FORMATION OF STATE BY SECESSION AND THE IMPORT OF RECOGNITION IN INTERNATIONAL LAW*

Abstract
An entity that secedes by exercising its right of external self-determination as per secession may be required to gain recognition in order to consolidate its status as a state. The right of self-determination may be futile if an entity that secedes does not become fully independent and functional as a state. This paper adopts a doctrinal research method which enabled the finding that although recognition does stand out in matters concerning statehood it is unclear whether an act of recognition is essential to the formation or emergence of states. The paper prescribes a viable ground for emergence of states as entrenched in the propounded theory in the work which places emphasis on the capacity of a seceding entity to govern itself as a criterion for statehood rather than recognition.

Keywords: International Law, Statehood, Secession, Recognition.

1. Introduction

An entity that secedes by exercising its right of self-determination may be required to gain state recognition so as to consolidate its status as a state. The international community may have wrongly put the recognition concept on the agenda of the forum of nations. Recognition has become much important especially by reason of its results. Recognition is defined as a procedure whereby the governments of existing states respond to certain changes in the world community. Such changes may occur by virtue of an act of secession of an entity from a state. Thus recognition can be said to be an activity of states as a legal person of international law. Consequently recognition confers on an entity that legal capacity it requires in order to enter into relations with the recognizing state with privileges and immunities within the domestic legal order. However the decision to recognize or not, appears not to have any legal prescriptions that compels states to recognize and as such an act of recognition largely depends on political views rather than legal grounds. This becomes a matter of concern for entities that will emerge as states through secession. The universally acclaimed right of self-determination may be futile if states and governments do not legally exist until recognized by the international community. This work analyzes the key theories regarding the recognition of states in international law. It reveals that whereas the Montevideo criterion for statehood expresses the legal requirement for recognition as a standard for statehood, recognition is observed to be largely dependent on the political will of states. The question asked by the international community is whether a state does not exist for want of recognition. From an analysis of some theories of state recognition, it will be clear that while the constitutive theory insists that a state could only exist as an international legal person if it is recognized by previously-established states, the declaratory theory rejects such a discretionary process. The declaratory conception appears more conformable to reason and parallel to the practice of international law and supported by the Montevideo Convention on Rights and Duties of States. Yet it may not have resolved the problems associated with statehood in international law. It is pertinent to consider whether the practice of state recognition is actually regulated by international law in spite of its importance.

2. Theoretical analysis of Statehood

At the beginning of the twentieth century there were some fifty acknowledged states and almost 200 by 2005.[1] The emergence of many states is significant in the twentieth century as a major political development that has changed most global affairs and international relations. However even as the emergence of states appears to be a reality in the century, it is doubtful whether the process is regulated by international law. Although the development is of importance in international relations it may not necessarily be subject to international law but a matter of facts.[2] Yet the equation of fact with law also obscures the possibility that the creation of states might be regulated by rules predicated on other fundamental principles. It has been amply submitted that *'the formation of a new state is a matter of fact, and not of law*.'[3] The position regarding

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[1] See Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006. Pg. 2.
[2] See the views of Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006. Pg. 2.
[3] Oppenheim (1st edn), Vol 1, 264, 209 (1); cf Erich (1926) 13 HR 427, 442; Jones (1935) 16 BY 5, 15-16; Marston (1969) 18 ICLQ 1, 33; Arangio-Ruiz (1975-6) 26 Ozfor 265, 284-5, 332. See also the formulation in Willoughby, Nature of the State, 195: 'Sovereignty upon all legality depends, is itself a question of fact, and not of law,' see also Oppenheim (8th edn), Vol 1, 544, 209; and the somewhat different formulation in Oppenheim (9th edn), vol 1, 120-3, 34.

the factual rule on state formation has gained support from a wide spectrum of legal opinion. One of the theories that shall be considered hereunder reflects in its argument that where a state actually exists, the legality of its creation or existence must be an abstract issue: the law must consider the new situation, despite its illegality.[4] In the same vein it is assumed that a nonexistent state implies that any rule treating it as existent is pointless and a denial of reality. The criterion according to the declaratory theory must be effectiveness rather than legitimacy. On the contrary, the constitutive theory holds the view that it is axiomatic to argue that the existence of a state is a matter of fact. If a state is and becomes an international person through recognition only and exclusively, and if recognition is discretionary, then rules granting to an unrecognized community a 'right to statehood' are excluded. The various theories do not satisfactorily explain modern practice. An attempt is made here to briefly analyze the theories before further extrapolation on the respective shortcomings of the theories;

