RECOGNITION OF STATES AND GOVERNMENTS IN INTERNATIONAL LAW: THEORY AND PRACTICE

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I. THE THEORY OF RECOGNITION OF STATES AND GOVERNMENTS

At the outset of the examination of the theory and practice of recognition in international law, three questions come to mind: (1) Is recognition a duty in international law? (2) Are there legal requirements or criteria for recognition in international law? (3) What are the legal predetermined effects of recognition? It is hoped that knowing the answers to these questions will shed sufficient light on the true nature of recognition of states and governments. In the present short article, I intend to look for the answers particularly on the basis of state practice which is, after all, the very source of general or customary international law.

Text books on international law have tended to regard recognition of states and governments as a unilateral state act that must conform to certain rules of international law, whether the author belongs to the constitutive or declaratory school. These international jurists have been categorized into three schools: namely, (1) the constitutivists, i.e., those holding the view that a state or government comes into being as a subject of international law only upon recognition, e.g., Triepel, Wheaton, Anzilotti, Oppenheim, Kelsen, Lauterpacht. Chen himself held a declaratory view as shown immediately below. In Japan, the following jurists have been constitutivists: Ryouichi Taoka, Kokusaihou Kougi [Lectures on International Law] 124-25 (1955); Kisaburou Yokota, who later changed to the declaratory theory as listed below; 1 Yuuichi Takano, Kokusaihou Gairon [Digest of International Law] 1219-57 (1985); Shi-An Ou, Kokusaihou ni miru Shounin [Recognition in International Law] 66 (1999). Chen classified as declarativists Vattel, Westlake, Brierly, Scelle among others. More recently the following authors hold a declaratory view: Ian Brownlie, Principles of Public International Law 85-90 (7th ed. 2008); James Crawford, The Creation of States in International Law 22-27 (2d ed. 2006); Malcolm N. Shaw, International Law 447 (6th ed. 2008). In Japan, most international jurists have come to hold a declaratory view: Shigejirou Tabata, Kokusaihou Kougi [Lectures on International Law] 67-82 (9th ed. 1986); Kisaburou Yokota, Kokusaihou Nyooumon [Introduction to International Law] 90 (2d ed. 2005); Souji Yamamoto, Kokusaihou [International Law] 173-81 (1994); Takane Sugihara, Kokusaihou Kougi [Lectures on International Law] 198-202 (2008).
Lauterpacht, in Japan: Taoka, Yokota Kisaburou of early days, Takano, as against (2) supporters of a declaratory theory or declarativists, i.e., those who believe that recognition of state merely confirms the existence of a state as a subject of international law, e.g., Vattel, Westlake, Brierly, Scelle, Chen, Brownlie, Crawford (incidentally, at present most Japanese international jurists are declarativists) and (3) those taking a position in between the two theories. Many Japanese authors agree that in recent times the declaratory theory has been the dominant opinion in the academic world.

It used to be believed by certain constitutivists that states are required to recognize a country as a legal entity, namely as a subject of international law, as soon as it attained statehood, that is, effective governance of a certain territory and its inhabitants by a sovereign government, although most international jurists have maintained that there exists in international law no duty to recognize a new state or government.

When the government of an already recognized state changes in an unconstitutional or revolutionary manner, notably in a coup d'\'état, the new government is also considered subject to recognition by other states, except that some states have done away with the act of recognition of governments itself.

According to the constitutive theory, state recognition of a new state is perceived to be an act of state that institutes a bilateral relationship based on the application of international law between the recognizer and the recognized, thus constituting or creating the international personality of the recognized state. International lawyers of this school have contended that recognition of states is an act of constituting a formal legal relationship between the recognizing and recognized states, thus giving birth to the international law personality of the recognized state which is opposable only between the

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3 Chen quotes Oppenheim to indicate four conditions of state recognition: namely, a people, a country, a government and sovereignty of the government. Chen, supra note 1, at 55. Crawford defines these conditions as (1) defined territory (2) permanent population (3) government (4) capacity to enter into relations with other states (5) independence (6) sovereignty. Crawford, supra note 1, at 37-95.

4 See Chen, supra note 1, at 52-54; Shaw, supra note 1, at 450; Yamamoto, supra note 1, at 176-77, Brownlie, supra note 1, at 89-90. The Institut de Droit International 1936 Brussels Resolution No.1 also denied this duty.

5 In 1907 Ecuadorian Foreign Minister Tobar put forth a policy of not recognizing a new regime established in an unconstitutional manner, unless accepted by the people. This principle was incorporated into the Peace and Friendship Treaty concluded in the same year between five Central American states. Mexico stopped recognizing new foreign governments at the time of Foreign Minister Estrada in 1930. From 1913 to 1931, the United States (US) adopted a policy of non-recognition vis-à-vis Central American regimes that it deemed not to be based on popular consent. France and Belgium appear to have adopted a policy of non-recognition of governments in the 1960s. In 1980 the UK declared a policy of not extending recognition to new governments. Japan and the US continue to recognize or not recognize new governments. The 1991 European Community Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union called for the respect of the UN Charter, the Helsinki Final Protocol and the human rights. Shaw, supra note 1, at 451-59.