titled to use loading and unloading machinery, etc., on the basis of agreements, concluded with the appropriate transportation and expeditionary agencies" (Article 38, Soviet draft, Article 41, convention). But these "appropriate agencies" are Soviet-sponsored companies in Hungary, Rumania and Yugoslavia. These companies have varying degrees of Soviet ownership, but always effective Soviet control; the general manager is in all cases a Soviet citizen. These companies have been given privileged treatment and special (in the case of Budapest, nearly exclusive) privileges; they dominate the Danube fleets in the various countries and have obtained control of most of the useful ports and dock facilities. Thus, Western shipping is at the mercy of these companies.

The United States, under these conditions, naturally rejected the convention and "will not, of course, recognize for itself or for those ports of Austria and Germany which are under its control, the authority of any commission set up in this manner to exercise any jurisdiction in those portions of Austria and Germany."

The Belgrade Conference is a failure as far as the Danube problem is concerned. Although the convention will come into force among the seven Eastern states, the Danube remains divided and dead. But there is even more to it, which confirms the discouraging statement that international law, as far as the laws of war and many other parts are concerned, is in a deplorable state of retrogression. As Ambassador Cannon in his final rejection stated, "The Soviet attitude defeats and destroys the whole concept of international waterways which has been the public law of Europe for over 130 years."

The Belgrade Conference presents the picture of a caricature of an international conference under totalitarian domination. Last, though not least, the Belgrade Conference has once more shown the crisis of our whole Western Christian culture, the danger of a new era of barbarism, by the tremendous decline of good manners in diplomacy. Such decline is, as Anthony Eden has stated, "at the same time, one of the most troubling factors in the present situation of the world."

JOSEF L. KUNZ

RECOGNITION OF STATES: SOME REFLECTIONS ON DOCTRINE AND PRACTICE

"The recognition of a new state has been described as the assurance given to it that it will be permitted to hold its place and rank in the character of an independent political organism in the society of nations."[1] The practice of states demonstrates that the granting of recognition to a new state is productive of juridical consequences in international law, but

[1] Henry L. Stimson, Secretary of State, Address before the Council on Foreign Relations, Feb. 6, 1931. Department of State, Latin American Series, No. 4, p. 6.

doctrinal controversy has raged over the precise implications of the act of recognition and the juridical status of the unrecognized state.[2]

Conceptualists, who, like Lauterpacht,[3] Anzilotti,[4] and Kelsen,[5] start from the premise that every juridical order, including international law, must determine who are its subjects and at what point juridical personality must be attributed to them, feel compelled by their own abstractions to regard the act of recognition as constitutive—as creative of legal personality in international law. Because international law possesses no central organ to perform this "legal" function of the establishment (*la constatation*) of the "legal fact" that a "state-in-the-sense-of-international law" exists, the function of recognition is attributed to each previously existing state as an "organ" of international law.[6] Because, however, this decentralized method of "creating" new subjects of international law might lead to the anomalous situation in which a new community is a state bound by international law for recognizing states but not for others, it is convenient to posit: (1) that international law contains rules stipulating the requirements of statehood and (2) that there is a legal duty under international law to recognize a community which meets these requirements of statehood.[7] The act of recognition thus becomes a "legal" act in the dual sense of being required of existing states by international law and of legally creating a new subject of international law.