Constitutive Theory of Statehood

State recognition has been initially founded on the constitutive theory of statehood, of which its essence could be traced back as early as 1815, at the Peace Congress of Vienna; the final act of this congress recognized only 39 sovereign states in Europe, and it also established that any future state could be recognized as such only through the acceptance of prior existing states.[5] The reason for such a distinction between the already established states and any future claim of statehood was argued to reside in the historical longevity of the former.[6] Accordingly, the theory postulates that a state is considered to be a legal international person only if it is recognized as sovereign by other states. In this respect, L.F.L Oppenheim considered that 'international law does not say that a state is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. Through recognition only and exclusively a state become an international person and a subject of international law.'[7] The views were also found in the works of Hegel, which claims that every state 'is sovereign and autonomous against its neighbors, (being) entitled in the first place and without qualification to be sovereign from their point of view, i.e. to be recognized by them as sovereign', while also admitting that 'recognition is conditional on the neighboring state's judgment and will.'[8] Such position establishes a discretion that should obviously have limitations. Kelsen holds the opinion that 'a state violates international law and thus infringes upon the rights of other states if it recognizes as a state a community which does not fulfill the requirements of international law. Nevertheless it could also be possible to have a state refusing to recognize another even when the criteria for statehood have been met. It is for this that Lauterpacht proposed that a state has a legal duty to recognize one another when the conditions of statehood exist[9], although Kelsen denied the notion of any such duty.[10] A major shortcoming of the constitutive theory is that recognition by states may not be unanimous. Thus where the principles of the theory is to be applied rigidly, there may be the implication of the state not being subject to international law which affects its capacity to assume rights and obligations that accrue to a recognized state. However Lauterpacht considered that the constitutive theory '*deduces the legal existence of new states from the will of those already established.*'[11] In addition eurocentrism was perceived to be a key feature of such recognitions, as early diplomatic and trade contacts with some Asian countries such as China, Japan, Siam or Persia involved a de facto acknowledgement of their sovereignty, but full-fledged relations and recognition were only granted upon meeting a certain standard of civilization.[12] However the constitutive theory eventually followed the changes and eventual fading of the Pax Britannica and Splendid Isolation doctrine and titled more to a more American-led international community.

[4] Cf Chen, Recognition, 38.

[5] Kalevi Jaakko Holsti, Taming the Sovereigns: Institutional Change in International Politics, Cambridge University Press, 2004, pp. 128-129.

[6] Ibid, p. 129.

[7] L. Oppenheim, International Law. A treatise, vol 1-Peace (Clark: The Lawbook of Exchange, 2005), pp. 135-136.

[8] G.W.F. Hegel, Elements of the Philosophy of Right, Oxford University Press, 2000, 331, quoted in James Crawford, Recognition in International Law: An Introduction to the Paperback Edition 2013, in Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. xxxi.

[9] Hans Kelsen, Principles of International Law, Rinehart, 1952, 70, in Adel Safty, The Cyprus Question: Diplomacy and International Law, iUniverse, 2011, pp. 191-192.

[10] Hans Kelsen, Recognition in International Law, in American Journal of International Law (1941), pp. 609-610; see also Krystyna Marek, Identity and Continuity of States in Public International Law, Libraire Droz, Geneva, 1968, p. 154.

[11] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 38. See also Thomas D. Grant, The Recognition of States: Law and Practice in Debase and Evolution, Praeger Publishing, Westport, 1999, p. 2.

[12] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 385.

Declaratory Theory of Statehood

While the constitutive theory gained ground and dominated international law since 1815, it only lasted until the shift in geographical dynamics that marked the beginning of the 20th century. At the end of the previous century, a great number of European nations became independent-Germany, Italy, Romania- and the first world war (1914-1918) led to the further emergence of sovereign states in Europe- Poland, Yugoslavia, Czechoslovakia- with the establishment of British or French mandates in some areas after the partition of multinational empires such as Austria-Hungary or the Ottoman Empire. However, the speech delivered by the United States President Woodrow Wilson on his fourteen points propagated the concept of self-determination, with direct consequences for the international order. In Wilson's conception, the lack of self-determination has been at the centre of Europe's turbulent history. The Great Powers, such as Britain and Austria, have previously resisted any attempt to partition the Ottoman Empire, expressing fears that the resulting independent states would be small and too fragile. It was reasoned that such partitioning may make the units potentially easy targets for annexation and could thus undermine the long established international order based on the balance of power.[13] The Wilson doctrine has arguably marked the end of *Pax Britannica* and paved the way for greater US influence on the world stage. In response to these changes, the constitutive theory lost its pre-eminence in favor of a new conception- the declarative theory of statehood. While the constitutive theorists claimed that recognition is a requirement for statehood, the declarative conception established by the 1933 convention of Montevideo challenged such an idea; according to article 3 of this treaty, statehood does not depend on recognition by other states. The declaratory model argues that a state does not obtain international legal personality through the consent of others, and as such the recognition of a state signifies nothing more than the admission of a factual situation.[14] While the common practice among states was argued to be somewhere in the middle of these two theories, the declarative conception is much closer to the current model[15] followed by the international community as it is also enshrined in the rules contained in the Montevideo convention and reiterated by the Badinter commission. Again neither theory of recognition satisfactorily explains modern practice. The declaratory theory assumes that territorial entities can readily, by virtue of their mere existence, be classified as having one particular legal status, which is rather complicated as to the effect of fact or law in formation of states.[16] In line with the declaratory theory, effectiveness is the dominant principle. However Kelson reasons that 'even if effectiveness is the dominant principle, it must nonetheless be a legal principle. A state is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is a legal status attaching to a certain state of affairs by virtue of certain rules or practices.'[17] Furthermore, the declaratory theorist's equation of fact with law also obscures the possibility that creation of states might be essentially regulated by rules which becomes a standard that may be founded in international laws. Conversely the constitutive theory fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis. Although the constitutive theory refers to the relevance of subjects of international law and the possibility of taking into account relevant legal principles not based on fact.

