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RECOGNITION OF STATES IN INTERNATIONAL LAW

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I.

INTRODUCTORY

Principles of the Recognition of States. To recognize a community as a State is to declare that it fulfills the conditions of statehood as required by international law. If these conditions are present, existing States are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfill that function in their capacity as organs of international law. In thus acting they administer the law of nations. This rule of law signifies that in granting or withholding recognition States do not claim and are not entitled to serve exclusively the interests of their national policy and convenience regardless of the principles of international law in the matter. Although recognition is thus declaratory of an existing fact, such declaration, made in the impartial fulfillment of a legal duty, is constitutive, as between the recognizing State and the new community, of international rights and duties associated with full statehood. Prior to recognition such rights and obligations exist only to the extent to which they have been expressly conceded or legitimately asserted by reference to compelling rules of humanity and justice, either by the existing members of international society or by the community claiming recognition.[1]

These principles are believed to have been accepted by the preponderant practice of States. They are also considered to represent rules of conduct most consistent with the fundamental requirements of international law conceived as a system of law. However, while followed in prac-

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1. These principles underlie the author's exposition of the doctrine of recognition in 1 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1937) §§ 71a, 75bb, 75g-i, and in his lectures delivered at the Hague Academy of International Law in 1937, *Règles Générales du droit de la Paix* (1937) 4 RECUEIL DES COURS 95, 243-62. It is hoped to give them a systematic form in a comprehensive work on Recognition in International Law.

tice with some regularity, they cannot be regarded as having been uniformly acted upon or clearly perceived by governments. Neither have they secured the assent of the majority of writers on the subject.

The Problem of Recognition in the Science of International Law. The majority of writers still adhere to the view that the act of recognition as such is not a matter governed by law, but a question of policy. They 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. If this is so, it will be asked, how is it that recognition looms so large in the writings of those very jurists who hold that it is outside the law? The answer is that, while denying the quality of law to the act of recognition, some of them maintain that this act of policy, once accomplished, entails legal consequences inasmuch as it is the starting point of international personality with all the rights pertaining thereto; that, in any case, the form and the circumstances of recognition are of legal interest and necessitate the consideration of such questions as the distinction between *de jure* and *de facto* recognition, implied recognition, and conditional recognition; and that important questions of law arise when that act of policy constitutes so-called premature recognition in disregard of the rights of existing States. But the dominant fact remains that the very commencement of the international personality of States and their legal right to existence are declared by these writers to be outside the orbit of international law.

This fact has been obscured by the circumstance that the problem of recognition of States has been identified with the controversy between the rival doctrines of the declaratory and the constitutive character of recognition. The opposition of these two doctrines has for a long time dominated discussion on the subject. Both theories have denied that recognition is a matter of legal duty in relation to the community which claims it. The constitutive theory, as commonly propounded, culminates in two assertions. The first is that prior to recognition the community in question possesses neither the rights nor the obligations which international law associates with full statehood; the second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to the community concerned. These two assertions, it will be shown, are not inconsistent. The theory of the declaratory nature of recognition fully accepts the view of its rival that there does not exist in any circumstances a legal duty to grant recognition. At the same time, with an obvious lack of consistency, it maintains that prior to recognition the nascent community exists as a State and is entitled to many of the most important attributes of statehood. This means, upon analysis, that the newcomer is entitled as a matter of legal right to claim what are usually regarded as the normal legal consequences of recognition, but that it is not entitled to claim recognition as such. The apparent logical

difficulty has been thought to be met by dint of the assertion—which is contrary to the practice of governments and of courts—that the only meaning of recognition is a political declaration of willingness to enter into normal diplomatic relations. This questionable solution has been regarded as preferable to accepting the main tenet of the constitutive doctrine according to which a purely discretionary political act of recognition is creative of substantive rights—indeed, of the very existence—of statehood.

The denial of the legal nature of recognition, that is, the denial of the existence of a duty to recognize and of a right to recognition, notwithstanding the presence of requisite factual conditions, is grounded in the same attitude which has brought into being the orthodox constitutive doctrine. It is the attitude congenial to the type of positivism current in the literature of international law. If, in conformity with positivist teaching, the will of the State is the sole source of its obligations, then it is impossible to concede that the existing States can have new duties thrust upon them as the result of the emergence of a politically organized community which they are henceforth bound to recognize as a State.

It would have been natural for those adhering to the declaratory doctrine to feel no hesitation in accepting the view of recognition as a juridical act performed in the fulfillment of a legal duty. For there is but one step—which is certainly not a revolutionary one—between maintaining that an act is merely declaratory of a fact of primary importance in the life of a nation and treating that act as one of legal duty. However, such is the lure of respectability, which has attached to the positivist creed, that most of those holding the declaratory view have felt it incumbent upon them to join the opposing doctrine in denying the legal nature of the act of recognition and in finding in such denial the hallmark of positivist orthodoxy.[2]

The Place of Recognition in the Relations of States. Concentration on the dispute between the constitutive and the declaratory doctrines as well as the tendency to apply positivist method also in this branch of international law have been responsible for the present unsatisfactory state of the law of recognition. The practice of States, after allowance has been made for discrepancies due to the political implications of the function of recognition, supplies a satisfactory basis for conceiving and presenting the process of recognition in all its manifestations as an act of

2. Kunz goes to the length of maintaining that most of the adherents of the declaratory view are positivists. KUNZ, DIE ANERKENNUNG VON STAATEN UND REGIERUNGEN IM VÖLKERRECHT (1928) 67. This is probably an exaggeration. But there are, in fact, some positivists who incline to the declaratory view of recognition. See, *e.g.*, 1 DE LOUTER, LE DROIT INTERNATIONAL PUBLIC POSITIF (Fr. trans. 1920) 216; LISZT, VÖLKERRECHT (12th ed., Fleischmann, 1925) 91; ULLMANN, VÖLKERRECHT (2d ed. 1908) 67.

law as distinguished from policy. From that practice it is possible to extract legal principles capable of general application. There ought to be no doubt as to the urgency and the intrinsic justification of such principles. For the problem of recognition touches the life of States in its most vital aspects. It confronts it in the form of recognition of statehood at the point of its emergence into the international arena; it faces the State in the form of recognition of governments at times of internal and external crises brought about by a revolutionary break in the legal continuity of its constitutional existence; and it confronts it in the shape of recognition of belligerency at periods of violent commotions when on the battlefields of civil war the nation seeks a solution of violent clashes of creed and interests. Yet, notwithstanding its obvious significance, recognition, as taught by writers, constitutes one of the weakest links in international law. The science of international law can no longer avoid the task of inquiring whether this state of affairs is due to a clear defect of international law as expressed in the practice of States or whether it is attributable to the failure of lawyers to analyze constructively the practice of States by reference to a jurisprudential principle of order as distinguished from amorphous maxims of policy. An inquiry of this nature is of special urgency at a time when the foundations are being laid of an improved international order.

There is an instructive analogy in this matter between recognition and the place of war in international law. Thus, prior to the General Treaty for the Renunciation of War of 1928, the admissibility of war as an instrument both for enforcing and for changing the law constituted the principal defect of the law of nations. In time of peace States were rigidly bound to respect the existence, the independence, and even the dignity of other members of international society. Recourse to reprisals was regulated by principles circumscribing the conditions and the extent of their application. But by availing itself of its unlimited right to declare war the State could gain entire freedom from these restraints and acquire the right to treat its neighbor thus attacked as a veritable *caput lupinum* to the point of legally permissible annihilation through conquest and annexation. The legal admissibility of war showed how unreal was the borderline between law and lawlessness, between the duty to let live and the right to extinguish. It showed that law obtained only so long as States were willing to tolerate it and that it was left to them to divest themselves of the most fundamental of all duties by one legally authorized arbitrary act.

This glaring gap in the effective validity of international law has been chosen here as an example not only for the reason that it constitutes a weakness much more real than the absence of enforcement or of overriding international legislation. It has been selected because it throws light upon a phenomenon similar to that created by the law of recogni-

tion—assuming always that the prevalent doctrine gives an accurate account of the existing practice. The State is bound by minute rules to respect the sovereignty and independence of other States. But, as in the traditional view of war the State is left to its free discretion by availing itself of the unlimited right of war to assail the very existence of other States, so, in the light of the predominant doctrine of recognition, it is free to decide according to its unfettered discretion and by consulting its own interests only whether another community shall enjoy the rights of sovereignty and independence inherent in statehood. By the simple device of refusing—or possibly of withdrawing—recognition, a State is legally entitled, according to a widely adopted view, to deny the right of independent existence to a political community apparently fulfilling the conditions of statehood.

The position is analogous in the case of recognition of governments. A State participates in the benefits of international law largely through the medium of its government. To decline to recognize the government of a State is to refuse, to a substantial extent, to recognize the State itself and to accord it what is its due in the international sphere. Such a refusal implies the denial of normal international intercourse; it results in ignoring the legislative, judicial, and administrative acts of the State whose government has been refused recognition; it entails in many cases the suspension of the operation of treaties concluded by former governments; and it has even been suggested that it deprives the government in question of the capacity to wage war.[3] In the case of a civil war the consequences of that alleged right to grant or refuse recognition according to discretion show themselves in an even more glaring manner. A right thus conceived may, in effect, amount to granting to foreign States a license to withdraw recognition from the lawful government and to bestow it arbitrarily upon the rebels, with all the profound consequences following from that change in the legal status of the two sides.[4] To say,

3. "In view of the fact that the Government of the United States has not recognized the existence in the Republic of Costa Rica of a *de jure* or even a legitimately *de facto* Government, but holds that only the people of Costa Rica can as a moral force set up in that country a government constitutional in character and duly sanctioned by law, it follows naturally that the Government of the United States could not recognize as legally existent any manifestation of such a Government.

"To declare war is one of the highest acts of sovereignty. The Government of Costa Rica being for the Government of the United States legally nonexistent, it follows that so far as the Government of the United States is concerned, no state of war could exist between Costa Rica and the Imperial German Government. Obviously there could be no question so far as this Government was concerned as to signing with Costa Rica the Treaty of Peace of Versailles." Memo of Secretary Lansing to President Wilson, Aug. 16, 1919, 1 FOR. REL. U. S. 1919 (U. S. Dep't State 1934) 852.

4. See, for instance, the recognition of the revolutionary government in Spain by Italy and Germany in November, 1936, at the beginning of the civil war. New York Times, Nov. 19, 1936, p. 1, col. 8.

therefore, that the granting of recognition to a new government is a matter of discretion unfettered by legal principle is to maintain that in this matter also the line dividing law and freedom from legal restraint is altogether illusory. Similar consequences in a different sphere follow from the view that in the case of a civil war the recognition of belligerency with all the rights attaching thereto is a matter of pure grace and political convenience on the part of foreign States.

In all these cases the view that recognition is not a function consisting in the fulfillment of an international duty, but a measure of national policy independent of binding legal principle, has had the further result of divorcing recognition from the scientific basis of fact on which all law must ultimately rest. That basis is the assumption that international personality, governmental capacity, and the competence to exercise the rights of a belligerent in a civil war, must all be determined primarily by reference to the actual conditions of power and effectiveness of the authorities claiming recognition in these various capacities. Law must be based on facts—insofar as such facts are not in themselves contrary to law. Successful secession from the parent State is a fact which is not contrary to international law; the same applies to a rebellion resulting in a revolutionary government or in a civil war. This being so, these events are facts which, if law is to approximate to social reality, must through the medium of the legally obligatory act of recognition be permitted to produce the appropriate legal results.

II.

THE LEGAL NATURE OF RECOGNITION AND THE PRACTICE OF STATES

The Legal Conception of Recognition and the Notion of Premature Recognition. The principal feature of the prevalent doctrine of recognition of States is the assertion that recognition is in its essential aspect, namely, in relation to the community claiming it, an act of policy as distinguished from the fulfillment of a legal duty. It is possible to criticize that view by reference to compelling legal principle, which forbids us to admit that a legal system either fails to determine what are the requirements of legal personality or, what is the same, that it lays down that legal personality shall be the gift of the already existing members of the community acting by exclusive reference to their own interests, to the passing whim of their sympathies, or to considerations of opportunism. We are not at liberty to assume without overwhelming proof the existence of a gap so detrimental to the reality of the international legal order.

It is proper to test the political view of recognition by the professed standard of most of its adherents, namely, the practice of States. Does

the practice of States suggest that the granting or refusal of recognition is a matter of political expediency and not of binding legal principle? Do States in this matter profess allegiance—and it is their disclosed profession that is of juridical interest, not surmised political motive and interest behind it—to a compelling rule of law or do they act as if they were free to do as suits their political convenience? In particular, is there any aspect of recognition of States which by general consent is regarded as being governed by rules of law as distinguished from policy, and if so, what is its relevance to the question of the nature of the act of recognition, namely, to the problem of the right to be recognized and of the duty to recognize?

There is no doubt that at least one aspect of the matter is by general agreement governed by international law, namely, what may be called the tortious or delictual aspect of recognition. It is contrary to international law to grant premature recognition. Communities claiming political independence arise as a rule by secession from the parent State. It is generally agreed that in relation to the parent State recognition is governed by a duty of restraint the disregard of which entails responsibility on the part of the recognizing State. It is almost exclusively from this point of view that recognition of States has been discussed in the literature of international law and in diplomatic correspondence. The question whether France committed a breach of international law by her early recognition of the United States in 1778; the protracted controversy concerning the Spanish protests against the recognition of the Latin-American Republics by the United States and Great Britain; the demand of the Confederate States for recognition during the American Civil War, a demand which was discussed mainly not from the point of view of the right of the Confederacy to recognition, but by reference to the propriety of such a step in relation to the United States; the recognition of Panama by the United States in 1903, which has been debated from the same point of view—all these incidents have occupied international lawyers as questions of premature recognition. It is generally agreed that premature recognition is more than an unfriendly act; it is an act of intervention and an international delinquency.[5] The community claiming recognition must fulfill certain conditions of permanency and political cohesion; in particular, the parent State must in fact have ceased to

5. There is practically unanimity among international lawyers about this aspect of the law. But see for a clear assertion to the contrary, ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE (1923) 93: "Il riconoscimento non è legato a particolari condizioni o presupposti . . . il diritto internazionale non conosce casi di riconoscimento lecito o illecito, vietato o imposto; le considerazioni sulla tempestività del riconoscimento . . . sembrano di natura politica più che giuridica." This extreme positivist assertion, which is contrary to frequent pronouncements of governments, is a consistent application of the doctrine that the grant or refusal of recognition is the result of a political decision in all circumstances.

make efforts promising success to reassert its authority. Recognition is unlawful if granted *durante bello,* when the outcome of the struggle is altogether uncertain. Such recognition is a denial of the sovereignty of the parent State. It has not the excuse of being dictated by the necessities of intercourse, for international law, notwithstanding the vagaries and the artificialities of the doctrine of implied recognition, permits various forms of intercourse short of recognition of a government or a new State. International law does not condemn rebellion or secession aiming at acquisition of independence. At the same time, save for collective measures of permissible intervention for the sake of humanity or general international settlement, as in the case of the recognition of Greek independence in 1827 or Belgian independence in 1831, it forbids third States to favor insurrection by recognizing its statehood before it has succeeded in establishing itself beyond a doubt. This principle was clearly expressed by a distinguished Secretary of State of the United States as early as 1823, at a time when inclination and policy might have counseled a less restrained course: "So long as a contest of arms, with a rational or even remote prospect of eventual success, was maintained by Spain, the United States could not recognise the independence of the colonies as existing *de facto* without trespassing on their duties to Spain by assuming as decided that which was precisely the question of the war." [6]

Premature recognition is a wrong not only because, in denying the sovereignty of the parent State actively engaged in asserting its authority, it amounts to unlawful intervention.[7] It is a wrong because it constitutes an abuse of the power of recognition. It acknowledges as an independent State a community which is not, in law, independent and which does not therefore fulfill the essential conditions of statehood. It is therefore a recognition which an international tribunal would declare not only to constitute a wrong,[8] but probably also to be in itself invalid.

6. Instruction of Mr. Adams to Mr. Anderson, United States Minister to Colombia, May 27, 1823. 1 MANNING, DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES CONCERNING INDEPENDENCE OF THE LATIN-AMERICAN NATIONS (1925) 194.

