RECOGNITION - A HISTORICAL STOCKTAKing

(PART I)

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I. The problem stated.

The first words in every paper on Recognition\(^1\) in International Law (of States, Governments, etc) should be words of warning. Here, we have to deal with a matter where all lawyers have doubts as to whether or not the subject really belongs to law. (In a certain way, to provide rules for recognition should be, for International Law, as paradoxical as it would be for Constitutional Law to provide rules for a revolutionary change.) Accordingly, such enlightenment as we receive on this subject consists of political approaches, transformed, according to the logic inherent in that specific approach, into juridical notions, concerning the legal conclusions to be drawn from the fact of the establishment of a new State, a new governmental regime in an already existing State, an insurgent or belligerent party, of certain territorial modifications. However just as the birth of a child, the establishment of a social fact is a meta-juridical fact\(^2\) and the subject belongs to International Law insofar as it concerns juridical consequences, similarly to another topic of great importance, the Monroe-Doctrine, which has also been described as a «settled standard of policy rather than as a rule of law». Proceeding as they do from a somewhat unenthusiastic standpoint, lawyers are more or less unanimous in attenuating various diplomatic expediences; one can often observe the sad, albeit amusing spectacle of the diplomats being at odds with their theoreticians. For example, at a time when most publicists and many law courts had reached the conclusion that there was no practical distinction between recognition de facto and de jure, we find an extremely shrewd use of this distinction continuously made in the diplomatic sphere proper. Therefore, the first task of the lawyers should be to examine the political part of the transaction which became known as recognition; this will allow to establish where the juridical problem begins. In this framework, two schools have formed themselves, a constitutive and a declaratory school. The results are far from satisfactory and may correctly be summed up in the words of Professor Briggs:
Juridical theories of recognition logically deduced from jurisprudential concepts fail to explain the facts of State conduct, and inductions from the conduct of States have failed to provide a juridically unambiguous theory of recognition.\(^3\)

The problems which arise have been further complicated by the establishment of international organizations. The main purpose of recognition ('acceptance into the Family of Nations') was projected into the legal regimes of the League of Nations and the United Nations Organization; they appear there under the name of admission of new members. The conditions prevailing under these regimes and particularly the diplomatic routine in which admissions of new members are dealt with, show small, if any, differences with earlier periods. Even when not espousing the idea of a delegation, by the Member-States, to the Organization, of their right to state on the admission of new members,\(^4\) the political interests involved are sufficient to show how during this period the problems of recognition and admission were influenced one by the other, to appear finally as if they were two stages of the same process — acceptance into the Family of Nations, and growth into statehood cannot be dissociated from a new State's admission to the International Community. This is a double-way passage: not only does this admission complete the new State by giving it the opportunity to translate into facts its capacity for international intercourse — but, moreover, the Organization itself is under a positive obligation to lead formerly dependent nations to independent statehood.

In consequence of this shift from International Law to International Organization, the present period is one of fundamental changes of doctrines as well as of practice. The period of concurrence of imperialism and the constitutive doctrine of recognition seems to belong properly to the past, and although no alternative order (and the declarative doctrine which belongs to it) has yet gained full momentum, we feel already the impact of international organizations, each one of them searching for its own raison d'être independent from the powers delegated to it by its members. They are creating their own system of legitimacy, of sanctions and of a (neo-)constitutive doctrine of recognition.\(^5\) Its terms are being confused with those belonging to earlier period, and many an innovation reminds one of the story of the Trojan horse: a new machine manned by old-time arguments and weapons.

Therefore, in order to give to discussions about recognition a firm direction, there is needed either extreme caution or an enor-