3. The Historic Position of Statehood in International Law

Having reviewed the theories on statehood, this part of the discussion attempts to position the theories above in context by investigating the question whether, and to what extent, the formation of states in history were regulated by international law, and whether it is not simply a 'matter of fact.' The opinion of scholars may be helpful in reviewing the historic perception of statehood in international law. It is important to consider statehood in history in order to ascertain the perspective of recognition and its role in the formation or emergence of states. Most theories of statehood have been essentially contextualized from a philosophical stand point rather than legal. There was little difficulty with regards to creation of states as far as its conceptual principles were concerned. Thus, although writers had divergent approaches to the process there was a unity of thought in crucial areas. New states could be formed by the union of two existing states.[18] It was essentially practicable to link two states in a personal union under one crown. This was the case between Poland and Lithuania in 1385; England and Scotland in 1603 and Aragon and Castile in 1479. The fusion of

[13] Henry Kissinger, Diplomatia, All Publishing House, Bucharest, 2010, pp. 191-192.
[14] Malcolm Nathan Shaw, International Law, 5th edition, Cambridge University Press, 2003, p. 382.
[15] Ibid
[16] See Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013. 45-50, for an effective critique of the 'state as fact' dogma. Lauterpacht's dismissal of the declaratory theory results in large part from his identifying the declaratory theory with this dogma.
[17] Kelson (1929) quoted in Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2006.
[18] Pufendorf, De Jure Naturae et Gentium, Bk VII, ch 3, p. 9, para 690.

two states as it were had a permanent effect. Another perspective to formation of new states was with the administrative effect of monarchy in which case a Royal in his reign could create new states by division of existing ones. Puferdorf aptly expressed this point in history.[19] A further perspective to creation or formation of new states was in the fact of the reality of revolutions. Nevertheless it is worthy to note, that the account in history has it that other existing states conducted well established relations and connections with the entity in revolt. As such, the emergence of the state through peculiar circumstances such as a revolution did not preclude other states from interacting with it in practice. In the same sense, the fact was made clear in the case of secession of South American provinces from Spain in the 1820s.[20] Nevertheless even as it was seemingly settled that the sovereignty of a state strengthens its ability to function as a state in fact, a problematic area was whether the break-away state required recognition by the parent state. The sense to this is that since the state was formed by revolution and not consent, it may be reasonable to assume that it would require the eventual ratification and consent of the parent state from which it broke out. But the position to recognition towards the end of the eighteenth century was as stated by Alexandrowicz: 'in the absence of any precise and formulated theory, recognition had not found a separate place in the works of the classic writers whether of the naturalist or early positivist period…'[21]

The scope of recognition in the middle of the eighteenth century was focused on elected monarchs and this implied that it was limited to recognition of governments. As such recognition of states formed through revolution or other means by the parent state was not considered at the period as observed by some commentators.[22] In fact in some sense the issue of recognition was considered to be meddlesome so that it was thought to be illegal or unnecessary.[23] Consequently recognition by other states was not necessary for considerations of a state's sovereignty.[24] There was apparent reluctance by early writers to accept the role recognition may play in the formation of a state. Apparently it was not fundamental to the emergence and sovereignty of a state. This position held sway even after the concept of recognition had become an aspect of the law. As expressed in *Handbuch des positivism:*

> The writers of the early period of eighteenth century positivism, whenever faced with the eventuality of recognition as a medium of fitting the new political reality into the law, on the whole rejected such a solution, choosing the solution more consistent with the natural law tradition. Even if the law of nations was conceived as based on the consent of states, this anti-naturalist trend was not allowed to extend to the field of recognition.[25]

In later years there was a shift in doctrine to the extent that the positivist reasoned that obligation to obey international law derived from the consent of individual states. Nevertheless international law, as it were, did not concern itself with how a state was formed. Its remote concern was centered on participation of the new state in the forum of nations. Yet this was a position which could only be attained through recognition. What then is the scope of recognition in modern international law? The positivist influential doctrines seem to place emphasis in matters of statehood on recognition. Recognition seems to play a crucial role in matters concerning attainment of statehood, no doubt, but the varying degrees of its relevance may be better examined through the aforementioned and analyzed theories- constitutive and declaratory theory. However in practice, and as has been submitted, courts of many states remain reluctant to determine for themselves any questions of statehood, even where the matter is between private parties,[26] on the ground that status is necessarily determined by executive recognition.[27] Consequently the fact of recognition has been set out as prominent in matters of statehood and has rather created difficulties in deciding cases with territorial implications by the courts. For this reason, the courts attempt to create a distinction between the external and internal implications of the fact of non-recognition of an entity. For instance in the case of *Hesperides*