7. On occasion, premature recognition has been described as an unfriendly act. See, *e.g.,* President Jackson's Message with respect to Texas, Dec. 21, 1836, 1 MOORE, INTERNATIONAL LAW DIGEST (1906) 98 (hereinafter cited as MOORE, INTERNATIONAL LAW). See also 1 FEDOZZI AND ROMANO, TRATTATO DI DIRITTO INTERNAZIONALE (1933) 193: "Tanto un riconoscimento tardato, quanto d'altro lato un riconscimento prematuro, possono esserre considerati come atti non amichevoli." Actually, such recognition is an illegal, as distinguished from an unfriendly act. It will be noticed that Fedozzi refers in this connection also to tardy recognition. Professor Borchard states in *Recognition and Non-Recognition* (1942) 36 AM. J. INT. LAW 108, 110, that it is true that since, as Kelsen correctly says, premature recognition is unlawful, the same would apply also to tardy, delayed recognition. See pages 450, 454-55 *infra.*

8. Moore, for example, regards the recognition of the United States by France in 1778 as an act of intervention. 1 MOORE, INTERNATIONAL LAW, 73. And see *id.* at 110, as to the Joint Resolution of Congress, approved April 20, 1898, declaring the people of Cuba to be free and independent.

Tests of Premature Recognition. Whether recognition is premature is a question of fact. The practice of States is not devoid of useful guidance in the matter. Thus mere protests and assertions of sovereignty unaccompanied by attempts to restore the challenged authority can safely be and have been disregarded. Apart from temporary and futile attempts to introduce the principle of legitimacy, formal renunciation of sovereignty by the parent State has never been regarded as a condition of the lawfulness of recognition.[9] For parent States are naturally slow in acknowledging the independence of revolted provinces. They often announce with pathetic finality that no such acknowledgment will ever be forthcoming.[10] The Netherlands declared their independence of Spain in 1576. Twenty years later that independence was recognized by Great Britain and France. But the Spanish renunciation of her sovereignty did not take place until the Treaty of Münster of 1648. Portugal, which became separated from Spain in 1640, was recognized by her in 1668. Belgium, whose independence was recognized by the European Powers in 1831,[11] was not recognized by the mother country until 1839. The independence of Mexico and other Latin-American States was recognized by the United States in 1822 and by Great Britain soon after, but the mother country did not recognize Mexico until 1836. The independence of Panama was recognized by most States within a year of her secession from Colombia in 1903. But when Colombia joined the League of Nations in 1920, she recorded the fact that her acceptance of Article 10 of the Covenant did not imply the recognition of the independence of the Republic of Panama.[12]

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9. For a clear statement to the effect that third States can validly recognize the new State before the mother country has given its recognition, see Deutsche Continental Gas-Gesellschaft v. Polish State, German-Polish Mixed Arbitral Tribunal, Aug. 1, 1929, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929-1930, Case No. 5.

10. This may on occasion be an imprudent announcement, since it supplies third States with an excellent reason for disregarding altogether the attitude of the parent State: "For this [Spanish] declaration plainly shows, that the complaint against us, is not merely as to the mode, or the time of our advances towards those States; it shows that the dispute between us and Spain is not merely as to the question of fact . . . it shows that no extent or forbearance on our part would have satisfied Spain . . . if the argument on which this declaration is founded be true, it is eternal." Canning's note to the Spanish Minister in London, March 25, 1825, 12 BR. AND FOR. STATE PAPERS (1825) 909, 914-15.

11. De Louter, a Dutch author, describes this recognition as premature in the following words: ". . . sans même attendre que la Holland pût reconnaitre le nouvel état de choses, renoncer formellement à son opposition ou s'avouer incapable d'étouffer l'insurrection." DE LOUTER, *op. cit. supra* note 2, at 222. In this case, probably the very fact that the recognition took place through a collective act of the Powers in a manner indicative of an international settlement raises the presumption that the recognition was not premature.

12. 1 FOR. REL. U. S. 1920 (U. S. Dep't State 1936) 825.

On the other hand, the initial success of the rebellion, even if apparently complete, does not establish the independence of the insurgent community in a manner to make recognition permissible. The shifting fortunes of the war of independence of the South American Republics afford a good example of the danger of drawing too hasty conclusions from apparently well-established facts.[13] Similarly, occasions may arise when the mother country because of revolutionary commotions or similar reasons is temporarily prostrate and not in a position to assert her authority. This was the case, for instance, with the various States which arose in 1917 and 1918 within the territory of Russia. The United States and, to some extent, Great Britain refused for a long time recognition *de jure* to Estonia, Latvia, and Finland on the ground that the prospect of a united Russia, then in the throes of revolutionary convulsions, was not altogether outside the range of possibilities.[14] This very hesitation,

13. The Chilean revolution broke out in 1810. It was suppressed by the Spanish troops in 1814. Not until 1817 did the insurgents gain a decisive victory.

14. It appears from the records that as late as October, 1920, Great Britain considered the possibility of a reconstituted and unified Russia as a reason for delaying the recognition *de jure* of the Baltic States. It was felt in some quarters that if *de jure* recognition were granted to the Baltic provinces, their request for admission to the League of Nations could not be refused and that as a result, members of the League might in consequence of Article 10 of the Covenant come into conflict with a reconstituted Russia. The attitude of the United States in the matter was officially stated on a number of occasions. The full independence *de jure* of Estonia, Latvia, and Lithuania was announced by the United States on July 28, 1922, in the following terms: "The Governments of Esthonia, Latvia and Lithuania have been recognized either *de jure* or *de facto* by the principal Governments of Europe and have entered into treaty relations with their neighbours.

"In extending to them recognition on its part, the Government of the United States takes cognizance of the actual existence of these Governments during a considerable period of time and of the successful maintenance within their borders of political and economic stability.

"The United States has consistently maintained that the disturbed conditions of Russian affairs may not be made the occasion for the alienation of Russian territory, and this principle is not deemed to be infringed by the recognition at this time of the Governments of Esthonia, Latvia and Lithuania which have been set up and maintained by an indigenous population." 2 FOR. REL. U. S. 1922 (U. S. Dep't State 1938) 873-74. On the original attitude of the United States with regard to the recognition of Lithuania and other Baltic States, see 3 FOR. REL. U. S. 1920 (U. S. Dep't State 1936) 465-66: "We are unwilling that while it is helpless in the grip of non-representative government, whose only sanction is brutal force, Russia shall be weakened still further by a policy of dismemberment, conceived in other than Russian interests." See also the statement: "The Government has held constantly to the belief that Russia—the Russia of 1917—must herself be a party to any readjustments of her frontiers." *Id.* at 659. For these reasons the United States recognized the independence of Armenia, but refused to recognize that of Georgia and Azerbaijan. The recognition extended to Armenia was "to the government of the Armenian State as a *de facto* Government on the condition that this recognition in no way prejudices the question of the eventual frontiers." *Id.* at 777-78. See also Laserson, *The Recognition of Latvia* (1943) 37 AM. J. INT. L. 233, 242. For some interesting details concerning the early history of the various States and governments which arose within the territory of Russia in 1917 and 1918, see 2 FOR. REL. U. S. 1918, RUSSIA (U. S. Dep't State 1932).

which a hasty estimate may mistake for an infusion of an arbitrary element of politics into the process of recognition, is on the contrary an instructive example of a painstaking desire to steer clear of the illegality of premature recognition.

Prohibition of Premature Recognition and the Legal Nature of Recognition. The clearly established rule of international law prohibiting premature recognition of States is not without bearing on the seemingly different question as to the right of the new community to recognition by third States and as to the duty of the latter to grant recognition. For, upon analysis, the substance of the rule relating to premature recognition is to give expression to the objective requirements which make the grant of recognition legally permissible. It is to give expression to the objective conditions making the grant of recognition a step which is in accordance with the requirements of international stability and intercourse, so as to justify what would otherwise constitute an interference with established legal rights of the old State. This being so, the insistence on the difference between the right to recognize (in relation to the parent State) and the duty to recognize (in relation to the new community) may be formally correct, but is not as convincing as appears at first sight. It is not easy to concede that in substance the objective conditions of recognition are different when looked at from the point of view of the duty to the parent State and from that of the obligation to the community asking for recognition.

When the struggle for independence has reached a tangible measure of success accompanied by reasonable prospect of permanency, international law authorizes third States to declare by means of recognition of the nascent community that the sovereignty of the parent State is extinct. This means that international law attaches a distinct legal effect to the situation thus created. That effect cannot be limited to the relations of the parent State and the third States. It necessarily enures to the benefit of the new State. This explains the interesting phenomenon that while governments in diplomatic correspondence answer the complaints of the parent State by asserting their right under international law to recognize the rebellious community, they are often driven to invoke their duty to grant recognition.[15] Similarly, in refusing recognition which they regard as premature, governments often put the matter in such a way as to deny that in the circumstances of the case the community which has risen in revolt is entitled to recognition. Thus we find President McKinley in his Annual Message of April 11, 1898, stating that "recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent state has entirely

15. See pages 398-402 *infra*.

passed away." [16] On a previous occasion he commended to the consideration of Congress the question "whether the Cuban insurrection possesses beyond dispute the attributes of statehood which alone can demand the recognition of belligerency in its favor." [17]

III.

The Duty of Recognition and the Practice of States

The Practice of Great Britain. What has been described as the tortious aspect of recognition supplies indirect evidence in support of the view that recognition of States is essentially a matter of legal right and duty as between the States granting and receiving recognition. But can we find more direct proof in support of the legal view of recognition? Such direct evidence must be sought in the declarations and correspondence of governments insofar as they discuss the question of recognition as a matter of principle. Of these there are two kinds. There are governmental pronouncements defending the right to grant recognition in the particular case irrespective of the attitude of the mother country; there are, secondly, pronouncements relating to the duty to recognize. The first are frequent. The second, more directly relevant to the issue here discussed, are rare. They are so for the simple reason that States have as a rule no compelling reason or inclination to expatiate on their duty to the seceding community; on the other hand, they have had occasion to vindicate as against the complaints of the parent State their right to grant recognition. It is this last aspect of the matter which has loomed large in diplomatic correspondence. As a result, the impression has gained ground that the question of recognition in relation to the community claiming it is not affirmatively governed by rules of law at all. Yet, although conditions have not been propitious, there is available some substantial evidence bearing on this aspect of the problem. The cumulative effect of that evidence renders it difficult to understand why, apart from the ascendancy of the positivist school, the predominant political view of recognition has become so firmly established. The pronouncements in question are of two kinds. Some admit clearly either the right of the seceding community to recognition or the corresponding duty of established States to grant recognition. Others lay down, in effect, the same principle by maintaining that the existence of a State is a question of fact.

Before surveying the available evidence, it is useful to note that there is probably no deliberate pronouncement of a government on record in which the granting or refusal of recognition of statehood is expressly

16. 1 Moore, International Law, 109.
17. *Ibid.*

claimed to be a matter of grace or political expediency. There is, to the author's knowledge, no State document in existence which professes to be based on a principle such as is, for instance, laid down by Fauchille (an author who was an adherent of the declaratory view of recognition): "Les Etats sont libres de reconnaître ou de ne pas reconnaître un Etat récemment formé, de se déterminer selon les convenances de leur politique." [18] The only passage known to the author approaching a claim of this nature is the statement by Canning made in his dispatch of November 30, 1822, to the British Minister in Madrid, in which he said: "The Recognition [of the new States of Latin-America] or any other Power [other than Spain] may undoubtedly be given or withholden at its own good Pleasure and may be made contingent or conditional." [19] The context of the passage shows that what was intended was not an assertion of an arbitrary right in relation to the communities which had risen in revolt, but a clear and emphatic reservation of the right to grant or to refuse recognition irrespective of the attitude of Spain. The dispatch was sent in connection with the proposed mediation by Great Britain. "A Power," explained Canning, "which while undertaking to mediate between the Parties should declare its Recognition of the Colonies to be contingent upon that of the mother country, would, in truth, be anything but impartial: it would throw its whole weight into the Scale of Spain, and would (in case of a failure of the Negotiation) leave the Colonies in a worse situation than it found them." [20] It is difficult to maintain that the element of Great Britain's own convenience and commercial interest did not enter into the matter at all. But these factors were not antagonistic to—they were part of—considerations of a more general nature; they were part of the convenience and commercial interests of the world at large; they were claimed to have been adopted for reasons of humanity and by reference to general principles of international law;[21] they were dictated by a sense of the practical necessities of the situation in which a mere pretension asserted itself hopelessly against the triumphant independence of the rebellious republics. "No man," said Canning in the crucial memorandum to the Cabinet of November 15, 1822, "will say that there is a reasonable hope of her recovering that jurisdiction. No man will say that under such circumstances our Recognition of these States can be indefinitely postponed." [22] In another communication Canning gave eloquent expression to the underlying facts of the situation. In his dispatch of January 30, 1824, to the British Minister in Madrid he said:

18. 1 FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (1922) pt. 1, 318.

19. 1 SMITH, GREAT BRITAIN AND THE LAW OF NATIONS (1932) 132; printed also in 2 WEBSTER, BRITAIN AND THE INDEPENDENCE OF LATIN-AMERICA, 1812-1830 (1938) 400.

20. *Ibid.*

21. See pages 399-400 *infra.*

22. 2 WEBSTER, *op. cit. supra* note 19, at 394.

> "It appears manifest to the British Government that, if so large a portion of the globe should remain much longer without any recognized political existence or any definite political connexion with the established Governments of Europe, the consequences of such a state of things must be at once most embarrassing to those Governments, and most injurious to the interests of all European nations. For this reason, and not from mere views of selfish policy, the British Government is decidedly of opinion that the Recognition of such of the New States as have established, *de facto*, their separate political existence, cannot be much longer delayed." [23]

The discretion which Great Britain claimed for herself in the matter was one of the time and of the degree of recognition. That time was undoubtedly hastened by what Canning called the "overbearing arrogance of Spain," who after a time embarked upon seizing British ships, not because they were carrying contraband or were guilty of breach of a blockade, but for the reason that they were engaged in trade with her former dependencies.

There was no intention to refuse to consider the situation from the point of view of the right of the insurgent communities to claim recognition. Thus in the final communication of March 25, 1825, addressed to the Chevalier de Los Rios, Spanish Minister to Great Britain, Canning asked: "Has it ever been admitted as an axiom, or ever been observed by any nation or Government, as a practical maxim, that no circumstances and no time, should entitle a *de facto* government to recognition?" [24] Neither did he show any inclination to refute the idea that the South American Republics could be entitled to recognition when Sir James Mackintosh presented on June 15, 1824, the Petition from the Merchants of the City of London humbly submitting that "these states have established, de facto, their separate political existence; and are, according to the practice of nations in former instances, entitled to be recognised as independent governments." [25] He agreed with Sir James Mackintosh that "we have no pretence to be so difficult and scrupulous, as to insist that a new government shall have all the stability of an old one before we acknowledge its independence"; but he urged "some degree of caution before we can give our fiat." [26]

In the important dispatch of March 14, 1825,[27] addressed to Sir Charles Stuart, British Special Minister to Lisbon, Canning reverted to

23. *Id.* at 414; printed also in 3 MANNING, *op. cit. supra* note 6, at 1516.

24. 3 MANNING, *op. cit. supra* note 6, at 1544.

25. The Petition is printed in 5 THE SPEECHES OF THE RIGHT HONOURABLE GEORGE CANNING (2d ed., Therry, 1830) 291-94.

26. *Id.* at 302.

27. 1 WEBSTER, *op. cit. supra* note 19, at 264. In the same dispatch there occurs the following significant passage: "The questions to be decided . . . in each case of a Col-

the same theme. Once, he said, "that essential requisite," namely, "the establishment of a substantive political existence with a competent power to maintain it at home and to cause it to be respected abroad" had been ascertained with respect to the several Spanish American provinces, "there was nothing to prevent our acknowledgment of each as it became entitled to be considered as practically independent." There followed the statement that "our interests loudly prescribed the adjustment and cultivation of commercial relations with each of those several States." Such references to the recognizing State's own interests are a conspicuous feature in the pronouncements of that period in the matter of recognition. They do not seriously affect the view, expressed with equal frequency, that recognition was due for the reason that the rebellious Provinces were "entitled" to be considered as independent. They rather tend to show, as in the analogous cases of recognition of belligerency, that recognition was being granted for reasons other than gratuitous interference.

In general, Canning's utterances clearly indicated the lines of the subsequent practice. That practice can best be summarized in the form of the proposition that governments base their attitude in matters of recognition not on any right to follow their own particular interests, but on principles derived from general considerations of international justice and utility. The frequently quoted British Note addressed by Canning to Spain on March 25, 1825, in reply to the Spanish protest against British recognition of the independence of the Latin-American States is an instructive instance of this approach to the subject. It relies to a large extent on principles governing State responsibility. It is convenient to quote the relevant passage in full:

> ". . . all political Communities are responsible to other Political Communities for their conduct,—that is, they are bound to perform the ordinary international duties, and to afford redress for any violation of the Rights of others by their Citizens or Subjects.
>
> "Now, either the Mother Country must have continued responsible for acts, over which it could no longer exercise the shadow of a control; or the inhabitants of those Countries, whose independent political existence was, in fact, established, but to whom the acknowledgment of that Independence was denied, must have been placed in a situation in which they were either wholly irresponsible for all their actions, or were to be visited, for such of those actions as might furnish ground of complaint to other Nations, with the punishment due to Pirates and Outlaws.