[2] See, for example, H. Lauterpacht, Recognition in International Law (Cambridge University, 1947); Josef L. Kunz, *Die Anerkennung der Staaten und Regierungen im Völkerrecht* (1928); Sir John Fischer Williams, "*La Doctrine de la Reconnaissance en Droit International et ses Développements Recents*," 44 *Académie de Droit International, Recueil des Cours* (1933), pp. 203–314; *idem*, "Some Thoughts on the Doctrine of Recognition in International Law," 47 Harvard Law Review (1933–34), pp. 776–794; Hans Kelsen, "Recognition in International Law: Theoretical Observations," this JOURNAL, Vol. 35 (1941), pp. 605–617, with comment by Philip Marshall Brown, *ibid.*, Vol. 36 (1942), p. 106, and Edwin M. Borchard, *ibid.*, p. 108; *Annuaire de l'Institut de Droit International*, Paris, 1934, pp. 302–357 (Philip Marshall Brown, *Rapporteur*) and Brussels, 1936, I, pp. 233–245, II, pp. 175–255, 300–305 (for English translation of resolutions adopted, see this JOURNAL, Supp., Vol. 30 (1936), p. 185); Arnold Raestad, "*La Reconnaissance Internationale des Nouveaux États et des Nouveaux Gouvernements*," *Revue de Droit International et de Législation Comparée* (3rd. Ser.), Vol. 17 (1936), pp. 257–313; Louis L. Jaffe, Judicial Aspects of Foreign Relations, In Particular of the Recognition of Foreign Powers (1933), Ch. II; Dionisio Anzilotti, *Cours de Droit International* (*trad.* Gidel, 1929), Vol. I, pp. 159–177; Le Normand, *La Reconnaissance Internationale et ses Diverses Applications* (1899).

[3] *Op. cit.*, p. 7 ff.

[4] *Op. cit.*, p. 160 ff.

[5] *Loc. cit.*, p. 606 ff.

[6] See Lauterpacht, *op. cit.*, p. 6; Kelsen, *loc. cit.*, p. 607.

[7] Although both Lauterpacht, *op. cit.*, p. 26 ff., and Kelsen, *loc. cit.*, p. 607 ff., assert that international law determines the requirements of statehood, Lauterpacht asserts and Kelsen denies (*loc. cit.*, p. 609 ff.) the duty to recognize a state which fulfills these requirements.

Although it is possible to conclude, by induction from the practice of states, that states achieving recognition possess people, territory, an effective government, independence, and the capacity for international relations, that same practice seems to indicate that states have no "legal" origin.[8] A colony revolts or is permitted to secede from the parent country and establishes its independent control over its territorial domain; or a group of states and territories combine to form a new state (*e.g.*, Yugoslavia in 1918). No rules of international law prescribe or proscribe the creation of such a new state; nor, except perhaps in the national jurisprudential theology, can the state be said to have had a "legal" origin.

The origin of the Republic of the Philippines provides an instructive example. On July 4, 1946, "The United States of America and the Republic of the Philippines, being animated by the desire . . . to provide for the recognition of the independence of the Republic of the Philippines as of July 4, 1946 and the relinquishment of American sovereignty over the Philippine Islands," signed at Manila a Treaty of General Relations,[9] from the Preamble of which the above words are taken, and which provides further:

> Article I. The United States of America agrees to withdraw and surrender, and does hereby withdraw and surrender, all right of possession, supervision, jurisdiction, control or sovereignty existing and exercised by the United States of America in and over the territory and the people of the Philippine Islands, except the use of such bases, necessary appurtenances to such bases, and the rights incident thereto, as the United States of America, by agreement with the Republic of the Philippines, may deem necessary to retain for the mutual protection of the United States of America and of the Republic of the Philippines. The United States of America further agrees to recognize, and does hereby recognize, the independence of the Republic of the Philippines as a separate self-governing nation and to acknowledge, and does hereby acknowledge, the authority and control over the same of the Government instituted by the people thereof, under the Constitution of the Republic of the Philippines.
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> Article II. The diplomatic representatives of each country shall enjoy in the territories of the other the privileges and immunities derived from generally recognized international law and usage. . . .
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> Article III. Pending the final establishment of the requisite Philippine Foreign Service establishments abroad, the United States of America and the Republic of the Philippines agree that at the request of the Republic of the Philippines the United States of America will endeavor, in so far as it may be practicable, to represent through its Foreign Service the interests of the Republic of the Philippines in countries where there is no Philippine representation. The two coun-

[8] Compare Louis Cavaré, "*La Reconnaissance de l'État et le Mandchoukouo*," *Revue Générale de Droit International Public*, Vol. 42 (1935), pp. 5–99.

[9] Department of State, Treaties and Other International Acts Series, No. 1568.

tries further agree that any such arrangements are to be subject to termination when in the judgment of either country such arrangements are no longer necessary.