[19] Pufendorf, De Jure Naturae et Gentium, Bk VII, ch 3, p. 9, para 690.
[20] See Frowein (1971) 65 AJ 568; Smith, GB & LN, vol 1, 115-70; Bethell (ed), The Independence of Latin America. See also de Martens, Nouvelles Causes célèbre du droit des gens (1843), vol 1, 113-209, 370- 498 (American War of Independence). Cf Wheaton, Principles, pt 1, ch II, p.26.
[21] (1958) 34 BY 176, 176.
[22] Versuche uber verschiedene Materien politischer und rechtlicher Kenntnisse (1783); A Compendium of the Law of Nations (1789), 18 ff.
[23] Alexandrowicz, (1958) 34 BY 176, 180 ff and authorities there cited.
[24] Saalfeld, Handbuch des positivism Voikerrechts, 26; cited by Alexandrowicz, (1958) 34 BY 176, 189.
[25] Ibid.
[26] See *Matimak Trading Co v Khalily, 118 F 3d 76 (2nd Cir, 1997, McLaughlin, CJ).*
[27] *Yrisarri v Clement (1825) 2 C & P 223, 225.* See also Bushe Foxe (1931) 12 BY 63; (1932) 13 BY 39.; Jaffe, Judicial Aspects of Foreign Relations, 79.

Hotels,[28] Lord Denning was posed with the challenge of determining the applicability of the laws of the Turkish Federated State of Cyprus. The question he asked was whether the law of the Turkish Federated State of Cyprus could be applied to a tort claim even though the Foreign and Commonwealth Office has certified that the United Kingdom did not recognize that entity as a state. Lord Denning submitted that:

> On the evidence before the court there is an effective administration in northern Cyprus under the laws of which the people who occupy the plaintiffs' hotels are not trespassers but occupy them lawfully; and as neither trespass to the land nor to the contents of the hotels is actionable according to the law in force in northern Cyprus, it is not actionable in England; and if the alleged trespass is not actionable an alleged conspiracy to trespass is also not actionable. I would unhesitatingly hold that the courts of this country can receive evidence and recognize the laws or acts in regard to day to day affairs of a body in effective control of a territory, even though it has not been recognized de jure or de facto by Her Majesty's government.[29]

To support the views and position the courts have taken are certain legislative efforts to circumvent the harsh effect of recognition of states particularly as it relates to non-recognition of entities that are self-governed within definite territories. For instance the extended definition of foreign state in the Foreign Enlistment Act 1870 (UK) empowers the courts to treat unrecognized entities as 'law areas' for various purposes.[30] The reason for such legislative intervention as well as the attitude of courts not to concern itself with recognition may not be far from the reality of the extreme damage caused by the potential effect of recognition and statehood. The practice of recognition as a basis for determining statehood must be seen to be contrary to the well laid principles of self-determination in the area of human rights. To assume that an entity that break-out or secedes from a state in self-defense or protection of rights cannot assert itself as a state is rather an absurd position. One shares the view of Crawford that 'the international status and rights of whole peoples and territories will seem to depend on arbitrary decisions and political contingencies if the conviction that recognition is at some level a legal act in the international sphere. Also if political leaders assume that they are or should be free to recognize or not recognize a state on grounds of their own choosing.'[31]

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[28] (1978) Q.B 206.

[29] Ibid;

[29] (1978) Q.B 206. The following cases are referred to in the judgments:
Aksionairnoye Obschestvo A. M. Luther v. James Sagor and Co. [1921] 1 K.B. 456; [1921] 3 K.B. 532, C.A.
American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504, H.L.(E.).
Boys v. Chaplin [1971] A.C. 356; [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085, H.L.(E.).
British South Africa Co. v. Companhia de Mocambique [1892] 2 Q.B. 358, C.A.; [1893] A.C. 602, H.L.(E.).
Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1965] Ch. 596; [1965] 2 W.L.R. 277; [1965] 1 All E.R. 300, C.A.; [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).
Government of the Republic of Spain v. S.S. Arantzazu Mendi (The Arantzazu Mendi) [1939] A.C. 256; [1939] 1 All E.R. 719, H.L.(E.).
James (An Insolvent), In re (Attorney-General intervening) [1977] Ch. 41; [1977] 2 W.L.R. 1; [1977] 1 All E.R. 364, C.A.
Marrinan v. Vibart [1963] 1 Q.B. 234; [1962] 2 W.L.R. 1224; [1962] 1 All E.R. 869; [1963] 1 Q.B. 528; [1962] 3 W.L.R. 912; [1962] 3 All E.R. 380, C.A.
Mostyn v. Fabrigas (1774) 1 Cowp. 161; 1 Smith L.C. 642.
Nissan v. Attorney-General [1968] 1 Q.B. 286; [1967] 3 W.L.R. 1044; [1967] 2 All E.R. 1238, C.A.; [1970] A.C. 179; [1969] 2 W.L.R. 926; [1969] 1 All E.R. 629, H.L.(E.).
Phillips v. Eyre (1870) L.R. 6 Q.B. 1.
Skinner v. East India Co. (1666) 6 St.Tr. 710.
Swiss Israel Trade Bank v. Government of Salta [1972] 1 Lloyd's Rep. 497.
Tolten, The [1946] P. 135; [1946] 2 All E.R. 372, C.A.
Ward v. Lewis [1955] 1 W.L.R. 9; [1955] 1 All E.R. 55, C.A.
The following additional cases were cited in argument:
Bird v. O'Neal [1960] A.C. 907; [1960] 3 W.L.R. 584; [1960] 3 All E.R. 254, P.C.
Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] A.C. 435; [1942] 1 All E.R. 142, H.L.(Sc.).
Deschamps v. Miller [1908] 1 Ch. 856.
Gouriet v. Union of Post Office Workers [1977] Q.B. 729; [1977] 2 W.L.R. 310; [1977] 1 All E.R. 696, C.A.
King of the Hellenes v. Brostrom (1923) 16 Ll.L.Rep. 167.
St. Pierre v. South American Stores (Gath and Chaves) Ltd. [1936] 1 K.B. 382, C.A.