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ony separating itself from the Mother Country were questions of fact and of time rather than of principle, and as to time, the decision of each recognizing State was necessarily to be guided by considerations of its own just interests and of general expediency. . . ." *Id.* at 263.

> "If the former of these alternatives,—the total irresponsibility of unrecognized States,—be too absurd to be maintained; and if the latter,—the treatment of their inhabitants as pirates and outlaws,—be too monstrous to be applied, for an indefinite length of time, to a large portion of the habitable globe:—no other choice remained for Great Britain, or for any Country having intercourse with the Spanish American Provinces, but to recognise, in due time, their political existence as States, and thus to bring them within the pale of those rights and duties, which civilized Nations are bound mutually to respect, and are entitled reciprocally to claim from each other." [28]

It is from the point of view of the right of the new communities to recognition that Hall summarizes the British attitude with regard to the wars of independence of the Latin-American Republics as governed by the principle "that recognition cannot be withheld when it has been earned." [29] He quotes Lord Liverpool's declaration as coinciding in this matter with the views of Canning, Lord Lansdowne, and Sir James Mackintosh that "there was no right to recognition while the contest was actually going on. . . ." The question of the right was not in dispute; what was controversial was whether the contest was still going on. The actual, and not merely verbal, continuation of the struggle was necessary in order, to quote Hall once more, "to prevent foreign countries from falling under an obligation to recognise as a state the community claiming to have become one." [30]

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28. 12 BR. AND FOR. STATE PAPERS (1846) 912-13. The following passage from Canning's dispatch to Wellington, Oct. 15, 1822, is of interest in this connection: "In the present situation of Spain with respect to her Colonies, we suffer equally from the maintenance of her claim of sovereignty by herself, and from the violation of it by her lawless subjects. By our determination to abstain from all interference in the internal struggles of Spain, we do not abandon our right to vindicate ourselves against its external violences." 2 WEBSTER, *op. cit. supra* note 19, at 75. The combination of the two elements—of the duty of recognition owed to the new community and of reasons of the nature of those adduced by Canning—had already been clearly expressed in the dispatch of the United States Secretary of State to the Minister in Great Britain, Jan. 1, 1819: ". . . we wish the British Government and all the European Allies, to consider, how important it is to them as well as to us, that these newly formed States should be regularly recognized: not only because the right to such recognition cannot with Justice be long denied to them, but that they may be held to observe on their part the ordinary rules of the Law of Nations, in their intercourse with the civilized World. We particularly believe that the only effectual means of repressing the excessive irregularities and piratical depredations of armed vessels under their flags and bearing their Commissions, will be to require of them the observance of the principles, sanctioned by the practice of maritime Nations. It is not to be expected that they will feel themselves bound by the ordinary duties of Sovereign States, while they are denied the enjoyment of all their rights." 1 MANNING, *op. cit. supra* note 6, at 87.

29. HALL, INTERNATIONAL LAW (4th ed. 1895) § 26.

30. *Ibid.*

During the American Civil War, Great Britain had occasion once more to formulate principles of recognition including the indirect acknowledgment of the duty to recognize the seceding community as soon as it fulfills the necessary requirements. In the British answer to the pressing demands of the Confederacy for recognition we find the following passage:

> "In order to be entitled to a place among the independent nations of the earth, a State ought to have not only strength and resources for a time, but afford promise of stability and permanence." [31]

The French view admitting the right to recognition was also expressed at that time. While assuring the United States that no hasty or precipitate action would be taken with regard to the recognition of the independence of the Confederacy, the French Government affirmed that "the practice and usage of the present century had fully established the right of *de facto* Governments to recognition when a proper case was made out for the decision of foreign Powers." [32]

The Practice of the United States. It is in particular in pronouncements of the successive Presidents and Secretaries of State of the United States that the view of recognition conceived as the performance of a legal duty towards the community entitled to claim it has found frequent expression. While for various reasons conspicuous changes of emphasis have taken place in the practice of the United States in the matter of recognition of governments, the consistency of its attitude with regard to recognition of States is both impressive and instructive. The utterances in question refer almost exclusively to the situation created by the secession of the Latin-American States. They were undoubtedly influenced by such factors as the revolutionary origin of the United States itself and the disapproval of the principle of monarchic legitimacy involving the possibility of European intervention. But these considerations do not detract from the significance of the legal principle to which they gave rise. Already on April 20, 1818, we find John Quincy Adams, Secretary of State, writing to the United States Minister to Spain: "None of the Revolutionary Governments has yet been formally acknowledged; but if that of Buenos Ayres, should maintain the stability which it appears to have acquired since the Declaration of Independence of 9 July 1816 it cannot be long before they will demand that acknowledgment of right—and however questionable that right may be now considered; it

31. Earl Russell to Mr. Mason, Aug. 2, 1862, I FONTES JURIS GENTIUM, DIGEST OF THE DIPLOMATIC CORRESPONDENCE OF THE EUROPEAN STATES, 1856-1871 (1932) 142.

32. BERNARD, A HISTORICAL ACCOUNT OF THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR (1870) 126, n. 1.

will deserve very seriously the consideration of the European Powers, as well as of the United States, how long that acknowledgment can rightfully be refused." [33]

In a communication addressed to President Monroe on August 24, 1818, the Secretary of State, Mr. Adams, expressed this view in an even more definite form: "But there is a stage in such contests when the parties struggling for independence have . . . *a right to demand* its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate." [34]

In the Message of January 30, 1822, announcing the intention to recognize the independence of some of the South American Republics, the President referred to the question whether ". . . their right to the rank of independent nations . . . is not complete," [35] as a matter for serious consideration. In the Message communicated to the House of Representatives on March 8, 1822, the President said once more, referring to the success which crowned the efforts of the insurgent States: "When the result of such a contest is manifestly settled, the new Governments have a claim to recognition by other Powers, which ought not to be resisted." [36]

Even more explicit is the passage in the reply of the United States of April 6, 1822, to the Spanish protest following upon the announcement of the intention to recognize the independence of the revolted provinces. The Secretary of State affirmed that the Government of the United States, far from consulting the dictates of a policy questionable in its morality, "yielded to an obligation of duty of the highest order, by recognizing as Independent States, Nations which, after deliberately asserting their right to that character, have maintained and established it against all the resistance which had been or could be brought to oppose it." [37] The recognition, the Note proceeded, was "the mere acknowledgment of existing facts." [38] These views were elaborated a year later with an emphatic insistence on principle in various instructions sent to the United States representatives in Latin-America. In his Instructions of May 17, 1823, to Mr. Rodney, United States Minister at Buenos Ayres, the Secretary of State wrote:

33. 1 MANNING, *op. cit. supra* note 6, at 61.

34. I MOORE, INTERNATIONAL LAW, 78 (italics supplied).

35. *Id.* at 85.

36. 1 MANNING, *op. cit. supra* note 6, at 147.

37. *Id.* at 157.

38. *Ibid.*

> "The foundation of our municipal Institutions is equal rights. The basis of all our intercourse with foreign powers is Reciprocity. We have not demanded, nor would we have accepted special privileges of any kind in return for an acknowledgment of Independence. But that which we have not desired and would not have accepted for ourselves, we have a right to insist ought not to be granted others. Recognition is in its nature, not a subject of equivalent; it is claimable of right or not at all. You will therefore strenuously maintain the right of the United States to be treated in every respect on the footing of the most favoured . . . nation." [39]

He reiterated these views in his Instructions to Mr. Anderson, United States Minister to Colombia, May 27, 1823:

> "The European alliance of Emperors and Kings have assumed, as the foundation of human society, the doctrine of unalienable *allegiance.* Our doctrine is founded upon the principle of unalienable *right.* The European allies, therefore, have viewed the *cause* of the South Americans as rebellion against their lawful sovereign. We have considered it as the assertion of natural right." [40]

In his Instructions of November 29, 1823, to Mr. Rush, United States Minister to Great Britain, the Secretary of State, after pointing to the fact that in the opinion of both Great Britain and the United States there was no hope for the recovery of the Spanish authority, said: "Having arrived at that conclusion, we considered that the people of these emancipated Colonies, were, *of right,* independent of all other nations, and that it was our duty so to acknowledge them." He urged earnestly upon the consideration of Great Britain that after conceding the hopelessness of the Spanish position, she could no longer regard the question of recognition as one of "time and circumstances." [41]

The events connected with the recognition of Paraguay in 1845 and 1846 showed the disinclination of the United States to depart from that conception of recognition as a legal duty. In these years Paraguay, after having seceded from Argentina, made repeated approaches to the United States in the matter of recognition. At that time Argentina was confronted by the hostile action of the combined fleets of Great Britain and France attempting to force a passage up the La Plata and the Paraná. In the circumstances, the sympathies of the United States were with the Argentine Republic exposed to foreign armed intervention. An inducement was thus present to delay recognition in order not to create a sem-

39. *Id.* at 191. See also for a similar line of reasoning the Instruction of Mr. Clay, Secretary of State, to the United States Minister to Mexico, *id.* at 230.

40. *Id.* at 198.

41. *Id.* at 211.

blance of solidarity with the European Powers. Actually, no departure was made from the established principle; neither was there undue delay in its application. "You are aware," wrote Mr. Buchanan, Secretary of State, to the United States Chargé d'Affaires at Buenos Ayres on March 30, 1846, "that it is the settled policy of the United States to recognise the independence of all governments which have manifested to the world that they are *de facto* independent. This duty has been eagerly performed towards our sister Republics on this continent." [42] The Minister was instructed to prepare the Argentine Government for the recognition of the independence of Paraguay "in pursuance of the long established and well settled policy of the American Government." [43]

There was no change of attitude when during the Civil War the United States were confronted with the attempts by the Confederate States to obtain the recognition of their independence. These attempts were strenuously resisted.[44] The experience of the Civil War, moreover, had the indirect effect of imparting a measure of legitimism to the practice of the United States in the field of recognition of governments. In the matter of recognition of States the well-established principle was not abandoned in deference to the exigencies of a grave moment. In a com-

42. 1 MANNING, DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, INTER-AMERICAN AFFAIRS, 1831-1860, ARGENTINA (1932) 30.

43. *Id.* at 31.

44. In a circular note, Feb. 28, 1861, the Ministers of the United States in various capitals were instructed to counteract any suggestion of recognition of the Confederacy and to urge upon the Governments concerned that: "It must be very evident that it is the right of this government to ask of all foreign powers that the latter shall take no steps which may tend to encourage the revolutionary movement of the seceding States; or increase the danger of disaffection in those which still remain loyal." DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, 1861-1862 (U. S. Dep't State) 15. In April, 1861, Mr. Seward, the United States Secretary of State, wrote as follows in an instruction to the United States Minister in Great Britain: "To recognize the independence of a new state, and so favor, possibly determine its admission into the family of nations, is the highest possible exercise of sovereign power, because it affects in any case the welfare of two nations and often the peace of the world. In the European system this power is now seldom attempted to be exercised without invoking a consultation or congress of nations. That system has not been extended to this continent. But there is even a greater necessity for prudence in such cases in regard to American States than in regard to the nations of Europe." *Id.* at 79. The United States were inclined to treat even recognition of belligerency as an unfriendly act and for a time insisted that compensation on account of premature grant of belligerent rights should be included within the purview of arbitral settlement. In a communication addressed to the United States Minister in London, Mr. Seward treated the recognition of belligerency as interference with the sovereign rights of the United States. Referring to the British proclamation of neutrality he said: "That proclamation, unmodified and unexplained, would leave us no alternative but to regard the government of Great Britain as questioning our free exercise of all the rights of self-defense guaranteed to us by our Constitution and the laws of nature and of nations to suppress the insurrection." *Id.* at 97.

munication of April 10, 1861, by Secretary Seward to Mr. Adams there occurs the following passage: "We freely admit that a nation may, and even ought, to recognize a new State which has absolutely and beyond question effected its independence. . . ." The Secretary of State added: "Seen in the light of this principle, the several nations of the earth constitute one great federal republic. When one of them casts its suffrages for the admission of a new member into that republic, it ought to act under a profound sense of moral obligation, and be governed by considerations as pure, disinterested and elevated as the general interest of society and the advancement of human nature." [45]

The controversy between the United States and Colombia concerning the premature recognition of Panama is particularly instructive in this connection. The Government of the United States did not, although the temptation was considerable, have recourse to the argument that in granting recognition it was entitled to take into account its own interests only. In rejecting the Colombian claim for arbitration in the matter it confined itself to declaring that "questions of foreign policy and of the recognition or nonrecognition of foreign states are of a purely political nature, and do not fall within the domain of judicial decision. . . ." [46] In a previous note of January 5, 1904, Secretary Hay refrained from supporting the conduct of the United States by any claim of a right to grant recognition by consulting the interest of his country only and irrespective of international principle. After referring to the fact that Panama had been recognized by all the Great Powers and by a number of other States, he said:

> "The law of nations does not undertake to fix the precise time at which recognition shall or may be extended to a new state. This is a question to be determined by each state upon its own just sense of international rights and obligations; and it has rarely happened, where a new state has been formed and recognized within the limits of an existing state, that the parent state has not complained that the recognition was premature. And if in the present instance the powers of the world gave their recognition with unwonted promptitude, it is only because they entertained the common conviction that interests of vast importance to the whole civilized world were at stake, which would by any other course be put in peril." [47]

45. FOR. REL. U. S. 1861 (U. S. Dep't State 1862) 76-79.

46. Mr. Hay, Secretary of State, to the Colombian Minister, Jan. 5, 1904, 3 MOORE, INTERNATIONAL LAW, 105.

47. *Id.* at 90-91. It is of interest to note that when, eleven years later, Mr. Bryan, the Secretary of State, advocated before Congress the Bill providing compensation to Colombia, he referred to the action of the United States in 1903 as an instance of the exercise of the right of international eminent domain in the interest of the world. See CALLCOTT, THE CARIBBEAN POLICY OF THE UNITED STATES (1942) 383.

Recognition as a Question of Fact. In addition to admitting expressly the right of new States to recognition, governments have on occasion voiced the same principle by declaring that the existence of new States is a question of fact. It was in this sense that Canning referred to the question of recognition of the Latin-American States as being one "of fact and of time rather than of principle." [48] It was in this sense that on numerous occasions he pointed to the distinction between "mere acknowledgment" of the existence of the new States—which, he insisted, was a question of fact—and their formal recognition *de jure* which expressed a title and whose grant was a matter for the parent State.[49]

Numerous pronouncements of the Government of the United States express the same attitude. In reply to the Mexican protest against the recognition of the independence of Texas, Mr. Forsyth, United States Secretary of State, wrote in 1837: "The independence of other nations has always been regarded by the United States as question of fact merely, and that of every people has been invariably recognized by them whenever the actual enjoyment of it was accompanied by satisfactory evidence of their power and determination permanently and effectually to maintain it." [50] In 1875, in a message concerning the question of the recognition of Cuba, President Grant said: "In such cases [of recognition of new States] other nations simply deal with an actually existing condition of things, and recognize as one of the powers of the earth that body politic which, possessing the necessary elements, has, in fact, become a new power. In a word, the creation of a new state is a fact." [51] The reply in a similar vein to the Spanish protest in 1822 has already been noted.[52]

What is the meaning of the principle that the question whether a State exists is a question of fact? It means negatively that recognition is not

48. See page 398 *supra*. And see his speech in the House of Commons, June 15, 1824: "It [recognition] has clearly two senses, in which it is to be differently understood. If the colonies say to the mother country, 'We assert our independence,' and the mother country answers, 'I admit it,' that is recognition in one sense. If the colonies say to another state, 'We are independent,' and that other state replies, 'I allow that you are so,' that is recognition in another sense of the term. That other state simply acknowledges the fact, or rather its opinion of the fact; . . ." 5 CANNING'S SPEECHES, *op. cit. supra* note 25, at 299.

49. For an interesting distinction, based on the same reasoning, between acknowledgment of independence and recognition, see Wellington's observations on Canning's notes on Chateaubriand's dispatch concerning the recognition of the independence of the South American Republics. 2 WEBSTER, *op. cit. supra* note 19, at 141, n. 1; printed also in TEMPERLY, FOREIGN POLICY OF CANNING, 1822-1827 (1925) 543.

50. 1 MOORE, INTERNATIONAL LAW, 102.

51. *Id.* at 107.

