CHAPTER TWO

THE EMERGENCE OF STATES IN CLASSICAL INTERNATIONAL LAW. THE DOCTRINE OF RECOGNITION

Classical International Law on the creation or emergence of new states was refined and re-established, in its modern form, by eminent jurists like the Polish-born Cambridge scholar, Hersch Lauterpacht, in the period between the two World Wars. Lauterpacht was reacting, variously, to the legal dilemmas created for the British and other Western European Foreign Ministries by the political events of the early and mid-1930’s, – in Ethiopia, where Mussolini was attempting to carve out a latter-day Italian Empire from the Africa remnants left behind by other, more powerful and more timely European rivals; and then in Spain, where a civil war originating from internal, local political-ideological conflicts had been used by outside states both as a testing ground for new weapons and new military tactics and, later, as a way for staking out strategic bases for the impending World War II conflict.

A. Declaratory and Constitutive Theories of Recognition

In the immediate pre-World War II period, the International Law doctrines of Recognition were legally controlling in the creation or emergence of new states. Each existing state, as a member of the international special legal community, made the determinative judgement as to whether to accept or to refuse a supplicant, would-be state. The Classical International Law doctrines were divided by the two different schools of thought on Recognition, the Declaratory and the Constitutive.

The Declaratory doctrine was rooted essentially in objective, verifiable facts – whether or not a claimed new community exhibited the characteristic external stigmata of a state: a defined territory and population, and a governmental authority exercising effective control over the territory and population concerned. It is not too surprising that
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the Declaratory theory of Recognition had been the one most consistent with the British state practice over the past century and more. The theory eminently suited an Imperial society, like Great Britain of that time, founded on the rise of commerce and international trade as solvents of international relations, with the British Navy and the British Pound Sterling supplying the uniform control measures necessary to maintain the resulting Pax Britannica. Of the Declaratory theory of Recognition, it has been said that its prime criterion was whether a proposed new state could be relied on to pay its debts and honour its international loan obligations.

By comparison, the Constitutive theory of Recognition was highly subjective in its doctrinal foundations and reflected neo-Kantian, voluntarist theories of law and law-making, popular in Continental European liberal democratic thinking on law towards the close of the nineteenth century and the opening of the new century. It was especially popular in the United States between the two World Wars where the failed Wilsonian imperatives, as set out in President Woodrow Wilson’s original Fourteen Points code designed to govern the eventual World War I peace treaties, were revived in President Hoover’s Secretary of State, Henry Stimson’s, doctrine of the non-recognition of situations created by the illegal use of force. This was invoked by Stimson in an attempt to deny legal results to Japan’s invasion and conquest of Manchuria in 1931 in defiance of the League of Nations Covenant.

Lauterpacht’s original contribution to the theory of Recognition was to attempt to define and limit, in legal terms, the manner and mode of exercise of a state’s will to recognise or not to recognise a supplicant, would-be new state or government.

With Ethiopia, the legal occasion was provided by a series of cases before the British Municipal (national) courts involving the disposition of assets, both local (Ethiopian) and foreign, including bank accounts of the government of Ethiopia and its affiliated institutions. While the military defeat of the Ethiopian Government in 1935 had been swift and complete, its Emperor had taken refuge in Great Britain, and the British Government itself had been under considerable political pressures from its own home population, and also some diplomatic pressures, not to recognise a situation of fact – the Italian conquest – created in clear violation of the League of Nations Covenant and in defiance of resolutions of the League of Nations’ governing Council.