[30] See the Foreign Corporations Act 1991 (UK); Foreign Corporations (Application of Laws) Act 1989 (Cth). These Acts, though general in terms, were passed to deal with the situation in Taiwan, an issue dealt with by the US through special legislation, the Taiwan Relations Act, 22 USC 3301. See *New York Chinese TV Programs, Inc V UE Enterprises, Inc, 954 F 2d 847 (2d Cir 1992), cert denied, 506 US 827 (1992); Millen Industries Inc v Coordination Council for N American Affairs, 855 F 2d 879 (1988), 98 ILR 61. Other jurisdictions have simply accepted Taiwan acts and laws without legislative mandate: Romania v Cheng, 1997 Carswell NS 424 (Nova Scotia SC); Chen Li Hung v Tong Lei Mao (2000) 1 HKC 461.*

[31] *See Crawford James, The Creation of* States in International Law, 2nd ed. Oxford University Press, 2007. P. 14.

It is submitted that the constitutive position taken by the early writers have the capacity to completely undermine or compromise the human right of peoples. The usual and apparent unwillingness of states to allow a part of it to secede- even at the height of gross human right abuses meted out on the seceding part- as well as the possibility that allies of the parent state may be reluctant to recognize such a break-away entity should be put into consideration. Drawing from the tenets of the two profound theories on state recognition, it may be seen that its principle do not properly propagate the expected ideals of international law. One can immediately see the flaws where the views of states that should accord recognition are 'constitutive.' Determining the legality of state conduct from the collective or individual views of states may not produce a definite or plausible result. Such determination often involves difficult circumstances of fact and law. Accordingly Crawford submits that 'if individual states were free to determine the legal status or consequences of particular situations and to do so definitively, international law would be reduced to a form of imperfect communications, a system for registering the assent or dissent of individual states without any prospect of resolution.'[32]

There are further arguments that add support to the rejection of the constitutive position. First, according to Crawford, if state recognition is definitive then it is difficult to conceive of an illegal recognition and impossible to conceive of one which is invalid or void.[33] But there is proof of nullity of certain acts of recognition which has been accepted in practice.[34] If that is the case then the test for statehood must be extrinsic to the act of recognition which essentially is a denial of the constitutive theory. Secondly, the constitutive theory seems flawed when considering its relative position. Kelsen sums up that 'the existence of a state has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence.'[35] Lauterpacht equally accepts the relativity of recognition as inherent in the constitutive position. Nevertheless it is amazing that he refers to it as a 'glaring anomaly'[36] and a 'grotesque spectacle' casting grave reflection upon international law.'[37] He submits that such relativism '*cannot be explained away…by questionable analogies to private law or philosophical relativism*.'[38] However it is worthy to note that the relative position of the constitutive theory is central to its theme. Yet it suffers such sharp criticism even from scholars that share similar sentiments in the context of its tenets. Crawford aptly posited that if a central feature of the constitutive position is open to such criticism the position itself must be flawed.[39]

Further criticisms lay in the difficulty of a duty to recognize an entity that has, prior to recognition, *ex hypothesi* no rights. In Lauterpacht's view 'the duty is owed to society of states at large…that society is entitled to claim recognition, but this is an unenforceable or imperfect right.'[40] It is a mere construct, bearing no relationship to state practice or general legal opinion.[41] As was expressed in Lauterpacht's Recognition- 'we are not in a position to say…that there is a clear and uniform practice of states in support of the legal view of recognition.'[42]

Further, Lauterpacht reviews state practice of recognition and states that

> Much of the available evidence points to what has here been described as the legal view of recognition. Only that view of recognition, coupled with a clear realization of its constitutive effect, permits us to introduce a stabilizing principle into what would otherwise be a pure exhibition of power and a negation of order…[43]

[32] See Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. P.15.
[33] Ibid, n 551.
[34] See Restatement (Third) Foreign Relations Law of the US, 202, Comment f, 'Unlawful recognition or acceptance', and further Chapter 3.
[35] Kelsen (1941) 35 AJ 605, 609. On Kelsen's position see Pauly, in Diner and Stolleis (eds), Hans Kelson and Carl Schmitt, 45, 46-7.
[36] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 67.
[37] Ibid, 78.
[38] Hersch Lauterpacht, Recognition in International Law, Cambridge University Press, 2013, p. 67.
[39] See Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. P.16.
[40] Ibid, n. 558 at 74-5, 191-2.
[41] Chen, Recognition, 52-4.
[42] Ibid, n. 558. 77-8.
[43] Ibid

Crawford points out that state practice demonstrates neither acceptance of a duty to recognize,[44] nor a consistent constitutive view of recognition. For instance the United Kingdom seems to have always accepted a duty to recognize but even its statement from time to time is not an assertion of the constitutive theory.[45]