. . . . . .

Article VIII. This Treaty shall enter into force on the exchange of instruments of ratification. . . .

It should be noted that although the Preamble states that one of the purposes of the treaty was "to provide for the recognition of the independence of the Republic of the Philippines as of July 4, 1946," the obligation assumed by the United States in Article I "hereby" to "withdraw and surrender . . . sovereignty" and to "recognize the independence of the Republic of the Philippines as a separate self-governing nation" was not legally effective, according to Article VIII, until October 22, 1946, the date of the exchange of ratifications. It should also be noted that, by an "Interim Agreement Effected by Exchange of Notes, Signed at Manila, July 10 and 12, 1946, Effective July 4, 1946," the United States and the Republic of the Philippines agreed to observe the provisions of Articles II and III of the Treaty, pending the final ratification thereof, in accordance with the provisions of a Protocol signed July 4, 1946, to accompany the Treaty and which had provided in part: "It is understood and agreed that pending final ratification of this Treaty, the provisions of Articles II and III shall be observed by executive agreement."

It would appear to be significant that the drafters of the Interim Agreement omitted to stipulate that Article I of the Treaty, providing for the recognition of the Republic of the Philippines, should be observed as from July 4, 1946. The implication would seem to be that by signing the Treaty [10] and concluding the Interim Agreement the United States had already recognized the independence of the Republic.

No one will question the conclusion that it was the policy of the United States which made possible the independence of her former colony, the Philippine Islands. However, was statehood conferred on the Philippines in any legal sense by United States recognition? If the Republic of the Philippines was not already a state prior to the signing of the agreements on July 4, did she have the legal capacity to conclude agreements intended to be governed by international law? If statehood and the legal capacity to conclude international agreements were conferred by the United States, what is to prevent the United States from withdrawing them? It is submitted that if the agreements were terminated, the question whether the Republic of the Philippines was or was not an independent state would be a question of fact, not of law.[11] Similarly, although the policy of the United

[10] *Cf.* Republic of China *v.* Merchant's Fire Assurance Corporation of New York (1929), 30 Fed. 2d. 278.

[11] Compare Wulfsohn *v.* Russian Socialist Federated Soviet Republic (1923), 234 N. Y. 372: "Whether or not a government exists, clothed with the power to enforce its

States made it possible for the people of the Philippines to organize themselves as a state, neither the United States nor international law "created" that state.

At this point troublesome theoretical questions recur: Is the new state endowed with rights and obligations under international law at birth or does it exist in a legal vacuum, without international legal rights and obligations with respect to states which have not recognized it? Adherents of the constitutive theory of recognition are logically forced to regard the new state as without rights or obligations under international law until recognized; although Lauterpacht attempts to minimize the embarrassment by taking refuge in his conceptualism. To assert, he writes,[12] that "whether a state exists is a question of fact" is "to predicate that a given legal result is a question of fact." Jaffe,[13] suggesting the pragmatic approach of the foreign office when confronted with the emergence of a new state, observes that:

> . . . recognized statehood is but the completion of a process wherein fact is informed by law, and where at any particular stage it may be difficult to say whether a thing is so because it is the fact or because it is the law . . . recognition does not create international personality . . . there may be limited relationships, necessarily implying the statehood of the parties, which do not rise to the dignity and completeness of the relation between recognizant states.

Nascent states, however indeterminate their status politically or legally, do not exist in a vacuum. Legal and political relations of varying intensity with neighboring or more distant states are an immediate or inevitable necessity and practice even prior to recognition.[14] Although the pronouncements of foreign offices and judicial tribunals sometimes echo the constitutive theory, the practice of states of entering into "unofficial" relations with unrecognized states, of concluding international agreements with them, of respecting their territorial limits, and of respecting their power to govern and establish legal relationships within that territorial domain would seem to be predicated, as Lauterpacht admits,[15] upon the possession by the unrecognized community of "a measure of statehood"—*i.e.*, of international legal personality. Not only is there a necessary implication of the juridical

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authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory. For it recognition does not create the state, although it may be desirable."