52. See page 402 *supra*.

a question of unfettered discretion, of contractual bargain, or of political expediency. It means positively that the State called upon to grant recognition must judge whether the required conditions of fact exist and that it is entitled to exercise its discretion in arriving at that judgment. This is a judicial discretion, however, aimed at ascertaining the existence of the relevant facts. When the Declaration of London laid down in Article 3 that the effectiveness of a blockade is a question of fact, the intention was to lay down that the requirement of effectiveness is an undoubted rule of law and that if the blockade is effective, it must be treated by neutrals as valid, though it may be difficult to lay down in advance the precise conditions of the operation of the requirement of effectiveness. To predicate that a given legal result is a question of fact is to assert that it is not a question of arbitrary discretion. This is in general the meaning of the jurisprudential distinction between questions of fact and of law. The emphasis—and that emphasis is a constant feature of diplomatic correspondence—on the principle that the existence of a State is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty.

Governmental Professions and the Creation of Legal Rules. The preceding examination of the practice of States and of pronouncements of governments showing the acknowledgment of the duty of recognition whenever there exist the requisite conditions of fact is open to the retort that in deducing a legal rule from the practice of States we must not look to the professions of governments, but to their motives. Any such retort is probably unsound. Official pronouncements of governments express what in their view are the right legal rules and principles capable of general application. It is with these alone that the jurist is concerned. The particular legal rule may suit the political interest and convenience of the State enunciating it. But the lawyer abandons his legitimate province once he begins to probe into the motives which have induced governments to express their obligation to act upon a legal rule. Such realism may be appropriate for the historian and the sociologist. The jurist is concerned with the legal rule upon which governments profess to act. The fact that the particular rule has been found to suit the interests of States does not derogate from its legal value; it adds to it. International law is not so rich as to be able to discard, in a spirit of realism of questionable propriety, legal rules acknowledged and acted upon by States.[53]

53. Such attempts at realism have occurred, it will be noted, in other fields of international law. Witness, for instance, the political interpretation of international leases as disguised cessions calculated to spare the susceptibilities of the lessor State. See LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927) 184-90.

IV.

THE LEGAL DUTY OF RECOGNITION AND THE CONDITIONS OF STATEHOOD

The Practice of States and the Essential Conditions of Recognition. The preceding survey of the practice of States illustrating the legal nature of recognition has shown at the same time the conditions which give rise to a legitimate claim to recognition of statehood. These coincide with the conditions which permit a third State to recognize a seceding community without committing an illegality in relation to the parent State. They are identical with the requirements of statehood as laid down by international law and as uniformly expressed in text-books, namely, the existence of an independent government exercising effective authority within a defined area. These requirements will now be considered.

An Independent Government. There must exist a government actually independent of that of any other State, including the parent State. The independence thus required is one irrespective of the attitude of the mother country. The attitude of the latter is of importance only insofar as the recognition by the mother country of the independence of the rebellious province naturally raises a strong, although not conclusive, presumption that such independence actually exists. On the other hand, it is clearly established that the refusal of the mother country to recognize such independence is not conclusive. The legal title of the parent State is relevant to the extent that conclusive evidence is required showing that it has been definitely displaced and that the effectiveness of its authority does not exceed a mere assertion of right. But once such evidence is available, the illegality of the new State's origin from the point of view of the constitutional law of the parent State is of no consequence. The principle of legitimacy, although proclaimed for a short time by the Powers of the Holy Alliance at the beginning of the nineteenth century,[54]

54. These Powers did not include Great Britain, who refused to subscribe to that principle, although a contemporary American critic described the British attitude as not uninfluenced by "The mystic Virtues of Legitimacy." Mr. Adams, United States Minister to Great Britain, to Mr. Monroe, Jan. 22, 1816. 3 MANNING, *op. cit. supra* note 6, at 1433. In 1822 Great Britain at the Verona Conference formally proposed to the Holy Alliance some measure of recognition *de facto* of the South American Republics as a necessary condition for effectively combating piracy and the slave traffic in those regions. While the attitude of Prussia and Russia was purely negative in their assertion of the imprescriptible rights of the King of Spain (at that time confronted with a civil war within his European possessions), the position taken up by Austria and France was an interesting mixture of legitimism and the *de facto* principle. The Austrian delegate declared:

"1. Que Sa Majesté Impériale, invariablement fidèle aux grands principes sur lesquels repose l'ordre social et le maintien des gouvernements légitimes, ne reconnaîtra

has never become part of international law. It has been proclaimed on occasion by absolutist government,[55] but it has never struck deep roots in the law of nations. When in Article 10 of the Covenant of the League members of the League of Nations mutually guaranteed their territorial integrity and political independence, they limited the guarantee to external aggression as distinguished from internal revolution. An international law which does not possess power to effect territorial and political changes within and between States cannot take upon itself the task of perpetuating existing conditions by refusing to recognize changes of sovereignty effected in violation of the constitutional law of States.

The meaning of independence, however, is not confined to the achievement of actual independence of the mother country. In includes also independence of any State other than the mother country. If a community, after having become detached from the parent State, were to become legally or actually a satellite of another State, it would not be fulfilling the primary condition of independence and would not, accordingly, be entitled to recognition as a State. This has probably been the position of Manchuria since 1932,[56] following its forcible separation from China as the result of invasion by Japan. Apart from the considerations arising out of the principle of non-recognition,[57] that province, controlled

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jamais l'indépendence des Provinces Espagnoles de l'Amérique tant que S. M. Catholique n'aura pas librement et formellement renoncé aux droits de Souveraineté qu'Elle a jusqu'ici exercé sur ces provinces.

"2. Que plus Sa Majeste Impériale est décidée à ne pas s'écarter de cette ligne de conduite, plus Elle se croira libre, dans l'état actuel des choses, et tant que l'Espagne se trouvera elle-même sous un régime que les Chefs de la révolution ont imposé *de fait* au Roi et à Son pays, d'adopter également vis-à-vis des Colonies Espagnoles telle attitude *de fait* que des considérations d'intérêt ou d'utilité générale pourrant Lui suggérer, toute fois sous la réserve expresse que telle que puisse être cette attitude, elle ne portera aucun préjudice permanent aux droits imprescriptibles du Roi et de la Couronne d'Espagne." 2 WEBSTER, *op. cit. supra* note 19, at 80.

The French declaration, after reiterating the principle of legitimacy, proceeded to sacrifice it to more compelling considerations:

"Néanmoins la France avoue avec l'Angleterre que lorsque des troubles se prolongent et que le droit des nations ne peut plus s'exercer pour cause d'impuissance d'une des parties belligérantes, le droit naturel reprend son empire; elle convient qu'il y a des prescriptions inévitables; qu'un Gouvernement après avoir longtemps résisté, est quelquefois obligé de céder à la force des choses, pour mettre fin à beaucoup de maux et pour ne pas priver un Etat des avantages dont d'autres Etats pourraient exclusivement profiter." *Id.* at 81. For these declarations, see also 3 MANNING, *op. cit. supra* note 6, at 1539-41.

55. Thus in reply to the request of the United States for assurances that no recognition would be granted to the governments of the Confederate States, Russia answered that "from the principle of unrelenting opposition to all revolutionary movements, [she] would be the last to recognize any *de facto* Government of the disaffected States of the American Union." BERNARD, *op. cit. supra* note 32, at 126, n. 1.

56. See pages 429-30 *infra*.

57. See Note 122 *infra*.

politically and strategically by Japan, has not fulfilled the primary requirement of statehood, that is, sovereignty exercised by an independent government. The same applies to such ephemeral creations as Slovakia or Croatia during the second World War.

Effective Authority. The second essential requirement of statehood is a sufficient degree of internal stability as expressed through the functioning of a government enjoying the habitual obedience of the bulk of the population. A community may have succeeded in shaking off allegiance to the mother country, but if it is in a condition of such internal instability as to be deprived of a representative and effective government, it will be lacking in a vital condition of statehood. This combination of the requirements of external independence and internal stability is shown in an instructive way in the questions formulated by Canning in connection with the proposed recognition of the independence of Mexico and that of other American States. These questions were:

> "1st. Has the Government so constituted already notified by a publick Act its determination to remain independent of Spain, and to admit no terms of accommodation with the Mother Country?
>
> "2ndly. Is it in military possession of the country, and also in a respectable condition of military defence against any probable attack from Europe?
>
> "3rdly. Does it appear to have acquired a reasonable degree of consistency, and to enjoy the confidence and goodwill of the several orders of the people?" [58]

An identical view was expressed by successive Governments of the United States with regard to the recognition of Cuban independence. Thus President Grant, in his Annual Message of December 7, 1875, while admitting the probability of the Spanish domination having been finally displaced, denied the Cuban claim to recognition on the ground that no effective and stable government had been established. There must exist, he said, "some known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties resulting from its

58. Canning's dispatch of October 10, 1823, printed in 1 WEBSTER, *op. cit. supra* note 19, at 435. As to the fourth condition relating to the slave trade, see page 417 *infra*. See also Canning's Note to Woodbine Parish, Aug. 23, 1824, concerning the conditions of recognition of Argentina, *id.* at 114.

acquisition of the rights of sovereignty." [59] For this reason the recognition of a new State often takes place in the form of recognition of its government. Thus when on May 3, 1919, it was decided that Great Britain and the United States should severally recognize the independence of Finland, the following communication was sent to Finland by Great Britain:

> "His Majesty's Government seeing in recent elections and in establishment of a new Government a clear expression of the desire of the Finnish people and of their determination to follow the path of order and of constitutional development have decided to recognise the independence of Finland and to enter into formal relations with the present Finnish Government. They desire to congratulate the people of Finland on having vindicated their title to the rights of an independent sovereign State." [60]

The importance of the requirement of an effective government may be gauged from the fact that the Committee of Jurists, who were asked to give an opinion in the matter of the Aaland Islands, held that notwithstanding the above acts of recognition, Finland was not at that date a

59. 1 MOORE, INTERNATIONAL LAW, 107-08. See also the statement of the same principle in the messages of President Cleveland in 1896, *id.* at 108, and of President McKinley in 1898, *id.* at 108-09.

60. 117 BR. AND FOR. STATE PAPERS (1923) 19. On May 5, 1919, the Department of State of the United States announced that "in view of the fact that the people of Finland have established a representative Government, the Government of the United States of America declares that it recognizes the Government, so constituted, as the *de facto* Government of an independent Finland." 2 FOR. REL. U. S. 1919 (U. S. Dep't State 1934) 214. Similarly, the British recognition of Poland, Feb. 25, 1919, was in the form of the "formal recognition of the Government of Poland." The French recognition was in the form of the "official recognition of Poland as an independent and sovereign State and of its government as a regular government." In December, 1884, Great Britain and a number of other States recognized the Association of Congo as a friendly government. The importance of the existence of an effective government explains why some authors maintain that there is no recognition of a State apart from the recognition of its government. See, *e.g.*, KLEIST, DIE VÖLKERRECHTLICHE ANERKENNUNG SOWJETRUSSLANDS (1934) 19; Redslob, *La reconnaisance de l'État comme sujet de Droit International* (France, 1934) 13 REVUE DE DROIT INTERNATIONAL 429, 433. For a refutation of this view, see SCALFATI, IL RICONOSCIMENTO DI STATO NEL DIRITTO INTERNAZIONALE (1938) 17-28. See also Erich, *La Naissance et la Reconnaissance des Etats* (1926) 13 RECUEIL DES COURS 431, 488-90, who discusses the recognition of Finland by France in January, 1918, and the alleged withdrawal of that recognition in October, 1918. He points out—rightly, it is believed—that the recognition in January was one relating to statehood, while the note of October, 1918, intimated unwillingness to recognize a particular regime. See also the case of Albania during the First Assembly of the League; that country, although recognized in principle as a State in 1913 by the Conference of London, was apparently in 1920 in the position of not having a recognized government.

State in the contemplation of international law having regard to her unsettled condition and the absence of an orderly administration.[61]

Defined Territory. The possession of territory is, notwithstanding some jurisprudential controversy which has gathered round the subject,[62] a regular requirement of statehood. Normally possession and administration of a defined territory is essential, since without it there cannot be a stable and effective government.[63] On the other hand, it has been held that the fact that the frontiers of a new State have not yet been definitely decided does not constitute an impediment in the way of its statehood.[64] Most of the new States which arose after the War of 1914-1918 were recognized *de facto* or *de jure* before their frontiers were finally laid down in treaties, although as a rule such recognition was accompanied by stipulations relating to the acceptance by the State concerned of the frontiers to be laid down by the peace conference. Thus the British recognition of Finland was accompanied by a declaration that "in recognising the independence of Finland His Majesty's Government do so with confidence [and] understanding that the Finnish Government accepts the decision to be taken by the Peace Conference as to the drawing of her frontiers. . . ." [65] However, when doubts as to the future frontiers were regarded as being of a serious nature, recognition was postponed. Thus when in 1919 Estonia and Latvia were recognized by the Allied Powers, no recognition was granted to Lithuania on the express ground that owing to the Vilna dispute her frontiers were not yet fixed.

Irrelevant Tests of Recognition of Statehood. The existence of the conditions of statehood outlined above—external independence and ef-

61. See page 432 *infra.*

62. See, *e.g.*, DONATI, STATO E TERRITORIO (1924) 27, 30; KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS (1920) 70-76; SALMOND, JURISPRUDENCE (1937) § 38.

63. The dispossession of the lawful government by the invader *pendente bello* is no more than an incident of military operations. The fact that Belgium during the first World War or numerous countries occupied by Germany during the second World War continued to exist as States with governments functioning in exile, is irrelevant to the question of the possibility of the existence of a State without territory.

64. Deutsche Continental Gas-Gesellschaft v. Polish State, German-Polish Mixed Arbitral Tribunal, Aug. 1, 1929, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929-1930, Case No. 5. The Tribunal said: "In order to say that a State exists and can be recognized as such . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited. . . . There are numerous examples of cases in which States have existed without their statehood being called into doubt . . . at a time when the frontier between them was not accurately traced." *Id.* at 15.

65. For a similar proviso in connection with the recognition by the United States of the Yugoslav State, see 2 FOR. REL. U. S. 1919 (U. S. Dep't State 1934) 900.

fective internal government within a reasonably well-defined territory—may be and has often been controversial in reference to particular situations. But, in essence, these conditions are definite and exhaustive. They have nothing to do with the degree of civilization of the new State,[66] with the legitimacy of its origin, with its religion, or with its political system. Once considerations of that nature are introduced as a condition of recognition, the clear path of law is abandoned, and the door opened wide to arbitrariness, to attempts at extortion, and to intervention at the very threshold of statehood. The legal irrelevance of these various considerations as factors in the process of recognition has not always been perceived. This may be seen, for instance, from Lorimer's treatment of the subject. He begins his exposition by emphasizing the fundamental importance of recognition in the system of international law. It is recognition, he says, which makes of international law a science. He lays down in an unexceptional manner that rights and duties have their origin in and are limited by the facts of natural life: "Any doctrine . . . which professes to regard it [recognition] as an act of courtesy, comity, or the like, the exercise of which may be jurally withheld, —deprives international law of a permanent basis in nature, and fails to bring it within the sphere of jurisprudence." [67] The question, he says, is one of ascertaining whether there exist the necessary requirements of statehood. He then advances the more debatable contention that in the present state of international law, it is for each State to lay down what these conditions are, while the business of the science of international law is to assist States in determining these conditions. Lorimer then proceeds to suggest what the proper tests are. He divides humanity into three concentric spheres: into civilized, barbarous, and savage peoples. The last two are excluded from recognition. They are excluded because they are unable to fulfill the fundamental condition of possessing what Lorimer calls a "reciprocating will." That requirement disposes not only

66. International law today knows of no distinction between civilized and uncivilized States or between States within and outside the international community of civilized States. It is, therefore, unnecessary to discuss this aspect of the question in any detail. In Lorimer's writings the student will find picturesque descriptions of varying degrees of civilization with reference to recognition. LORIMER, THE INSTITUTES OF THE LAW OF NATIONS (1883). See page 414 *infra*. Fauchille followed his example, 1 FAUCHILLE, op. *cit. supra* note 18, at 327-28. Kunz distinguishes between recognition and "reception into the community of nations." He describes recognition prior to reception into the international community as partial recognition, as in the case of Turkey with whom various States entertained diplomatic relations and concluded treaties prior to her admission to the benefits "of the public law and of the Concert of Europe" as the result of Article 7 of the Treaty of Paris of 1856. KUNZ, *op. cit. supra* note 2, at 25-34, 105-09. Actually, modern international law knows nothing of reception into the international community as distinguished from recognition of a State. The legal position of Turkey remained unaffected by Article 7, whose legal significance is somewhat elusive.