Consequently, the disarray in international law as to recognition begs the question, for instance, whether the fact that Belize was not recognized by Guatemala,[46] Macedonia by Greece, or Liechtenstein by Czechoslovakia and its successors mean that these entities did not exist, were not states, had no rights at the time? After all, even after the Former Yugoslav Republic of Macedonia was admitted to the UN[47] it remained for a time unrecognized by Greece.[48]

Another dimension can be taken from perspective of the declaratory theory. According to the declaratory theory recognition of a new state is a political act, which is, in principle, independent of the existence of the new state as a subject of international law. Taft CJ's comments in the Tinoco Arbitration are frequently cited as the classic statement of the declaratory position:

> The non-recognition by other nations of a government claiming to be a national personality is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition vel non of a government is by such nations determined by enquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned…Such non-recognition for any reason…cannot outweigh the evidence disclosed…as to the de facto character of Tinoco's government, according to the standard set by international law.[49]

More clearly stated, was the opinion of the court in *Wulfsohn v RSFSR*:

> The result we reach depends upon more basic considerations than recognition or non-recognition by the United States. Whether or not a government exists clothed with the power to enforce its 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 its recognition does not create the state although it may be desirable[50].

Although the opinion in the Tinoco Arbitration was a case of recognition of governments, it is apt to state that where an authority in fact exercises governmental functions within an area already accepted as a state, there seems to be nothing for recognition to constitute, at least at the level of international personality. Indeed the claim that the recognition granted by other states asserts the status of a new state is unfounded in legal opinion or state practice.[51] It is difficult to even logically draw such conclusion. The several acts of recognition by other states, it is submitted, may rather add to its international capacity and not conclusive as to its status. In *Deutsch Continental Gas Gesellschaft v Polish State*, it was stated that 'the recognition of a state is not constitutive but merely declaratory. The state exists by itself and the recognition is nothing else than a declaration of this existence, recognized by the states from which it emanates.'[52]

Basically the focus of courts has always been on the conditions required for the formation of a state and not necessarily the recognition it should obtain from other states. The Report of the Commission of Jurists on the Aaland Islands case dealing with the independence of Finland explicitly buttresses this point where it states that:

> …these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign state…The same legal value cannot be attached to recognition of new states in war-time, especially to that accorded by belligerent powers, as in normal times…In addition to these facts which bear upon the external relations of Finland, the very abnormal

[44] Ibid n, 559 at p. 17.
[45] Verhoven, Reconnaissance, 576-86; Rich (1993) 4 EJIL 36.
[46] See (1992) 63 BY 633-4; 243 HC Debs, vol 243, WA, col 5, 9 May 1994.
[47] GA res 225, 8 April 1993.
[48] See Riedel (1996) 45 Sudost-Europa 63; Craven (1995) 16 AYIL 199; Pazartzis (1995) 41 AFDI 281.
[49] (1921) 18 AJ 147, 154. See also MooreHopkins Claim (1927) 21 AJ 160, 166.
[50] 138 NE 24, 25 (1923); app diss 266 US 580 (1924).
[51] See the views of Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. P.18.
[52] (1929) 5 ILR 11, 13.

> character of her internal situation must be brought out. This situation was such that, for a considerable time, the conditions required for the formation of a sovereign state did not exist.'[53]

It is explicit that the commission regarded the value of recognition but nonetheless did not accept it as conclusive on matters of statehood. The commission rather referred to the conditions required for the formation of a sovereign state. The same report reflected a significant aspect of Finland's statehood even before independence. The continuity between the independent State of Finland after 1917 and the autonomous State of Finland before 1917 is regarded as a continuity of legal personality, despite absence of recognition of pre-1917 Finland. Again the report further made reference to 'an autonomous Finland which…on the 6th December 1917, proclaimed her full and entire independence of Russia, detached herself from the latter by an act of her own free will, and became thereafter herself a sovereign state instead of a dependent state.'[54] Again, in its first opinion on the 29 November 1991, the Arbitration Commission established to advice the European Peace Conference on Yugoslavia stated that 'the effects of recognition by other states are purely declaratory.'[55] The International Court in the Bosnian Genocide case,[56] while addressing the issues of genocide, by implication, firmly expressed the point that statehood is not attained by acts of recognition by other states. The rights of a new state are equally not given to it by an act of recognition. In that case, the Federal Republic of Yugoslavia had argued that the court was not competent to adjudicate questions under the Genocide Convention, because the FRY and Bosnia-Herzegovina had not recognized each other at the time proceedings were instituted. The argument was dismissed and it was concluded that the rights of Bosnia-Herzegovina were opposable to the FRY from the time the former became a state, whether or not the FRY had yet recognized it as such.[57] It is instructive to point out that in practice; states do not regard unrecognized states as exempt from international law.[58] Thus Macedonia was recognized for some years, yet it was treated by all as a state. Serbia and Montenegro was not recognized as the continuation of the old SFRY, and most states had limited diplomatic relations with it as a result. But its statehood was never in doubt. Brownlie submits that 'recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard.[59]