[12] *Op. cit.*, pp. 24, 45 ff.

[13] Louis L. Jaffe, Judicial Aspects of Foreign Relations, In Particular of the Recognition of Foreign Powers (Harvard University, 1933), pp. 96, 121.

[14] See illustrative materials, sometimes under the rubric "Acts Falling Short of Recognition," in Moore, Digest of International Law, Vol. I, p. 206 ff.; Hackworth, Digest of International Law, Vol. I, p. 327 ff.; H. A. Smith, Great Britain and the Law of Nations, Vol. I (1932), pp. 115 ff., 190; Lauterpacht, *op. cit.*, p. 369 ff.

[15] *Op. cit.*, p. 54.

capacity of the unrecognized state through its agents to conclude agreements which are legally binding under international law,[16] but the unrecognized state is regarded as obligated not to commit acts in violation of a law by which, according to the constitutive theory, it is not bound. An unrecognized state, writes Lauterpacht [17] with careful dialectic,

> cannot, in reliance on the formal logic of its non-recognition, claim the right to commit acts which if done by a recognized authority would constitute a violation of international law. . . . There can be no objection to treating the unrecognized state as if it were bound by obligations of international law if these obligations are so compelling as to be universally admitted and if the non-recognizing state acknowledges itself to be bound by them.

Thus, on May 9, 1922, the American Commissioner in Albania was instructed to protest to the governmental authorities of the unrecognized Albanian state against their action in depriving American citizens of Albanian origin of their American passports and forcing them to take Albanian passports. Although the printed correspondence describing the American protest and the Albanian engagement to recognize all United States passports contains no reference to international law, the evidence suggests that, despite non-recognition of Albania by the United States, international law was regarded by both states as regulating their relations and as establishing both the delictual responsibility and the contractual capacity of the unrecognized state.[18]

Since "unofficial relations" are a convenient, although juridically ambiguous, device for dealing with communities from which, because of their indeterminate status or for political reasons, it is considered desirable to withhold recognition, foreign offices have been reluctant to admit a legal duty to recognize. "We are not in a position," admits Lauterpacht [19] after a barren search for convincing evidence to the contrary, "to say either that there is a clear and uniform practice of states in support of the legal view of recognition, or that the process of recognition has invariably taken place, in all its aspects, under the aegis of international law."

A study of the practice of states [20] reveals that considerations which have

[16] See, for example, the agreement relating to most-favored-nation treatment and other matters concluded by the United States and Albania by exchange of notes at Tirana, June 23 and 25, 1922, prior to, and as a condition of, United States recognition of Albania as a state on July 28, 1922. U. S. Foreign Relations, 1922, Vol. I, pp. 603–604; *ibid.*, 1925, Vol. I, pp. 511–512.

[17] *Op. cit.*, pp. 53–54.

[18] U. S. Foreign Relations, 1922, Vol. I, p. 599; *ibid.*, 1925, Vol. I, pp. 511–514.

[19] *Op. cit.*, p. 78.

[20] As set forth particularly in Moore, *op. cit.*, Vol. I, p. 77 ff.; Hackworth, *op. cit.*, Vol. I, p. 195 ff.; H. A. Smith, *op. cit.*, Vol. I, p. 77 ff.; M. W. Graham, The Diplomatic Recognition of the Border States: I, Finland; II, Estonia; III, Latvia; Lauterpacht, *op. cit.*, pp. 12 ff., 26–37; *Fontes Juris Gentium*, Ser. B, Ser. 1, Tom. 1, Digest of the Diplomatic Correspondence of the European States, 1856–1871, p. 130 ff., and *ibid.*, Tom. 2, 1871–1878, p. 78 ff.; U. S. Foreign Relations, *passim*.

been weighed by foreign offices in determining whether to recognize a new state or to defer or withhold recognition include: the freedom of the new state from external control; the stability and effectiveness of its government, and perhaps an estimate of its permanence as indicated by popular support; the ability, and perhaps the willingness, of the new state to fulfill its obligations under international law; whether "its existence responds to political exigencies" in a region such as Europe or the Adriatic or in the world community; the extent to which it "commands international support," *i.e.,* has been recognized by other states; the extent to which its establishment affronts principles of dynastic or constitutional legitimacy; whether its recognition would offend an ally or be otherwise premature; whether its recognition would not go far "to support legitimate enterprise" of the recognizing state or be politically advantageous; the use of non-recognition as a sanction of national policy or of international law.