67. 1 LORIMER, *op. cit. supra* note 66, at 104.

of savage or barbarous peoples as candidates for statehood. It eliminates religious creeds whose doctrine renders impossible the presumption of reciprocating will, as, for example, the Mohammedan religion.[68] It excludes, further, secular creeds which are devoid of the "reciprocating will," such as intolerant monarchies ("the very name of monarchy savours of exclusiveness"), intolerant republics (like that of the French Convention of 1793), intolerant anarchies, communities wedded to communism or nihilism (which are "prohibited by the law of nations"), and communities under personal or class governments (on the ground that their form of government renders them incapable of expressing or reaching a reciprocating will). Lorimer's treatment of the subject conveys the impression of absurdity. It has been deemed useful to summarize it at somewhat excessive length as a not unnecessary reminder of the consequences which may follow from the introduction of tests divorced from the solid basis of reality on which all law must ultimately rest.

V.

The Political Aspect

National Interest and the Duty of Recognition. It has been submitted in the preceding sections that the legal view of recognition, that is, of recognition conceived as a declaration, made in the fulfillment of a legal duty, of the existence of the requisite conditions of statehood, can be regarded as being in accordance with the general practice of States. At the same time it is a fact that the tests of recognition as outlined above, although supported by the bulk of State practice and by cogent legal principle, have often yielded to motives and considerations essentially foreign to the purpose of recognition. This has been so for the reason that governments have not always found it possible to divorce the fulfillment of a duty implied in the act of recognition from the achievement, on that occasion, of specific advantages. In a properly constituted political society the function—which is perhaps the most important function of any legal system—of ascertaining the presence of the conditions of legal capacity and existence is performed by impartial organs delegated by the law for that purpose. In international society that task is as a rule fulfilled by individual States acting on their own responsibility and endowed with wide discretion in the appreciation of the relevant facts. That discretion is unfettered only in the meaning that, at present, the State which takes a decision on the issue of recognition is not ac-

68. "To talk of the recognition of Mahometan States as a question of time, is to talk nonsense." *Id.* at 123.

countable for its acts to any superior jurisdiction. In essence, it is a discretion determined by international law. In granting or refusing recognition the State administers international law; it does not perform a legally indifferent act of national policy. In the imperfectly developed international society States are often called upon to act in the fulfillment of a legal duty or in the assertion of their legal interest without being directly and immediately responsible to a higher authority. This does not mean that in these matters States are not bound by law at all. They have freedom in ascertaining the facts and assessing their significance; but they are not free to assert a liberty to disregard the facts or to act in defiance of them.[69]

While the task of ascertaining the existence of conditions of statehood is essentially one of administration of international law, it is at the same time, however, a political act fraught with political consequences involving the interests of the State called upon to grant recognition. In some cases its interests may be identical with those of the international community at large in such a manner that their consideration is not incompatible with the loyal application of the objective tests of recognition. That possibility is clearly illustrated by the substance of the British answers, quoted above,[70] in reply to the Spanish protest against the recognition of the Latin-American Republics.

Recognition in Consideration of Benefits. The identity of national and international interest is in this matter by no means a constant phenomenon. International practice is rich in examples of an abuse of the function of recognition for the purpose of securing particular national advantages. Even the lofty position assumed by the United States on the question of recognition of the independence of the Latin-American States was not always entirely free from attempts to safeguard the particular interests of the United States. Thus in 1819 the United States made it to some extent a condition of its recognition of Argentina that no special privileges of indefinite duration should be granted to Spain. This, it was said, was not to be interpreted as making recognition an object of bargaining. The reason for the delay in recognition was that if such rights were to be reserved to Spain, it would not be quite clear

69. The manner in which the Assembly of the League interpreted the obligations of its members under Article 16 of the Covenant may be referred to as an illustration. The Second Assembly laid down that "it is the duty of each member of the League to decide for itself whether a breach of the Covenant has been committed." At the same time the Assembly insisted that the fulfillment of that duty, though dependent upon the member's finding as to the existence of the requisite facts, was a clear legal obligation under the Covenant.

70. See pages 398-400 *supra*.

whether "the independence of Buenos Ayres would be complete." [71] There is agreement among historians that the recognition of the United States by France in 1778 was not entirely disinterested. That event, it may be added, showed how shifting and haphazard in their operation may be mere considerations of opportunism in connection with recognition. When the American Colonies declared their independence in 1776, Turgot advised the King of France that it was in the French interest that the insurrection be suppressed because the insurgents when subdued would require a considerable British force to keep them down permanently and as a result, Great Britain would become a peaceable or at least a harmless neighbor.[72] In February, 1778, France concluded treaties of commerce and alliance with the United States which amounted to recognition and which brought about the war with Great Britain.

Neither are instances lacking in more modern history of attempts to make recognition an object of a bargain or a matter dependent upon political conditions or considerations. In May, 1918, the British Minister at Stockholm informed the Finnish Chargé d'Affaires that Great Britain was prepared to recognize provisionally the *de facto* Finnish Government pending final settlement at the peace conference, if the Finnish Government would obtain the release of British subjects arrested on Finnish territory by the Germans and give guarantees for the maintenance of neutrality (including the passage of Allied ships through Finnish territorial waters).[73] The attitude of the United States was not dissimilar. The instructions to the United States Representative at Helsingfors were that "recognition as a *de facto* government could be given to any properly constituted government established on democratic principles and with a policy not in conflict with the Allies, which may result from the recent Finnish elections." [74]

One of the reasons given by the United States in 1920 for refusing to recognize Georgia and Azerbaidjan was the "reaction on the minds of

71. Mr. Adams, Secretary of State, to Mr. Monroe, Jan. 28, 1819, 1 MANNING, *op. cit. supra* note 6, at 93. "If Buenos Ayres," wrote Mr. Adams to President Monroe in 1818, "confined its demand of recognition to the provinces of which it is in actual possession, and if it would *assert its entire independence by agreeing to place the United States upon the footing of the most favored nation*, . . . I should think the time now arrived when its government might be recognized without a breach of neutrality." 1 MOORE, INTERNATIONAL LAW, 79.

72. See the letter of Mr. Adams, United States Minister to Great Britain, to Mr. Monroe, United States Secretary of State, Jan. 22, 1816, 3 MANNING, *op. cit. supra* note 6, at 1433.

73. Communication of the British Ambassador to the United States Secretary of State, May 4, 1918, 2 FOR. REL. U. S. 1918, RUSSIA (U. S. Dep't State 1932) 784. See also the statement of the British Foreign Secretary, The Times, Jan. 31, 1918, p. 5, col. 4.

74. Acting Secretary of State to the Consul at Helsingfors, March 20, 1919. 2 FOR. REL. U. S. 1919 (U. S. Dep't State 1934) 213.

the Russians, hitherto friendly to the Allied and Associated Governments, of such a recognition." [75] The element of national interest as a determining factor in matters of recognition is shown in connection with the recognition of Latvia. In October, 1920, Poland informed the Latvian Government that she was willing to grant immediate recognition *de jure* to Latvia provided that the latter offer a ninety-nine years' lease of a port, to be declared a free port.

When the question of recognition of Albania came before the United States Secretary of State in 1922, both the persons acting on behalf of Albania and the United States Secretary of Commerce pointed to some connection between the grant of recognition by the United States and the grant of oil concessions by Albania.[76] The Secretary of State informed the Secretary of Commerce that there were "naturally various considerations involved in the question of recognition." [77] On July 28, 1922, recognition *de jure* was extended. When the United States, on April 25, 1922, recognized the independence of Egypt, it made the recognition "subject to the maintenance of the rights of the United States of America as they have hitherto existed." [78] This was done in order not to leave doubts as to the maintenance of the capitulatory and commercial rights of the United States. When in 1928 the Kingdom of Hejaz and Nejd approached the United States with a request for recognition, the Department of State, in a communication to the American Legation at Cairo, expressed the opinion that "the final decision would be largely influenced by the character and extent of American commercial interests, actual as well as potential, in Hejaz." [79]

Conditions of recognition have been exacted which, although not imposed in the selfish interest of the State in question, have been unrelated to the purpose of recognition. Thus when in 1823 Great Britain admitted in principle the propriety of recognizing the new State of Brazil, she insisted, as a condition of recognition, upon the renunciation of the slave traffic on the part of Brazil.[80] The condition, accompanying the recognition at the Berlin Congress in 1878 of Bulgaria, Montenegro, Serbia, and Roumania, is another instance of the same practice. In general, it follows from the conception of recognition—whether conceived as being of con-

75. 3 FOR. REL. U. S. 1920 (U. S. Dep't State 1936) 778.

76. 1 FOR. REL. U. S. 1922 (U. S. Dep't State 1938) 594-95.

77. *Id.* at 600. The United States consular representative at Tangier was instructed to inquire, inter alia, as to the "Albanian administration's attitude towards the protection of American interests and its degree and willingness to afford most-favored-nation treatment to the United States." 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1940) 197.

78. 2 FOR. REL. U. S. 1922 (U. S. Dep't State 1938) 105. See HACKWORTH, *op. cit. supra* note 77, at 209.

79. *Id.* at 218.

80. See Canning's dispatch, Feb. 15, 1823, 1 SMITH, *op. cit. supra* note 19, at 187; printed also in 1 WEBSTER, *op. cit. supra* note 19, at 221.

stitutive or of declaratory effect in relation to the rights of the recognized community—as a declaration of the existence of the requisite conditions of statehood, that it cannot properly be granted upon conditions (other than the implied condition that if these conditions cease to exist, recognition may be withdrawn). Similarly, it follows from that conception of recognition that the only difference between *de jure* and *de facto* recognition is that the latter is provisional in the sense that its eventual finality is dependent upon the stabilization of the as yet precarious factual conditions of statehood.[81]

The Incidental Political Element of Recognition. The political implications of recognition reveal themselves in the fact that even when it is broached in good faith and in a spirit of impartiality, recognition or its denial may expose the recognizing State to protests, reprisals, and even war on the part of the parent State. The vehemence of the Spanish protest against the recognition of the Latin-American Republics by Great Britain and the United States offers an instructive example of the inherent difficulty of the situation.[82] In 1861 the United States contemplated a declaration of war against any State recognizing the independence of the Confederacy.[83] When in 1778 France recognized prematurely the independence of the United States, she adduced general reasons of legal principle and of necessities of peace in support of her action. She was answered by a declaration of war. When Holland in the same year concluded a draft treaty with the representatives of the United States, she made the recognition of the independence of the United States conditional upon its previous acknowledgment by Great Britain, a precaution which did not in the long run prevent a British declaration of war. In fact, governments do not as a rule invoke considerations of national policy as a factor in granting or refusing recognition, except when they refer to the danger of being embroiled with the parent State on account of premature recognition.[84] On the other hand, continued refusal to grant recognition may provoke the lasting enmity of the new State in addition to immediate measures of retorsion or reprisals such as the with-

81. Detailed discussion of conditional recognition and of the difference between *de jure* and *de facto* recognition must be reserved for some future occasion.

82. See as to this, the communication of Mr. Adams, United States Minister to Great Britain, to Mr. Monroe, Jan. 22, 1816, 3 MANNING, *op. cit. supra* note 6, at 1434.

83. See GOEBEL, THE RECOGNITION POLICY OF THE UNITED STATES (1915) 171-92.

84. The case of Georgia indicates the possibility of recognition not being in the interest of the community about to receive it. Thus on January 26, 1921, the Supreme Council of the Allied Powers in Paris decided to recognize *de jure* Estonia and Latvia and also Georgia "provided it was clearly established that the latter desired immediate recognition." It had been pointed out that the Georgians might not welcome immediate recognition, as it might expose them to Bolshevik attack.

drawal of the exequatur of consuls,[85] and the legal, commercial, and diplomatic inconvenience resulting from the refusal to recognize a *de facto* authority.

The instances referred to in the preceding paragraph are in the same category as those in which the introduction of a distinct element of national interest is unobjectionable on the ground that it coincides with general international interest. For when the decision to grant or to refuse recognition is determined by the wish to avoid war or reprisals, the motives are such that international law could hardly disapprove. Both types of case, however, testify to the unsatisfactory nature of the situation resulting from the fact that the task of determining the admission to membership of international society is entrusted to individual States called upon to combine two incongruous functions in circumstances likely to blur the disinterestedness of judicial detachment.

It is necessary to keep in mind, lest we fail to perceive the wood for the trees, that the admitted—and decisive—infusion of political interest into the process of recognition is not the typical and normal occurrence. Undoubtedly, considerations of national interest cannot always be divorced from the exercise of the function of recognition which, even when performed in a spirit of detachment and of impartial fulfillment of an international duty, may still have far-reaching political repercussions. This, as will be suggested,[86] is a good reason for making a change in the existing machinery in the direction of collectivization of the process of recognition. It is not an adequate reason for misinterpreting the preponderant evidence of the practice of States according to which recognition is conceived in terms of the fulfillment of a legal obligation owed to the community combining the requisite elements of statehood. If we keep that fact in mind, we shall be in a position to approach with a better prospect of success the consideration of the respective merits of the constitutive and the declaratory doctrines of recognition.

VI.

The Rival Doctrines

The Constitutive View. Consideration of the theory of recognition in international law has traditionally taken place in terms of the conflict between the constitutive and the declaratory doctrines. The orthodox constitutive view, which deduces the legal existence of new States from the will of those already established, dates back to Hegel, one of the

85. As was the case when in 1860 upon the refusal of certain German States to recognize the new Kingdom of Italy, Count Cavour withdrew the exequaturs of their consuls.

86. See pages 447-49 *infra*.

spiritual fathers of the nineteenth century doctrines of positivism and of the absolute sovereignty of the State in the international sphere. States, he taught, enter into legal relations with one another in conformity with their own will by virtue of the act of recognition. Prior to that act no relations of a legal nature can exist between them.[87] It was natural that that view commended itself to those wedded to the conception of international law as a loose "law of co-ordination" based on agreement as distinguished from the overriding command of a superior rule of law. This applies in particular to Jellinek, who gave the first modern formulation of the constitutive doctrine. He insisted that legal relations in the form of legal rights and duties between two entities not subject to a superior legal order can arise only as the result of mutual recognition of legal personality.[88] He admitted that every State which is actually a part of organized humanity enters *ipso facto* into the general community of States, but he urged that recognition is necessary in order to make it part of the *juridical* community of States. This confusing distinction between (natural) statehood which is independent of recognition and membership of the international community (or full international personality) which alone is a source of rights and which is dependent on recognition, was taken over literally by a number of writers, including Liszt[89] and Oppenheim.[90] The distinction seems to be of little value. There is in law no substance in the assertion that a community is a State unless we attach to the fact of statehood rights and competencies within the internal or international sphere which international law is ready to recognize. It seems irrelevant to predicate that a community exists as a State unless such existence is treated as implying legal consequences.

Subsequently, the theory of constitutive consent as a basis of recognition, clearly foreshadowed by Triepel,[91] was developed by Anzilotti and others as resting on a contract proper. Anzilotti's view may be summarized as follows:[92] Rules of international law are created by the consent of States. Accordingly, a subject of international law comes into existence simultaneously with, but not before, the conclusion of the first agree-

87. HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN IM GRUNDRISSE (Rosenkranz ed. 1870) §§ 545, 547. It is, however, significant that at the same time, Hegel clearly perceived the importance of recognition as "the general principle of so-called international law," *id.* § 547, and insisted that, given the necessary requirements, it is "the first absolute right of a State" to be recognized by others. See also VON SOLZ, HEGELS STAATSPHILOSOPHIE UND DAS INTERNATIONALE RECHT (1932).

88. JELLINEK, DIE LEHRE VON DNE STAATENVERBINDUNGEN (1882) 92-99; DIE RECHTLICHE NATUR DER STAATENVERTRÄGE (1880) 48.

89. LISZT, *loc. cit. supra* note 2.

90. 1 OPPENHEIM, INTERNATIONAL LAW (3d ed. 1920) § 71.

91. He regarded recognition as part of a "Vereinbarung" (law-making agreement). TRIEPEL, VÖLKERRECHT UND LANDESRECHT (1899) 102.

92. See ANZILOTTI, COURS DE DROIT INTERNATIONAL (Gidel trans. 1929) 160 *et seq.*

ment as expressed by the treaty of recognition or its equivalent. Such recognition is reciprocal and constitutive (that is, creative of rights and obligations which have not existed so far). Like any other treaty it is, in the last resort, binding by virtue of the fundamental rule *pacta sunt servanda*. This last proviso is a precaution calculated to meet effectively the criticism of those who insist that if the existence of a State is grounded in a treaty, that is, in the will of another State, then the State recognized can no longer be regarded as anything else than a delegated and, therefore, not sovereign part of the recognizing State. For, says Anzilotti, the operation of the treaty is reciprocal and is supported by the overriding norm *pacta sunt servanda* [93] by virtue of which the treaty is, henceforth, binding equally upon both States in conformity with a higher rule of law.