It can thus be concluded that states do in fact carry on substantial relations with new states regardless of whether or not the new state is recognized; even to joint membership of inter-state organizations such as the United Nations.[60] Consequently recognition is usually regarded as a political act and even if it is not considered as one then it merely subsists as an act of political accommodation.[61] Incidentally the character of recognition appears more confusing that it has hardly resolved any of the problems in international law practice. Brownlie stipulates that:

> in the case of 'recognition', theory has not only failed to enhance the subject but has created a tertium quid which stands, like a bank of fog on a still day, between the observer and the contours of the ground which calls for investigation. With rare exceptions the theories on

[53] LNOJ, Sp Supp 4 (1920), 8.
[54] Op cit, n.575.
[55] Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165; see also the reiteration of same point in Opinions 8 and 10: 92 ILR 201 (4 July 1992); ibid, 206-8 (4 July 1992).
[56] ICJ Rep 1996, p. 595, 612-13.
[57] Ibid.
[58] See the Protocol of the London Conference, 19 Febraury 1831: 18 BFSP 779, 781 (concerning Belgium); Marek, Identity and Continuity, 140. Non-recognition of North Korea and of Isreal was not regarged as precluding the application of international law rules to the Korean and Middle East Wars: Brownlie, Use of Force, 380. See also Briggs (1949) 43 AJ 113, 117-20; Charpentier, Reconnaissance, 45-8, 56-8; Whiteman, 2 Digest, 604-5.
[59] Principles (2nd ed.), 94; (6th ed.), 89-90; see also (2nd ed), 90-3; (6th ed), 86-8. Among older authorities, those supporting the declaratory position include: Erich (1926) 13 HR 427, 457-68; Jaffe, Judicial Aspects of Foreign Relations, 97-8; Borchard (1942) 36 AJ 108; Brown (1942) 36 AJ 106; Kunz (1950) 44 AJ 713; Chen, Recognition; Marek, Identity and Continuity, 130-61; Charpenter, Reconnaissance, 196-200; Lachs 01959) 35 BY 252; Waldock (1962) 106 HR 147-51; Brierly, Law of Nations (6th ed), 139; Higgins, Development, 135-6; Starke, Studies in International Law, 91-100; O'Connell, International Law (2nd ed), vol 1, 128-34; Fawcett, The Law of Nations (2nd ed.), 49, 55; Akehurst, Modern Introduction (3rd ed), 60-3. See also the Resolutions of the Institut du Droit International (1936): 'La reconnaissance a un effet declarative. L'existence de l'Etat nouveau avec tous les effets juridiques qui s'attachent a cette existence n'est pas affectee par le refus de reconnaissance d'un ou plusieurs Etats: Wehberg (ed), Institut de Droit International, Table General des Resolutions 1873-1956, ii; and Brown (1934) Annuaire 302-57. Among more recent writers see Davidson (1980) 32 NILQ 22; Menon (1989) 67 RDISDP 161, 176; Weston, Falk and D'Amato, International Law and World Order (2nd ed), 847; Verhoeven (1993) 39 AFDI 7.
[60] See Bot, Non-Recognition and Treaty Relations; Whiteman, 2 Digest, 524-604, and for the older practice, see Moore, 1 Digest, 206-35; Hackworth, 1 Digest, 327-63.
[61] Lachs (1959) 35 BY 252, 259; Higgins, Development, 164-5; Verhoeven, Reconnaissance, 721.

> recognition have not only failed to improve the quality of thought but have deflected lawyers from the application of ordinary methods of legal analysis.'[62]

The fundamental issue that arises is to consider the overall effect of recognition in state formation? It is submitted that recognition does play a pivotal role in practice, but to the extent of depicting the reality of the existence of a state from inception or at the moment of its declaration. Thus it is further submitted that recognition merely contributes towards the consolidation of the status of an entity. After all, does the denial of recognition to an entity otherwise qualifying as a state entitle the non-recognizing state to act as if it was not a state? Does the denial of recognition strip a state of its essential nationality? Does it deny the non-recognizing state the exercise of state rights under international law? The answer is no. For instance, Crawford's position is that such denial does not affect the existence, nationality and exercise of state rights of the non-recognizing state.[63] He goes further to state that the categorical constitutive position, which implies a different answer, is unacceptable.[64] Crawford firmly holds the opinion that the status of an entity as a state is, in principle independent of recognition. It is submitted that this represents the correct opinion and that international law and practice must have a workable criteria for statehood as a crucial element of state establishment through the means of secession. The preceding paragraph captures a theory of statehood propounded in this work which aims at resolving the problems associated with emergence of states. The status of a seceding entity may be consolidated as a state with international rights soon after it emerges.