Particular considerations adverted to in state papers may be deemed by an observer to be politically noxious or juridically ambiguous but, despite occasional references to a natural right to recognition or a moral obligation to recognize, the evidence fails to support the thesis that, in granting recognition, foreign offices regard themselves as fulfilling a legal duty or performing a function as an "organ" of international law. Was it really the failure of Israel to fulfill the "basic criteria" of statehood or considerations of British foreign policy and international politics which caused the British Foreign Office to decline recognition to Israel in May 1948?[21] When the United States hastily granted *de facto* recognition to Israel and the Soviet Union countered by granting *de jure* recognition, and the Arab states granted no recognition, does the available evidence suggest that considerations of national or international politics were subordinated to legal criteria or that any one of these states was fulfilling a legal obligation or violating international law? "The main difficulty with the constitutive theory," writes Philip Marshall Brown, "is that it is mere theory."[22]

What, then, is the juridical function of recognition as determined by state pronouncements and conduct? The establishment of diplomatic relations, although a normal consequence of recognition, is not a consequence required by international law, since states are legally entitled to establish "unofficial relations" prior to recognition and to delay, establish or sever official diplomatic relations even after recognition. The principal juridical function of recognition is that, by acknowledging the full status of a hitherto indeterminate community, the recognizing state makes possible the regularizing of relations between them on the basis of international law. The acknowledgment that the recognized political community possesses the attributes of statehood and full capacity in international law at the time of recognition does not pretend to answer the question as to how long prior

[21] See Philip Marshall Brown, "The Recognition of Israel," this JOURNAL, Vol. 42 (1948), pp. 620–627.

[22] "The Effects of Recognition," this JOURNAL, Vol. 36 (1942), p. 106.

to recognition the community may or may not have been in possession of the attributes of statehood and legal capacity. The act of recognition is thus not constitutive in the sense that it confers international juridical personality upon an entity which did not possess it prior to recognition. Nor is recognition merely cognition. The cognitive element of acknowledging that the recognized community possesses the attributes of statehood and capacity under international law is formally embodied in an official assurance that the legal consequences of statehood and capacity will be accepted by the recognizing state.[23]

There is no necessary implication that the probably limited relations between them prior to recognition were not governed by international law. The theoretical objection that, if the unrecognized state possesses rights under international law prior to recognition, it is a violation of international law for a non-recognizing state to deny the exercise of these rights, assumes too much and proves too little. Even between recognized states the exercise of certain rights is suspended when diplomatic relations are severed. Moreover, except perhaps in such fields as the extraterritorial effect to be given to certain state acts, practice with regard to unrecognized states reveals no wholesale disregard of the rights and obligations stipulated by international law for the governance of international relations. The significant fact is that, prior to recognition, relations with an unrecognized state are likely to be limited in scope.

Foreign offices have not been concerned with pushing juridical conceptions to the limit of their logic and have regarded recognition as extending the scope of rights and obligations between recognizing and recognized states, without indulging in sterile debate as to whether the act of recognition "confirmed" previously existing rights or "created" new rights. The practical effect has been an increased sense of obligation on the part of the recognizing state and an increasing ability on the part of the recognized state to secure the enjoyment of its rights abroad. The belief that "the unrecognized state and its acts do not legally exist prior to recognition" [24]—a confusion exhibited by English and American courts in the early 19th century—has influenced national jurisprudence, but appears to be based upon a misconstrued judicial deference for the acts of another branch of the same government in granting or withholding recognition, or upon conceptualist logic, rather than upon the requirements of international law.[25]

[23] Compare J. L. Brierly, The Law of Nations (3rd ed., 1942), p. 100: "The primary function of recognition is formally to acknowledge as a fact something which has hitherto been uncertain, namely, the independence of the state recognized, and to declare the recognizing state's readiness to accept the normal consequences of that fact. . . ."