The theory of mutual constitutive recognition as based on contract has been assailed on a number of grounds. One of them, which is of some cogency,[94] has been that in actual experience there is no mutuality at all in the process of recognition since the recognizing State appears to grant a benefit without a compensating *quid pro quo*.[95] The second, and much more persistent, criticism has been that it is impossible to understand how an entity which does not possess a juridical existence can conclude a treaty which presupposes its personality. This immanental criticism has

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93. It is useful to reproduce here the wording in the original: "la personalità internazionale, resa possibile de questa norme, diviene attuale è concreta col riconoscimento. Questo, secondo noi, e puramente e semplicemente l'accordo iniziale a cui si collega il sorgere di norme giuridiche per dati subietti e quindi la loro personalità l'uno di fronte all'altro; pel suo stesso concetto è reciproco e costitutivo." ANZILOTTI, *op. cit. supra* note 5, at 148. For more recent and occasionally somewhat modified affirmations of the constitutive theory of recognition as based on reciprocal agreement, see KNUBBEN, DIE SUBJEKTE DES VÖLKERRECHTS (1928) 317 *et seq.*; PERASSE, LEZIONI DI DIRITTO INTERNAZIONALE (1922) 52-55; Heuss, *Aufnahme in die Völkerrechtsgemeinshaft und völkerrechtliche Anerkennung* (Deutschland, 1934) 18 ZEITSCHRIFT FÜR VÖLKERRECHT 37, *esp.* 63 *et seq.*; Redslob, *supra* note 60. See also SPIROPOULOS, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (1933) 48.

94. Mutuality of advantage is absent only in the sense that recognition is for the new State, as a rule, of more immediate political, economic, and sentimental value. When the news of the recognition of Colombia by Great Britain reached Bogota, a British observer reported that "Rockets are flying in all directions, bands of musick parading the street, and the Colombians galloping about like madmen, exclaiming, 'We are now an independent nation!!!'" 1 WEBSTER, *op. cit. supra* note 19, at 385. On the other hand, it is difficult to deny that in requesting recognition or acknowledging it when granted, the new State undertakes by implication to comply with rules of international law in relation to the recognizing State. To that extent, the transaction is not altogether one-sided.

95. ". . . la tesi della reciprocatà bilateralità del riconoscimento è nettamente smentita dalla pratica, la quale conosce soltanto l'atto di riconoscimento de parte dei vecchi Stati verso il nuovo, senze che questo si sogni di riconoscere i vecchi. . . ." 1 FEDOZZI AND ROMANO, *op. cit. supra* note 7, at 103.

been voiced by numerous writers, including for a time Kelsen,[96] Kunz,[97] Diena,[98] and Cavaglieri.[99] The last named, in order to meet the objection—more formidable in logic[100] than in practice—that a community which does not exist in law cannot take part in a legal transaction establishing its personality, has put forward the view that recognition is a constitutive unilateral act on the part of the recognizing State. Recognition, he says, "does not declare an already existing quality; it creates and attributes it";[101] "it is a manifestation of the will of the already existing States addressing itself to the new State." [102] The objection that such unilateral conferment of personality is contrary to the principle of State equality receives the easy answer that that principle applies only in the relations of already existing States.[103] The precautions taken by Cavaglieri and others against the charge of logical inconsistency may not be altogether effective seeing that they are open to the retort that a unilateral act, if conceived as having juridical effects, must have reference to an entity which already exists within the legal system in question.

The other criticisms of the orthodox constitutive view are discussed below.[104] Whatever may be their merits, they fail to point to the cardinal

96. See Kelsen, *Théorie Générale du droit International Public* (1932) 42 RECUEIL DES COURS 121, 260, 268 *et seq.* More recently, Professor Kelsen has expressed his adherence to the current constitutive view of recognition. See Kelsen, *Recognition in International Law* (1943) 35 AM. J. INT. L. 605, 608-09.

97. KUNZ, *op. cit. supra* note 2, at 90. See ROMANO, CORSO DI DIRITTO INTERNAZIONALE (2d ed. 1929) 59.

98. Diena, *Ancora qualche ossenuazione in tema di riconiscimento degli Stati* (Italia, 1932) 24 RIVISTA DI DIRITTO INTERNAZIONALE 465, 478-79.

99. CAVAGLIERI, CORSO DI DIRITTO INTERNAZIONALE (1934) 213; *La situazione quiridica dello Stato non-diconosciuto* (Italia, 1932) 24 RIVISTA DI DIRITTO INTERNAZIONALE 304, 338.

100. "To maintain that the legal personality of a State is the result of an act in which it is created by that very State is to put forward an assertion reminiscent of the attempt by Baron Munchhausen to extricate himself with the aid of his pigtail from the morass into which he had fallen." Kelsen, *supra* note 96, 42 RECUEIL DES COURS at 269. However, Professor Kelson now adheres to the constitutive view, and it is by some such act, though considerably more complicated, that he explains the process of recognition. In the first instance, he says, the new State proclaims itself a State with the effect that it "becomes a subject of international law for itself." It is then recognized with a constitutive effect by other States. Finally, it, in turn, extends recognition to these States. See Kelsen, *supra* note 96, 35 AM. J. INT. L. at 609.

101. CAVAGLIERI, *op. cit. supra* note 99, at 204.

102. *Id.* at 214.

103. *Id.* at 216. Strupp's theory of recognition follows similar lines. STRUPP, GRUNDZÜGE DES POSITIVEN VÖLKERRECHTS (1932) 75-78; *Les Régles Générales du Droit da la Paix* (1934) 47 RECUEIL DES COURS 263, 301. For a valuable statement of the constitutive view on different grounds, see Sander, *Das Faktum der Revolution und die Kontinuität der Rechtsordnung* (Deutschland, 1919) 1 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 132.

104. See pages 433-40 *infra*.

defect of the constitutive doctrine as generally propounded, namely, that the constitutive act creative of statehood is an act of unfettered political will divorced from binding considerations of legal principle.

The Declaratory View of Recognition. The declaratory doctrine of recognition can be stated in simple terms. A State exists as a subject of international law—as a subject of international rights and duties—as soon as it "exists" as a fact, that is, as soon as it fulfills the conditions of statehood as laid down in international law. Recognition merely declares the existence of that fact. These propositions are regarded by the adherents of the declaratory view [105] as self-evident. In the words of Mérignhac:

> "La reconnaissance, en effet, prend l'Etat déjà existant et se borne à constater qu'il réunit les conditions voulues pour qu'on puisse entretenir avec lui les rapports internationaux ordinaires. Donc l'Etat existait avant la reconnaissance, car, autrement, il n'aurait pu être question de reconnaissance: on ne reconnaît pas le néant." [106]

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105. These, to give what is believed to be a representative selection, include BRIERLY, THE LAW OF NATIONS (3d ed. 1942) 100; 1 BUSTAMANTE, DROIT INTERNATIONAL PUBLIC (trans. 1934) 171; 1 DE LOUTER, *op. cit. supra* note 2, at 216-18; HEILBORN, GRUNDBEGRIFFE DES VÖLKERRECHTS (1912) 59-69; KUNZ, *op. cit. supra* note 2, at 85-95; 1 NYS, LE DROIT INTERNATIONALE (1912) 74; ULLMAN, *op. cit. supra* note 2, at 67; VERDROSS, VÖLKERRECHT (1937) 114-16; Erich, *supra* note 60, at 461 *et seq.;* Williams, *La Doctrine de la Reconnaissance en Droit International et ses Développements Récents* (1933) 44 RECUEIL DES COURS 203, 236-38; and see page 432 *infra*. See also the Resolutions of the Institute of International Law of 1936, note 130 *infra*. The declaratory view of recognition of States seems to underlie also the Pan-American Convention on Rights and Duties of States, Dec. 26, 1933. Article 3 of the Convention stated: "The political existence of the state is independent of recognition by other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts." Article 6 laid down the proposition that "the recognition of a state merely [sic] signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law." 6 HUDSON, INTERNATIONAL LEGISLATION (1937) 622-23. In signing the Convention the United States added a reservation, which described as unfortunate the fact that the conference did not prepare a definition or interpretation of the fundamental terms used in the Convention so as to "enable every government to proceed in a uniform way without any difference of opinion or interpretations." *Id.* at 625. For a judicial affirmation of the declaratory view, see Deutsche Continental Gas-Gesellschaft v. Polish State, German-Polish Mixed Arbitral Tribunal, Aug. 1, 1929, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929-1930, Case No. 5. For discussion of this case, see Herz, *Le Problème de la Naissance de L'Etat et la Decision du Tribunal Arbitral Mixte Germano-Polonais du 1er, Aout 1929* (France, 1936) 17 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARÉE 564.

106. MERIGNHAC, TRAITÉ DE DROIT PUBLIC INTERNATIONAL (1905) 328.

Or, in the more modern formulation of Erich:

> "Quand un gouvernement étranger reconnaît un nouvel Etat il constate, par là même, qu'on se trouve devant un fait, un statut organisé dont l'existence lui paraît incontestable. On le reconnaît parce qu'il existe. On ne le reconnaît pas afin qu'il prenne naissance." [107]

If recognition is purely declaratory of an existing fact, what is its juridical significance? The answer which, granting the premises, seems to be most logical and which is often given, is that recognition is a political rather than a legal act.[108] Others maintain that its sole legal effect is to establish ordinary diplomatic relations between the recognizing and the recognized State.[109] This probably is also the intention of that large number of adherents of the declaratory doctrine for whom recognition signifies the acceptance of the new State as a member of the international community.[110] Others still explain the declaratory effect of recognition by the view that while prior to it the new State possesses all rights of statehood under international law, only after recognition is it assured of enjoying them.[111] Finally, some interpret the function of recognition as being of evidential value because the recognizing State is henceforth bound by its own declaration.[112]

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107. Erich, *supra* note 60.

108. BRIERLY, *loc. cit. supra* note 105; Miceli, *Il Problema del Riconoscimento nel dirotto Internazionale* (Italia, 1927) 19 RIVISTA DI DIRITTO INTERNAZIONALE 169.

109. See, in particular, KUNZ, *op. cit. supra* note 2, at 95; ROMANO, *op. cit. supra* note 97, at 98; VERDROSS, *op. cit. supra* note 105; possibly also FEDOZZI AND ROMANO, *op. cit. supra* note 7, at 191; PALLIERI, DIRITTO INTERNAZIONALE PUBLICO (1937) 191-92; PERASSI, *op. cit. supra* note 93, at 37; SCALFATI, *op. cit. supra* note 60, at 53. See also for an earlier but weighty statement of this view, Strisower, *Handbuch des Völkerrechts* (Deutschland, 1890) 17 GRÜNHUT'S ZEITSCHRIFT FÜR DAS PRIVATE UND ÖFFENTLICHE RECHT 716-17.

110. See, *e.g.*, 1 CALVO, DROIT INTERNATIONAL (5th ed. 1896) 240-41; 1 NYS., *op. cit. supra* note 105, at 70; Holtzendorff, *Entstehung und Untergang der Staaten* in 2 HANDBUCH DES VÖLKERRECHTS (1887) 18; Rougier, *Les Récentes Guerres Civiles* (France, 1904) 11 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 225.

111. See, *e.g.*, 1 FAUCHILLE, *op. cit. supra* note 18, at 306; FIORE, INTERNATIONAL LAW CODIFIED (Borchard ed. 1918) 145; 1 PRADIER-FODERE, TRAITE DE DROIT INTERNATIONAL (1885) 237; 1 RIVIER, PRINCIPES DU DROIT DES GENS (1896) 57; Diena, *supra* note 98, at 482, who distinguishes between "la capacita di diritto" (prior to recognition) and "capacita di agire" (after recognition).

112. This, possibly, is the intention of Erich in stating that the declaratory nature of recognition "n'empêche pas que la reconnaissance oblige celui qui reconnaît d'observer une certaine attitude qu'il n'était pas obligé d'observer envers le même État avant la reconnaissance." Erich, *supra* note 60, at 461. See Kelsen's statement that while recognition is juridically of no significance, it may be of some usefulness as introducing an element of certainty and stability. KELSEN, *op. cit. supra* note 62, at 231. It seems that Professor Kelsen's view on the matter subsequently underwent some modification.

VII.

THE DECLARATORY VIEW OF RECOGNITION

The Declaratory View and the Practice of Courts. The above survey of the various interpretations of the declaratory view of recognition cannot claim the merit of clarity; for the differences between them are elusive, and there is little correspondence between them and the practice of courts and governments. This divorce from practice is strikingly illustrated by some of the main contentions of the adherents of the doctrine of the declaratory nature of recognition. One of them is that courts recognize both the internal competence and the international rights of States prior to recognition. Actually, if, as is often said, the answer to the question as to the nature of recognition lies in the juridical position of unrecognized States,[113] then the declaratory doctrine is untenable when gauged by current judicial practice.

It is true that the purely declaratory effect of recognition and the full internal and international existence of the State prior to recognition have on occasion been maintained both by members of international tribunals and by judges in municipal courts as a matter of national dignity and interest. This was the case with the American members of the British-American Mixed Commission under Article 6 of the Jay Treaty, when they asserted that the United States were "in fact . . . independent so early as 1775, and on the ever glorious and memorable fourth of July, 1776, they solemnly and formally declared to the world they were independent, and from *that* period have maintained their independence with honor and prosperity." [114] Numerous decisions of the Austrian, Polish, Czechoslovak, and other succession States established by the Peace Treaties of 1919 were in similar vein. Thus, for instance, the Czechoslovak courts repeatedly declined to admit the view that the Czechoslovak State came into existence as the result of the coming into force of the Peace Treaties. They held that the sovereignty of the Czechoslovak Re-

Thus in 1929, while denying that recognition is constitutive of international personality, he admits that it may have important juridical (*i.e.* constitutive) results. Kelsen, *La naissance de l'Etat et la formation de sa nationalité Les principes leur application au cas de la Tchecoslovaquie* (France, 1929) 4 REVUE DE DROIT INTERNATIONAL 613, 617. In a more recent contribution Professor Kelsen, while distinguishing between political and legal recognition, regards the latter as constitutive. Kelsen, *supra* note 96, 35 AM. J. INT. L. at 605-09. See also Salvioli, *Il Riconoscimento Degli Stati* (Italia, 1926) 18 RIVISTA DI DIRITTO INTERNAZIONALE 330, maintaining that prior to recognition, the State possesses the so-called fundamental, that is, universally admitted rights under international law, but that in many other respects recognition is constitutive.

113. See, *e.g.*, Kunz's statement that "the juridical solution of the entire problem of recognition of States depends on the proper understanding of the legal position of the unrecognized State." KUNZ, *op. cit. supra* note 2, at 42.

114. 3 MOORE, INTERNATIONAL ADJUDICATIONS (1931) 244.

public was established by the revolution of October 28, 1918, on which day the Czechoslovak National Committee assumed sovereignty in all its aspects.[115] The authority of these and similar pronouncements is limited. It is natural for municipal courts or arbitrators appointed by the State, especially in the period following the establishment of national independence amidst turmoil and suffering, to use proud and resounding language in relation to the "glorious and memorable" event of the proclamation of national independence. Moreover, for the purposes of the municipal law of the State concerned, it is reasonable and proper that the autonomous act of the will of its population should be regarded as decisive for fixing the commencement of national independence. But these cases do not decide the question of the *international* validity of the internal acts of the newly established State. In *foreign* courts, the unrecognized State and its acts do not legally exist prior to recognition. English and American courts have been consistent in this attitude to the point not only of refusing to admit the validity of acts of unrecognized States, but also of continuing to apply the law of the parent State,[116] of declining to grant to the unrecognized State the ordinary jurisdictional immunities,[117] of denying to it the right to sue,[118] and even of withholding

115. See the decision in the Establishment of the Czechoslovak State, Supreme Administrative Court of Czechoslovakia, May 9, 1925, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1925-1926, Case No. 8; and see Foreign Bills Decree, Supreme Administrative Court of Czechoslovakia, March 14, 1925, reported *id.* Case No. 9; Payment of War Tax (Czechoslovakia) Case, Supreme Administrative Court of Czechoslovakia, Jan. 21, 1921, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1919-1922, Case No. 4; Rights of Citizenship (Establishment of Czechoslovak State) Case, Supreme Administrative Court of Czechoslovakia, April 26, 1921, reported *id.* Case No. 5; Rights of Citizenship (Establishment of Czechoslovak Nationality) Case, Supreme Administrative Court of Czechoslovakia, Dec. 15, 1921, reported *id.* Case No. 6. As to Poland, see Republic of Poland v. Harajewicz, Polish Supreme Court, Jan. 16, 1923, reported in ANNUAL DIGEST OF INTERNATIONAL LAW CASES 1923-1924, Case No. 1. As to Austria, see A. L. B. v. Federal Ministry for the Interior, Austrian-Administrative Court, Feb. 11, 1922, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1919-1922, Case No. 7, where the Court said: ". . . the Peace Treaty presupposes that the new States already existed legally before it came into force, otherwise the new States could not have been parties. The legal existence of the new Republic of Austria began on 30 October, 1918, the moment when she came into life by the fundamental law of the Provisional National Assembly." *Id.* at 20-21. The same considerations apply to such cases as McIlwaine v. Coxe's Lessee, 4 Cranch (U. S. 1808) 207, in which a United States Court found that a person born in New Jersey after the Declaration of Independence acquired the nationality of that State; or to the decision Del Vecchio v. Connio, Court of Appeal, Milan, Nov. 24, 1920, 46 FORO ITALIANO, 1921 I. 209 (relating to Fiume).

