to remove an ambiguity of recognition, the Montevideo Convention can be updated according to the conditions of twenty first century's legal system.

Bibliography

Books;

- Bayles M D, *Principles of Legislation: The Uses of Political Authority* (Wayne State University Press 1978)
- Evans M D, *International Law* (2nd edn, Oxford University Press 2006)
- Hammer L M, *A Faucauldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Ashgate Publishing Limited 2007)
- Kelsen H, *Principles of International Law* (Robert W Tucker ed, 2nd edn, Holt Rinehart and Winston 1966)
- Lauterpacht H, *Recognition in International Law* (Cambridge University Press 1947)
- Malanczuk P, *Akehurst's Modern Introduction to International Law* (7th revised edn, Routledge 1997)
- Shaw M N, *International Law* (6th edn, Cambridge University Press 2008)
- Shearer I A, *Starke's International Law* (11th edn, Butterworth & Co 1994)

Articles;

- 'Institut De Droit International: Resolutions Concerning the Recognition of New States and New Governments' (1936) 30 **AJIL** 185
- Kelsen H, 'Recognition in International Law Theoretical Observations' (1941) 35 AJIL 605
- Kunz L, 'Critical Remarks on Lauterpacht's "Recognition in International law"' (1950) 44 AJIL NO 4 713
- Sterio M, 'A Grotian Moment: Changes in the Legal Theory of Statehood' [2011] Denv. J. Int'I L. &Pol'y 209
- Yamali N, 'What is Meant by State Recognition in International Law' Ministry of Justice of Turkey, 9. <http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf> accessed 20 November 2013

Treaties;

- Montevideo Convention on Rights and Duties of States 1933
- The Opinions of Badinter Arbitration Committe: A Second Breath for the Self-Determination of Peoples Opinion no 1

Web-based Material

- 'The Pure Theory of Law' <http://plato.stanford.edu/entries/lawphil-theory/> accessed 28 November 2013.
- 'Countries of the World' <http://www.worldatlas.com/aatlas/populations/ctypopls.htm#.UpCQN9Ik1SI> accessed 23 November 2013