[24] Lauterpacht, *op. cit.*, p. 44. Compare Kelsen, *loc. cit.*, p. 608: "Before recognition, the unrecognized community does not legally exist *vis-à-vis* the recognizing state."

[25] See P. L. Bushe-Fox, "The Court of Chancery and Recognition, 1804–31," British Year Book of International Law, 1931, p. 63; Bushe-Fox, "Unrecognized States: Cases

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. The path to the future is clearly indicated by two considerations: the decentralized nature of the practice of recognition and the developing community interest in the emergence of new states. Collective recognition by the Great Powers has been sparingly employed in the past and has sometimes savored of collective intervention.[26] Whether admission to membership in the League of Nations constituted automatic recognition was always controversial.[27] Nor has the United Nations clearly settled the question of the relation of membership to recognition.[28] In his *A Modern Law of Nations,* Philip Jessup has proposed that the United Nations General Assembly might by general convention or declaration establish the essential criteria of statehood, provide for a finding that a particular entity possesses the required attributes and pledge members not to accord recognition to new states except in accordance with a standard procedure.[29] With the centralization of the recognition of states in an international organization, the granting of recognition might well acquire the rôle of a legal function performed on behalf of the organized community of states, a rôle which today appears to exist more in theory than in fact.

HERBERT W. BRIGGS

in the Admiralty and Common Law Courts, 1805–26," *ibid.*, 1932, p. 39; A. B. Lyons, "The Conclusiveness of the Foreign Office Certificate," *ibid.*, 1946, pp. 240, 245 ff.; Jaffe, *op. cit., passim;* E. D. Dickinson, "The Unrecognized Government or State in English and American Law," 22 Michigan Law Review (1923), pp. 29, 118. For the decision of an international tribunal affirming the declaratory nature of recognition, see Deutsche Continental Gas-Gesellschaft *v.* Polish State, decided Aug. 1, 1929, by the German-Polish Mixed Arbitral Tribunal, *Recueil des Décisions des Tribunaux Arbitraux Mixtes,* Vol. IX, pp. 336, 344; see comment thereon by Hans Herz, "*Le Problème de la Naissance de l'État et la Décision . . . du 1 Août 1929,*" *Revue de Droit International et de Législation Comparée* (3rd ser.), Vol. 17 (1936), p. 564.

[26] See, for example, collective recognition of Greece, 1830, British and Foreign State Papers, Vol. XVII, p. 191; of Belgium, 1831, *ibid.,* Vol. XVIII, pp. 645, 723 ff.; of Montenegro, Serbia and Roumania, 1878, *ibid.,* Vol. LXIX, pp. 758, 761, 763, 862 ff.; of Albania, 1921, League of Nations Official Journal (2nd Year, 1921), p. 1195, and Gerhard Pink, The Conference of Ambassadors (Paris, 1920–1931), Geneva Studies, Vol. XII, Nos. 4–5 (1942), pp. 106–116, 203 ff.; of Estonia and Latvia, 1921, British and Foreign State Papers, Vol. CXIV, p. 558, and M. W. Graham, *op. cit.,* p. 290 ff. See also British and Foreign State Papers, Vol. CXII, p. 225 ff., Clemenceau to Paderewski, June 24, 1919.

[27] Graham, *op. cit.,* pp. 295 ff., 300–301, 372, 375–6; Graham, The League of Nations and the Recognition of States (1933), and the works there cited.

[28] The Advisory Opinion of May 28, 1948, of the International Court of Justice on Conditions of Admission of a State to Membership in the United Nations (Charter, Art. 4) (I. C. J. Reports, 1947–1948, p. 57 ff.; this JOURNAL, Vol. 42 (1948), p. 927), while dealing with the criteria of membership in the United Nations, discusses neither the criteria of statehood nor recognition.

[29] *Op. cit.* (1948), pp. 44–51.