116. Gelston v. Hoyt, 3 Wheat. (U. S. 1818) 246; The Nereide, 9 Branch (U. S. 1815) 388; Rose v. Himely, 4 Cranch (U. S. 1808) 241.

117. The Annette, The Dora, [1919] P. 105.

118. City of Berne v. Bank of England, 9 Ves. 347, 32 Eng. Rep. R. 636 (1804).

relief in claims for whose maintenance it was necessary to allege the existence of an unrecognized State.[119] The attitude of the courts of other countries has, on the whole, been the same, although in most cases it can be gauged only indirectly by reference to the decisions of those courts in connection with unrecognized governments.[120]

The "Existence" of a State and the Commencement of International Personality. The principal feature of the declaratory view is the confident assertion that as the existence of a State is a fact, recognition is a formal act of political rather than legal relevance. However, it seems unhelpful and tautologous to say that recognition is purely formal and declaratory for the reason that a State becomes a subject of international law as soon as it exists or that a State exists as soon as there exist the requirements of statehood. For such existence may be and often is the question at issue. In municipal law the beginning of the existence of physical or juridical persons is as a rule determinable by external tests. With regard to physical persons there has been some discussion, especially in the domain of criminal law, as to the precise moment of the beginning of life, but the question does not on the whole give rise to undue difficulties. Neither is it irrelevant that, apart from the question of its commencement, the mere physical existence of a person does not

119. Taylor v. Barclay, 2 Sim. 213, 57 Eng. Rep. R. 769 (1828); Thompson v. Powles, 2 Sim. 194, 57 Eng. Rep. R. 761 (1828); Jones v. Garcia del Rio, Turn. and Russ, 297, 37 Eng. Rep. R. 1113 (1823). See as to all these cases, Bushe-Fox, *The Court of Chancery and Recognition 1804-31* (1931) 12 BRITISH YEAR BOOK OF INTERNATIONAL LAW 63. That rigid attitude was modified to a slight extent by common law courts, as distinguished from Chancery, but not to the extent of granting any rights to the unrecognized State or of applying its law. See Bushe-Fox, *Unrecognized States: Cases in the Admiralty and Common Law Courts 1805-26* (1932) 13 BRITISH YEAR BOOK OF INTERNATIONAL LAW 39.

120. See, *e.g.*, as to France, HENRY, LES GOUVERNEMENTS DE FAIT DEVANT LE JUGE (1927) 97-99; as to Italy, see the decision in Katsikis c. Societa Fati Svorori, Tribunal de Gênes, May 14, 1923, 50 J. D. I. 1021, 1024, where the court stated that "la reconaissance politique de l'État étranger est une condition indispensable à le exercice de son activité juridique dans les rapports avec les autres Etats." As to Switzerland, see the decision relating to non-recognition of the law of Soviet Russia, De cuius russe, Civil Tribunal, Berne, July 21, 1924, 52 CLUNET 491. The practice of States contradicts also another assertion often propounded by the adherents of the declaratory view, namely, that the effect and purpose of recognition is nothing more than a declaration of willingness to enter into diplomatic relations. The treatment of the immediate effects of recognition (or, what amounts to the same thing, of the effects of non-recognition) before judicial tribunals negatives that view, which is equally inconsistent with the fact that a decision to terminate diplomatic relations with a recognized State—a not uncommon occurrence not only in time of war—has never been regarded as tantamount to withdrawal of recognition. See, *e.g.*, Princess Alga Paley v. Weisz, [1929] K. B. 718, a case in which the principle of Luther v. Sagor, [1921] 1 K. B. 456, was followed notwithstanding the fact that in the meantime diplomatic relations had been severed.

necessarily carry with it full legal personality. Thus there have been systems of law which, in admitting the institution of slavery, have regarded certain physical persons as incapable, wholly or in part, of possessing legal rights. Legal personality is a creature of law, not of nature. Neither is the rise of juristic persons like corporations an automatic question of fact, although, as in the case of companies, the nature of the various requirements of registration, minimum capital, and the like is such as to render their ascertainment comparatively easy.

This is not the case with regard to the determination of the beginning of the existence of States. When we assert that a State exists as a normal subject of international law by virtue of the fact of its existence, we must necessarily have in mind a State fulfilling the conditions of statehood as laid down in international law; in particular, we must be referring to an independent State, that is, a State with a government independent of any other State. But such independence is often a controversial question which cannot be answered by the tautologous test of existence. In the first instance, in the case of communities aspiring to independent statehood subsequent to secession from the parent State, the sovereignty of the mother country is a legally relevant factor so long as it is not abundantly clear that the lawful government has lost all hope or abandoned all effort to reassert its dominion. It is a self-deception to assume that a difficult problem has been solved by such statements as the one that the Latin-American Republics existed as States as soon as they became independent of the mother country. For the question of actual independence is not one capable of any easy or automatic answer. A temporary success resulting in such independence would not, so long as there exists a reasonable prospect of the mother country asserting her authority, justify in law the recognition of statehood. The same applies to the assertion that the American Confederacy during the Civil War was, as it claimed to be, a State because it "existed," or that the United States existed in international law as a State as soon as they declared their independence—as soon as they "existed." [121] The fact that the mother country does not, for the time being, make an effort to regain sovereignty may not always be decisive. In all cases in which, on an objective estimate, recognition is premature and as such violative of international law, the seceding community, although actually wielding a substantial degree of independence of the lawful authority, is not a State in international law although it may claim that it "exists."

121. Only a few months before the recognition of the United States by France, the French Ambassador informed the British Government that "We [France] have repeatedly told them [the United States], you call yourselves an independent State, but you are not so; when Great Britain has *acknowledged* that Independency, then we will treat with you, but not before; at present you are at War with your Sovereign who by no means admits the Independency you assume." Cited in GOEBEL, *op. cit. supra* note 83, at 89.

Similarly, apart from secession from the mother country, mere "existence" as a State offers no answer to the question of existence as a State in international law, that is, as a normal subject of international law. The "State" in question must be independent of other States. As is clearly shown by the example of Manchukuo, such independence cannot be ascertained by any simple test of "existence." Did Manchukuo, established by Japan as a State subsequent to her invasion of the Chinese province of Manchuria in 1932, constitute a State by the very fact of its "existence"? Apart from the continued claims of the mother country and the so-called principle of non-recognition,[122] the decisive question governing the matter was whether Manchukuo was independent of the State which had detached that province from China. The answer which commended itself to impartial observers has been that that province, being under the military occupation and the controlling domination of Japan generally in most aspects of its internal and external government, was not independent.[123] The example of Manchukuo shows that it serves no useful purpose to declare that a community is a State because it "exists" or claims to exist. The question is: Does it exist as a State independent of other States? It is unhelpful to say that Manchukuo existed as a State independently of recognition. For the prior question must be answered, whether it "existed" as a State in the meaning of international law. Professor Borchard has suggested that "Manchukuo exists whether the fact

122. The principle of non-recognition of territorial changes and situations brought about by means contrary to international law was, subsequent to the announcement of the attitude of the United States and of the League of Nations in connection with the invasion of Manchuria, largely responsible for the recrudescence of the declaratory view of recognition. The principle of non-recognition is not, it will be noted, inconsistent with the legal and constitutive view of recognition as here put forward, namely, the view of recognition as a legal obligation to recognize statehood whenever there exist the requisite conditions of fact not inconsistent with international law. See pages 408-12 *supra*. See also, with reference to Manchukuo, Lauterpacht, *The Principle of Non-Recognition in International Law* in LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT (Wright ed. 1941) 129. The facts giving rise to and the situation brought about by the establishment of Manchukuo were in violation of international law. However, in the case of Manchukuo non-recognition follows with equal cogency from the absence of one of the essential conditions of statehood, namely, independence.

123. Yet it is apparently with reference to Manchukuo that Dr. Baty speaks of a "perfectly independent community" being denied the rights of a State. Baty, *Abuse of Terms: "Recognition"; "War"* (1936) 30 AM. J. INT. L. 377. Similarly, an Italian writer spoke in 1938 of "e completa dimostrazione della esistenza, nella Manciuria, di tutti gli elementi di uno Stato indipendente." SCALFATI, *op. cit. supra* note 60, at 215. So, in 1942, does Professor Borchard, *supra* note 7, 108. See also to the same effect, Cavare, *La Reconnaissance de L'Etate et le Manchoukuo* (France, 1935) 42 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 10. When, therefore, Erich says: "les États souverains sont, dans l'organisation actuelle du monde, de par leur même, des personnes," the solution is unhelpful without a prior determination whether the State is "souverain" or not. Erich, *supra* note 60, at 463.

is recognized or not." [124] It is respectfully submitted that "the fact" which in his view clearly "exists" is not an independent State in the contemplation of international law. Can it be accurately maintained that in 1942, or at any preceding date, Manchukuo existed as an independent State, that is, as a State in international law, and not as a subservient province of Japan endowed for the purpose of deception, which was not even intended to deceive, with flimsy and transparent paraphernalia of a spurious statehood?

In February, 1944, Soviet Russia adopted amendments to her constitution by virtue of which each Republic of the Union acquired "the right to enter into direct relations with States, to conclude agreements with them and exchange diplomatic representatives with them." [125] It was maintained by some that by virtue of these amendments the Republics of the Union acquired the position of independent States entitled to full equality and voting at international conferences and that their recognition as such was unnecessary in view of the obvious fact of their "existence."

The Automatic Test of "Existence." Reliance on the automatic test of existence is the gist of the declaratory doctrine of recognition, and it is, therefore, profitable to adduce some further examples showing the unhelpfulness of that test. Thus the State of the Vatican City as established by the Lateran Treaty of 1929 suggests that not only independence but also the existence of other requirements may be a subject of controversy. The territory of the Vatican City does not exceed forty acres; one element of statehood is thus reduced to a vanishing point. The question whether, notwithstanding the smallness of its territory, a community is entitled to the rank of a State in international law is not one which can be answered by a simple reference to the fact of its existence. The case of the Vatican City also suggests that the second element of statehood, namely, the existence of a population subject to the natural process of renewal and growth, may equally be a subject of controversy. The population of the Vatican City is composed almost exclusively of persons residing there by virtue of their office. It is thus of a radically different nature from the population of any other State, and for this reason, also, doubts have been expressed whether it can be deemed to be a State. Moreover, its statehood has been questioned for the reason that it was set up for the fulfillment of purposes other than those usually associated with temporal States. Finally, its very independence has been put in question in relation to both the Italian State and the Holy See. No view is expressed as to the justification of these doubts concerning the state-

124. Borchard, *supra* note 7, at 109.

125. Russia: Law of Feb. 1, 1944, on the Granting to Union Republics of Authority in the Sphere of Foreign Relations.

hood of the Vatican City. They are conclusively answered, it is believed, by the fact of the almost universal recognition of the Vatican City by other States. But it is that recognition—not the "existence" of the Vatican City as a State—which alone is conclusive.

By the same token, a protected State is not a State in international law, although it may claim to "exist" as a State and is as a rule referred to as such. British courts have treated the native States of Johore, of Kelantan, of Baroda, and others as sovereign and independent States in actions involving jurisdictional immunities, but it would be misleading to assert that they are States in international law because they "exist." The question is whether they are independent in the meaning of international law. But this is not a question admitting of an automatic and self-evident answer.

In 1871 a certain Sydney Burt and some other adventurous British subjects constituted a government in the Fiji Islands, an uncivilized unrecognized State under King Thakombau, who was the puppet of the government thus set up. Was that community and its government a State because it "existed"? This was not the view of the Law Officers who, in a series of Opinions, reported that notwithstanding any recognition *de facto* of the Fiji authorities, the British subjects in question should not be accepted as subjects of the new State, not yet duly recognized, and that "Her Majesty's Government may interfere with the acts and engagements of British subjects within Fiji and may declare certain acts and engagements to be legal or illegal in the case of British subjects within Fiji." [126]

In 1894 Mr. Harden Hicky, formerly director of a commercial journal in Paris, purported to establish a State on an island seven hundred miles off the coast of Brazil. He claimed recognition as a State and addressed his request to Switzerland asking for admission to the Universal Postal Union. The Federal Council intimated that in these matters it was proper for the colonial and maritime Powers to take the initiative.[127] Did Mr. Hicky's commonwealth enjoy international personality by virtue of the fact of its "existence" independently of recognition?

The above examples may appear unduly numerous and polemical. But a measure of elaboration is perhaps indicated if the science of international law is to be freed of a plausible but unhelpful formula often

126. Opinion of Law Officers, Aug. 9, 1871, F. O. 83/2314 (unpublished). See also to the same effect, Opinions of June 14, 1872; July 18, 1872; Dec. 9, 1872 (all unpublished). See also the Fijian Land Claims, American-British Claims Tribunal, Oct. 20, 1923, NIELSON, AMERICAN AND BRITISH CLAIMS ARBITRATION UNDER THE SPECIAL AGREEMENT OF AUGUST 18, 1910: REPORT (1926) 588, with regard to some questions of State succession concerning land grants by native chiefs.

127. (France, 1934) 1 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 179; Le Temps, Jan. 30, 1894, p. 2, col. 2.

relied upon by writers of distinction. We find, for instance, Sir John Fischer Williams lending the weight of his authority to the automatic test of "existence." He quotes in support of the declaratory view of recognition the Greek poet's saying: "This is alone beyond the power of Heaven, To make what has been not to have been." [128] But the real question is whether the thing "has been." Sir John himself deplores as unfortunate the premature grant of recognition of statehood to some communities after the first World War. Did these communities "exist"? It is only recognition given in good faith in pursuance of legal principles that can decide. There is little force in the often repeated argument that France was fully justified in insisting, in her answer to the British complaints, that she recognized the United States for the reason that the United States "existed" as a State. The question is whether it existed as an independent State, that is, whether the recognizing State was justified in its view that the proclaimed independence was effective, in the sense that the chance of the mother country asserting her sovereignty had disappeared beyond all hope and was no more than a *brutum fulmen.* Neither is it always clear whether the new community claiming to exist as a State possesses an effective government of a sufficient degree of stability. The manner in which the authoritative Committee of Jurists in the controversy concerning the Aaland Islands decided that Finland, notwithstanding its recognition by a number of States, was not a State at the crucial date because of the absence of effective governmental control, is instructive.[129]

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128. See Williams, *supra* note 105; *Some Thoughts on the Doctrine of Recognition in International Law* (1934) 47 HARV. L. REV. 776, 785.

129. The Committee of Jurists which in 1920 was entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the legal aspects of the Aaland Islands question expressed the view that, although Finland was recognized by Soviet Russia on January 4, 1918, by Sweden on the same date, by France on January 5, by Denmark and Norway on January 10, by Switzerland on February 22, and by numerous other States, "these facts by themselves do not suffice to prove that Finland, from this time onwards, became a sovereign State." *The Aaland Islands Question. Report of the Committee of Jurists* (1920) LEAGUE OF NATIONS OFFICIAL JOURNAL, Spec. Supp., No. 3, 8. This was so because, in the view of the Committee, Finland at that time lacked a stable political organization and because the public authorities were not strong enough to assert themselves throughout the territory of the State without the assistance of foreign troops. *Id.* at 9. See also *Report of the Permanent Mandates Commission* (1931) 12 LEAGUE OF NATIONS OFFICIAL JOURNAL 2176, on the question of the conditions under which a territory can be released from the mandatory regime. These included: (a) a settled government and an administration capable of maintaining the regular operation of essential government services; (b) capacity to maintain its territorial integrity and political independence; (c) capacity to maintain peace throughout the territory. For a somewhat different formulation of the conditions of statehood, see the Memorandum of the Belgian Government, *What Is the Nationality of Territories Placed under Mandate?* (1922) 3 LEAGUE OF NATIONS OFFICIAL JOURNAL 607.

