

THE IMPACT OF RECOGNITION ON THE CREATION OF STATES IN INTERNATIONAL LAW: A CRITICAL ASSESSMENT

Aminul Islam*

ABSTRACT

It is the fact that international law itself does not create States by way of some legislative fiat; rather it merely has a role in acknowledging them which already been put in place. This acknowledgement has usually been given by the existing States to a nascent State, which is known as recognition; comparatively a new branch of international law. In addition to the existing 193 member States of the United Nations, numerous entities such as Palestine, Kosovo, Somaliland and many others demand themselves as States. But they are not enjoying fully their statehood in international intercourse due to lack of recognition and non admission to the international organisations. This article examines whether the recognition can put any impact, if so under what circumstances, on the creation of States under international law.

I. Introduction

Since the establishment of the United Nations (hereafter the UN), there has been a dramatic increase in the number of States. This has largely been a consequence of the process of decolonisation and the increasing recognition of new or reconstituted States based on the right of peoples to self-determination.¹ To recognise a community as a State is to declare that it fulfils the conditions of statehood as required by international law. “If these conditions are present, the existing States are under the duty to grant recognition.”² The majority of writers urge that recognition is the result of a decision taken not in obedience to a legal duty, but in pursuance of the exigencies of national interest.³ ‘Recognition of States is not a matter governed by law but a question of policy’ – the view expressed in Lauterpacht’s 1947

* **Aminul Islam**, LL.M. in International Human Rights Law (University of Liverpool, UK), LL.M. in International & Comparative Law and LL.B. (Hon’s) (University of Dhaka, Bangladesh), Commonwealth Scholar 2014-15 (UK), is a Joint District and Sessions Judge at Bangladesh Judicial Service.

¹ Boas, G., *Public International Law*, Cheltenham, 2012, at p. 158.

² Lauterpacht, H., “Recognition of States in International Law” 53 (1944) *The Yale Law Journal*, pp. 385-458, at p. 385.

³ *ibid* at p. 386.

book on recognition of States⁴ is probably still the predominant view in the literature of international law. That is why, we see that many of the entities such as Palestine, Kosovo, Somaliland, Taiwan and many others, despite of their repeated claim of fulfilling the conditions of statehood, are not enjoying fully their rights and duties as States in the international intercourse due to non-recognition by existing States and non-admission to the international organisations. There might be two possibilities: either they are not States under international law or, they hold statehood but failed to establish it in the international plane due to non-recognition. The exact case for those entities will be examined in this article. The purpose of this article is to make a critical assessment, with reference to recent practice as appropriate, of the impact that recognition can have on the creation of States in international law. To that end, Section 2 of this article will review the legal framework on the creation of statehood in international law. In Section 3 this article will discuss the concept and theories of recognition, the different ways in which it can occur and the kinds of situations it may apply. Section 4 will examine the political and legal effects of recognition on the nascent States. Finally, the impact of recognition on the creation of States will be discussed in Section 5 with appropriate examples. Section 6 will draw the conclusion by assessing what has been discussed throughout the article.

II. Statehood in International Law

According to Grant, 'Statehood is the state of being a State.'⁵ Warbrick says in his essay on – *States and Recognition in International Law* that 'it is defined by international law: entities which satisfy the international legal criteria of statehood are entitled to claim to be States.'⁶ The criteria have been described in Article 1 of the *Montevideo Convention on Rights and Duties of States, 1933* (hereafter *Montevideo Convention*), which states that:

'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 other States.'⁷

This 'criteria' has been widely accepted and, still today, continued to be regarded as the fundamental elements of statehood. Craven in his scholarly article on- *Statehood, Self-determination, and Recognition* described it as a basic

⁴ Lauterpacht, H., *Recognition in International Law*, New York, 1947, at p. I.

⁵ Grant, J. P., *International Law Essentials*, Dundee, 2010, at p. 41.

⁶ Warbrick, C., "States and Recognition in International Law" in Evans, M. D., (ed.), *International Law*, Oxford, 2003, pp. 205-267 at p. 207.

⁷ Convention on Rights and Duties of States (signed at Montevideo 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, art. 1.

definition which, if not definitive, could be taken as the starting point for most discussions of territorial status.⁸

Similarly, the *Arbitration Commission of the European Conference on Yugoslavia* (hereafter *EC Arbitration Commission on Yugoslavia*) in Opinion No. 1 declared that ‘the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority; that such a State is characterised by sovereignty.’⁹ However, Shaw describes that “such provisions are neither exhaustive nor immutable; other factors including self-determination and recognition may also be relevant here”.¹⁰ Crawford in his influential book on the subject – *The Creation of States in International Law*¹¹ provides the following five exclusive and general legal characteristics of States, which constitute in legal terms the core of the concept of statehood and the essence of the special position of States in general international law:

- “(1) States have plenary competence to perform acts in the international sphere— make treaties and so on.
- (2) States are exclusively competent with respect to their internal affairs— ‘exclusive’ means plenary and not subject to control by other States.
- (3) States are not subject to international process without their consent.
- (4) States are regarded in international law as ‘equal’; it is a formal, not a moral or political, principle.
- (5) States entitled to benefit from the *Lotus* presumption, especially that any derogation from the previous principles must be clearly established.”¹²

These five principles appear nominal, but it is difficult to find more substantive candidates. However, for a better understanding of the creation of statehood in international law, it will be necessary to consider whether the developments in the law have modified and extended the above discussed criteria or not. Therefore, the developments in the law since the 1930s are discussed below:

A. Population

The existence of a permanent population is naturally required. But there is not a specification of a minimum number of people and again there is not a

⁸ Craven, M., “Statehood, Self-determination, and Recognition” in Evans, M. D., (ed.), *International Law*, Oxford, 2014, pp. 201-247 at p. 217.

⁹ *EC Arbitration Commission on Yugoslavia* (1991) 92 ILR 162.

¹⁰ Shaw, M. N., *International Law*, Cambridge, 2014, at p. 144.

¹¹ Crawford, J., *The Creation of States in International Law*, Oxford, 2007, at pp. 40-43.

¹² *supra* note 6 at p. 231 (emphasis added).