4. Essential Theory: A New Dimension in the Concept of Statehood

In view of the difficulty of ascertaining the actual import and effect of recognition and the surrounding complexities associated with the application of rules of recognition to statehood, it is considered necessary to propound a theory which shall in effect meet the challenges in the subject of recognition. The over-all consideration of the new theory is predicated on the human rights of peoples. It is reasoned that if recognition continues to inhibit the emergence of states particularly through secession, then the reason for which the principles of self-determination has been developed would have been defeated. It is here imagined, like sending back a fleeing man to the forest wherein he is attacked by a fearsome lion. In other ways, it is likened to a case of refusing a grant of divorce where a marriage has broken down irretrievably. Nevertheless it is not intended here to relegate or deny the relevance of recognition in international law. But as shown earlier, it is doubtful whether recognition has a place in international law. In fact, according to Chen, recognition is a mere construct bearing no relationship to state practice or general legal opinion.[65] Nevertheless the Essential theory avoids a complete denial of the relevance of recognition in the context of statehood. The theory does hold the view that recognition does not create the rights essential to a state but merely consolidates an existing right and status. The 1933 Montevideo Convention**,** which set out the modern rules of statehood, stipulates that a state should possess a population, a defined territory, a government, and the ability to enter into relations with other countries. The Montevideo Convention was written at the start of the end of empires and colonization, so it is not too much of a leap to say that it reflects the sign of the times or what was expected to come. It makes sense to have legal space for the creation of new states with the assumption that recognition will automatically come at the point of decolonization. And that is what happened for most post-colonial states that gained their independence in the 20th century.

For purposes of formation of states particularly through secession, it is necessary that a State have certain characteristics. It must have a territory, population, government and the ability to interact with other States. In addition, because the state is an entity that belongs to a wider community, it must be accepted, recognized at least to some extent, by that community. Recognition can also cure certain defects in the characteristics of a state as long as they are not too serious to prevent that entity from fulfilling its purpose. Having a two-tier system like this is to the benefit of the international community. If all that mattered were the Montevideo criteria, any warlord or group that could assemble enough force could carve out a new state simply by controlling a territory and nothing else. This would encourage any group that wanted their own state to simply take up arms instead of encouraging democratic compromise by requiring individuals and groups to work within the states they find themselves. On the other hand, if all that was required were recognition, the politics of state creation could easily leave the world of reality behind. States would be able to preclude new states from forming not because they are insufficient in some manner, but based entirely on politics without regard to circumstances that necessitated the break-away particularly human rights situations. Thus a hybrid

[62] Brownlie (1982) 53 BY 197, 197.
[63] See Crawford James, The Creation of States in International Law, 2nd ed. Oxford University Press, 2007. P.20.
[64] Ibid.
[65] Chen, Recogntion, 152-45.

from the constitutive and declaratory theories is here proposed. The said hybrid is considered productive and results to a model of theory here referred to as Essential. In its main, the Essential Theory balances the relevance of the aforementioned theories but relaxes the strict need for recognition as a basis for statehood. Illustratively, in the English context of marriage, one may ask whether a marriage contract having met all essential requirements becomes void only because it is not recognized by family members. It is submitted that an entity that meets the specifications in the Montevideo convention is indeed a state. However, the effect of recognition will further consolidate the status of statehood. The most important criteria of the convention in this regard will be the capacity of the state to govern itself. Self-government provides assurances that the population's rights shall be protected. Factually, it may amount to further abuse of rights if a break-away entity is unable to govern itself democratically in order to enthrone the pillars of human rights in the entity. Such failure may reflect the initial resolve of the Israelites to return to the parent state of Egypt upon realizing that the leader of the exodus had no capacity to further govern the population. Consequently, it is at the level of self-government that recognition becomes relevant. States may not recognize an entity where it is deemed incapable of governing itself by universally acceptable and democratic standards. Even so, it will be observed that capacity of self-government equally affect the ability of a state to enter into international relations with other states. Most states have recognized a newly formed state on economic grounds. In essence, the true test for statehood should be recognition of the ability of a newly formed state to govern itself which invariably portends its capacity to enter into international relations. To refer again to the analogy of marriage; there is a contract where two persons who meet the essential requirement of marriage are joined in matrimony. However the announcement and pronouncement of the marriage does consolidate the parties' new status. It is in this way that a state is formed soon as it is declared in compliance with the criteria for statehood under the Montevideo convention. The fact of recognition consequently consolidates this status by announcing the current position of the state in order to easily foster international relations and engagements.

Nevertheless even as recognition plays a pivotal role in statehood, it is immaterial whether a substantial number of existing states do not recognize the new state. To set majority recognition as a yardstick will be to politicize the process of recognition. It can easily be imagined how some states will refuse to grant recognition to an enemy territory and vice versa. Most states may also refuse recognition because they enjoy friendly relations with the parent state. Thus it is submitted that recognition be limited to such number of states that may be reasonably considered essential for the welfare of the newly formed state. After all, is it not true that most states refuse to enter into bilateral relations with others because they were common foes? What should be of importance to the international community is the welfare of the population of the new state in view of their most basic human rights. Once assured, the criteria for self-government would have been met, and a new state formed. The paramount consideration for statehood should therefore be the ability for self-government which is essential to the survival of the human population of a seceding entity.

6. Conclusion and Recommendation

It is easy to see how important a process of determining the subjects of international law is, and the need for an effective method for conclusive determinations. However there is nothing conclusive or certain about a conflict between different states as to the status of a particular entity, and there is no reason why they should be bound either by the views of the first state to recognize or of the last to refuse to do so. The problems such system of determination presents can be immediately seen in the case of an entity that secedes and depends on the will of states to recognize it in order to survive. It is recommended that the model for statehood be reviewed in international law to shift focus to the capacity of a seceded entity to govern itself as a criterion for such number of recognitions by states as may be essential for the entity to survive if it stands on its own.