It is clear from what has been said that there is no substance in the assertion that a State commences its international existence with concommitant rights and duties as soon as it "exists."[130] On the contrary, recognition, when given in the fulfillment of a legal duty as an act of application of international law, is a momentous, decisive, and indispensable function of ascertaining and declaring the existence of the requisite elements of statehood with a constitutive effect for the commencement of the international rights and duties of the community in question.

VIII.

The Constitutive View of Recognition

Criticism of the Constitutive View on Ethical Grounds. It will be apparent from the preceding analysis of the declaratory doctrine of recognition that it is not regarded by the author as acceptable. For reasons already given and to be stated in more detail, the constitutive view is here considered to be in accordance with the practice of States and with sound legal principle—though it is not the constitutive view as generally propounded, namely, the view that recognition is an act of policy not implying any legal duty to the community claiming recognition.

One of the principal grounds of the criticism raised against the constitutive view by its rival doctrine has been that it is offensive to considerations of ethics and humanity. Thus it has been argued that if the community in question does not in the contemplation of international law exist prior to recognition, then it is neither protected by international law in the essential aspects of its existence nor bound to respect the equally vital legal interests of other States. It has been maintained that on the constitutive view of recognition the territory of the unrecognized State could be invaded; that (as in the case of secession from an already recognized State) its subjects, hitherto indirectly protected by international law, would suffer a calamitous *capitis diminuto*; that it could be treated in a war with utter disregard of rules of warfare; and that, in any war in which it may be engaged, third States would not be bound by obligations of neutrality. Similarly, it has been pointed out that all these iniquities may, *mutatis mutandis*, be inflicted by the unrecognized State

130. These criticisms apply also to the Resolution of the Institute of International Law of April, 1936, which lays down that "recognition of a new State is the free act by which one or more States acknowledge the existence" of certain facts creative of statehood; that "recognition has a declaratory effect"; and that "the existence of a new State with all the juridical effects which are attached to that existence, is not affected by the refusal of recognition by one or more States." (1936) Am. J. Int. L., Supp., 85. The description of recognition as being a "free" act apparently means that, although it has only a "declaratory effect," it can be withheld at discretion.

upon already existing States. These perturbing possibilities have been vividly painted by writers.[131] However, the prospects involved in this criticism of the constitutive view are not as terrifying as may appear at first sight. The territory of the unrecognized community is liable to invasion but, under traditional international law,[132] a State may invade the territory of a *recognized* State as soon as it has gone through the formality of declaring war or has otherwise manifested its *animus belligerendi*. Should an unrecognized community become engaged in war, then in all probability the mutual observance of most rules of warfare will naturally follow for reasons of humanity, of fear of retaliation, of military convenience, of conservation of military energy, and, generally, for reasons similar to those for which rules of warfare are observed in a civil war between the lawful government and the rebels declared to be traitors. For the same reason third States will, unless they decide to become belligerents, observe neutral conduct in any wars in which the unrecognized community may be involved. The subjects of the unrecognized community may, it is true, be maltreated in foreign States without international law offering any protection, but here again the legal position represents only inadequately the realities of the situation. If a State is determined to treat some aliens in defiance of the canons of civilization or of generally recognized international law, and if the State affected is a weak State unable or unwilling to protect its subjects by retaliation or otherwise, then recognition will seldom prevent that kind of conduct. On the other hand, if the unrecognized State is in a position effectively to show its displeasure, the absence of recognition will not be likely to cause serious injury to its interests or to those of its subjects. Moreover, absence of recognition does not necessarily render impossible regular intercourse in connection with the protection of nationals abroad and with other purposes; neither does it prevent measures of accommodation calculated to meet the circumstances of the case.

Similar considerations apply to the converse case, namely, to such acts of the unrecognized community as would, if performed by a recognized State, constitute a violation of international law. Experience does not show that the fact of non-recognition is taken advantage of by either side as an opportunity for committing acts otherwise illegal under international law.

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131. See, *e.g.*, BRIERLY, *op. cit. supra* note 105, at 100; KUNZ, *op. cit. supra* note 2, at 89; Williams, *supra* note 105, at 237-38.

132. As distinguished from international law established by the Covenant of the League and the General Treaty for the Renunciation of War. In theory, a State which has been recognized by two-thirds of the members of the League who have voted for its admission may, through Article 17 of the Covenant, secure the advantages of assistance against invasion by the non-recognizing State.

Full recognition is refused as a rule for the reason that the conditions of recognition of statehood or governmental capacity are not entirely fulfilled. But it does not follow that the unrecognized community must be ignored altogether, as is convincingly shown by the manifold forms of official and unofficial intercourse with unrecognized governments. The unrecognized community is taken notice of so far as this proves necessary. Thus, for instance, an unrecognized State or government or belligerent 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. States cannot be compelled to choose between recognition, which they deem themselves rightfully entitled to refuse, and passive toleration of unlawful acts. They can have recourse to remonstrances, protests, retorsion, reprisals, or war. They need not—and probably will not—pay much attention to the argument that a State or government which has not been recognized does not exist as a subject of international rights and duties and that it cannot therefore be saddled with effective responsibility.[133] The answer to such arguments is twofold. First, 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 recognized and if the non-recognizing State acknowledge itself to be bound by them. To that extent the community in question, although not recognized generally, may be recognized for particular purposes on the not unreasonable ground that the rules in question are general and mutual in their operation. Secondly, if the offending authority declines because of its non-recognition to act or to be dealt with on the basis of law, it must be dealt with—and suppressed—as a physical evil. There is in cases of this description a discrepancy—an unavoidable one—between law and fact. The seceding community possesses a measure of statehood; it does not possess enough of it to justify full recognition. In such cases the flexible logic of the law adapts itself to circumstances. It refuses to accept the easy dichotomy: either no rights and duties or all rights and duties following upon recognition. A situation is created in which the unrecognized community is treated *for some purposes* as if it were a subject of international law. It thus becomes a subject of international law to the extent to which existing States elect to treat it as such in conformity with general rules of international law. In many cases substantial rights of statehood have been accorded, notwithstanding the ab-

133. For a clear example in which a State was held bound, in relation to the State which had refused to grant recognition, by the obligations contracted by a government to which the recognition had been refused, see the award in the Dispute between Great Britain and Costa Rica, Taft, sole arbitrator, Oct. 18, 1923, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1923-24, Case No. 15.

sence of recognition as a State, through recognition of belligerency or insurgency.[134]

The "Right" of Existing States to Determine Statehood. The circumstances which reduce to its true proportions the possible mischief of the constitutive view do not, it must be admitted, dispose altogether of the possibility that because of the improper exercise of the function of recognition, a community may through no fault of its own be deprived of the benefits of international intercourse, that the rights acquired under its laws may be without effect abroad, and that its citizens may remain without the usual diplomatic protection. These are weighty considerations. They are only partly met by the suggestion that these rights will be enjoyed in relation to the States which agree to grant recognition, that the number of these States will in the long run be in some proportion to the merits of the claim to recognition, and that in relation to the others the weapon of retaliation may prove to be not altogether without effect. The fact is that the denial of rights of statehood to a community which seems to be entitled to them is an anomaly which it is difficult to justify. But these apparent consequences of the constitutive view are, in fact, attributable to a cause fundamentally different from the antinomy of the constitutive doctrine conceived in its essential aspect. They are due not to the circumstance that recognition is constitutive, but to the fact that insofar as it is treated as a matter of policy and not of legal duty, it may be liable to abuse. This particular criticism leveled against the constitutive view is, in fact, based not on its being constitutive, but on its being political and arbitrary. But this defect is an aberration, not an unavoidable consequence of the constitutive view.

These considerations, it may be noted, supply also the answer to a question which is often asked: Why should the mere accident of prior exist-

134. Similar results may be reached by way of the doctrine of so-called fundamental rights of the individual. It may be argued that, notwithstanding the absence of recognition, a community is entitled to the rights which the conscience of mankind gives to individuals, regardless of whether they act in isolation or collectively. The fundamental rights of the individual are not lost for the sole reason that he acts in conjunction with other individuals. Recognition makes a community a normal subject of international law or, as it is sometimes said, a full member of the international community with all the normal consequences attaching thereto. That does not mean that in the absence of such recognition, it is in conformity with the spirit of international law that the individuals composing the community in question should be treated as being altogether outside the pale of law. Similarly, individuals composing a community unrecognized as a State cannot because of that fact acquire an immunity from the fulfillment of duties corresponding to the fundamental rights of the individual. The doctrine of the fundamental rights of the individual protected by international law is, of course, a highly controversial, although—it is to be hoped—not entirely discredited doctrine. It acquires a special significance in situations connected with the rise of international personality in cases in which the border line between law and fact as well as between law and morals is necessarily lacking in precision.

ence give to some States the right to call into being the full international personality of rising communities?[135] The answer is that personality as such cannot be automatic and that as its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, it must be fulfilled by already existing States. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty. Criticism must properly be directed not against the constitutive nature of recognition, but against the abuse of its true function, which is one of applying a rule of international law.[136]

The Logical Argument against the Constitutive View. We may now consider the various criticisms which have been raised against the constitutive view on logical grounds. The first is directed against that aspect of the constitutive doctrine which considers recognition to be in the nature of an agreement between the old and new States. It points to the logical impossibility of the creation of international personality taking place by means of a treaty which presupposes the existence of the State in question.[137] The notion of recognition as a bilateral agreement cannot be accepted, not for reasons of logic, but mainly because it finds no support in the practice of States, where recognition is as a rule the result of a unilateral request by one party and unilateral compliance by the other.[138] But it is useful to attempt to meet that particular logical criticism because it has a bearing on the question previously discussed whether communities which have not been recognized as States may not have a limited international capacity insofar as it has been expressly conceded to them. The cogency of the argument as to the logical impossibility of a new State taking part in its own creation as an international person by means of a treaty which presupposes its existence is more apparent than real. The fact that recognition is provided for in a treaty does not imply that it is due to the treaty. It is not difficult to regard a given treaty as fulfilling two purposes at the same time, namely, as recording the unilateral act of recognition of the new State, which thereupon takes part

135. See, *e.g.*, Williams, *supra* note 105, at 236.

136. The constitutive doctrine of recognition is not, it may be noted, a case of importation into the domain of law of the idealistic principle of "esse est percipi" in philosophy. The analogy, if any, is superficial. There is no kind of compulsion to induce perception. But there is a legal duty of recognition.

137. See pages 421-22 *supra*.

138. Similarly, the contention, occasionally advanced, that in order to establish the plenitude of international rights and duties between the established and the new communities, it is also necessary for the latter to recognize the former, belongs to the domain of pure theory. That contention is, upon analysis, a variation of the contractual theory.

in the contractual determination of the details of the future relationship. The practice of States shows frequent examples of such treaties preceded or accompanied by recognition in one and the same instrument. This, in fact, is the typical form of treaties of this description. Thus, for instance, Article 1 of the Definitive Treaty of Peace between Great Britain and the United States of September 3, 1783, provided that "His Britannic Majesty acknowledges the said United States . . . to be free, sovereign and independent States. . . ."; and that "he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof." [139] The same Treaty then laid down the details of the settlement of the principal matters at issue between the two countries. In the Treaty of August 29, 1825, between Portugal and Brazil,[140] Article 1 provided as follows: "His Most Faithful Majesty recognizes Brazil as an Empire, independent and separate from the Kingdoms of Portugal and Algarve. . . ." There followed detailed provisions touching the future relationship of these two States.

In these and similar treaties recognition, although expressed in the treaty, does not form part of the contractual arrangement. The treaty is merely a convenient and suitable opportunity for registering the fact of recognition. If the treaty were to lapse, for instance, as the result of a subsequent declaration of war, the recognition expressed therein would nevertheless remain in full vigor.[141] Recognition is independent of the content of the treaty.

Another objection to the constitutive view on logical grounds is directed against the notion of recognition as a *unilateral* act on the part of the recognizing State. That criticism is based on the contention that juridical effects even of a unilateral act cannot be conceived except between entities already having juridical personality.[142] It is unnecessary to discuss that criticism in detail for, even if justified with regard to the unilateral character of the constitutive act of recognition conceived as an act of purely political discretion, it does not apply to a constitutive act of recognition conceived as an act of application of international law in pursuance of a legal duty. What happens in the latter case is that the international legal system as represented by the States already existing extends its orbit to cover a new component part of the international so-

139. 3 MOORE, *op. cit. supra* note 114, at 2-3.

140. 12 BR. AND FOR. STATE PAPER (1846) 675.

141. There was little justification, therefore, for the apprehension expressed in Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 8 Wheat. 464 (U. S. 1823), that the War of 1812 might be regarded as terminating all former treaties with Great Britain; ". . . even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles." *Id.* at 494.

142. See page 422 *supra*.

ciety. This may, because of the absence of a central organ of recognition, amount to a complicated and baffling procedure inasmuch as the existing States may not all speak with the same voice. Apart from this, the process of recognition thus conceived as a unilateral act is not open to objection. The practice of States shows that recognition is as a rule a unilateral act, unless we regard the request for recognition, which is usually but not universally made by the new State, as an offer to recognize the existing State with the implied obligation to respect the rules of international law in relation to it, and the actual recognition as acceptance of the offer. But such a construction is artificial and unnecessary. It begs the question inasmuch as it postulates that all obligations of international law must have their source in voluntary agreement.[143]

Similarly, it is difficult to accept the view that if recognition is regarded as constitutive, it amounts to a subordination of the recognized community to the recognizing State by transforming it into a delegated authority derived from the law of that State. Even if it were true that the existence of the new State is derived from the will of the recognizing State, this fact could not leave any permanent stigma of subordination, for recognition once given creates an obligation which like any other international obligation owes its continued binding force to international law and not to the will of the State concerned. Moreover, there would be a measure of subjection if recognition were an act of policy as distinguished from one of application of international law. But, as stated, that assumption does not necessarily follow from the constitutive view, although it does follow from the notion of recognition conceived as an unfettered act of policy.

Finally, it is not easy to admit the relevance of the criticism that under the constitutive view a situation is created in which a new community exists as a State for those States which have recognized it, but not for others. For this is a criticism not of the constitutive doctrine, but of the imperfection of international organization due to the fact that there is no international authority competent to recognize the existence of the new State. The declaratory view, it is true, avoids this particular difficulty, but it does so by the easy device of asserting that a State exists in international law as soon as it exists and that, accordingly, recognition is a formality. It has been shown that that formula offers no solution

143. There are isolated instances of mutual recognition of a semi-contractual nature. See, *e.g.*, the official communique issued after the ceremony of the signature of the Lateran Treaty, Feb. 11, 1929, stating that the Holy See "recognizes the Kingdom of Italy under the dynasty of the House of Savoy, with Rome as the capital of the Italian State" and that "Italy, on its side, recognizes the State of the Vatican City under the sovereignty of the Supreme Pontiff. DOCUMENTS OF INTERNATIONAL AFFAIRS 1929 (1930) 216, 225. There is no such mutual recognition in the text of the Treaty. Mutual recognition in this particular case might also be explained by reference to the necessity of recognition on the part of the Vatican City of the annexation by Italy of the Papal State in 1870.

of the difficulty. On the other hand, once recognition is conceived not as subject to the vicissitudes of political bargaining and concessions,[144] but as an impartial ascertainment of facts in accordance with international law, the likelihood of divergent findings is substantially diminished.

Retroactivity of Recognition and Traditional Doctrines. The principle of retroactivity of recognition as acted upon by courts has proved a stumbling block both for the constitutive and for the declaratory doctrine. It is, therefore, convenient to attempt to assess its place in the field of recognition, although the judicial pronouncements on the matter bear almost exclusively on the question of recognition of governments.[145] Recognition is retroactive in the meaning that, once granted, it dates back to the actual commencement of the activities of the recognized authority with regard to international rights and duties and, in particular, with regard to the recognition by foreign courts of the validity of its internal acts. That principle is obviously an embarrassment for the declaratory view.[146] For if a State is a subject of international rights and duties as soon as it "exists," then there is no necessity for a special judicial doctrine sanctioning the validity of those rights and duties *ab initio*. In fact, the principle of retroactivity is an indirect but clear refutation of the declaratory view. It seems equally to be incompatible with the consti-

144. The adherents of the political constitutive view of recognition have attempted to minimize the effects of the resulting divergency of action by maintaining, as does Cavaglieri, that recognition by the majority of States, especially the most influential Powers, "sembra avere invece per effeto di investire il nuovo Stato di una qualificazione soggettiva rilevânte *erga omnes*," inasmuch as the silence of other States must be regarded as tacit acquiescence. CAVAGLIERI, *op. cit. supra* note 99, at 218. For a criticism of the theory of tacit consent, see KUNZ, *op. cit. supra* note 2, at 91, and Strupp, *supra* note 103, 47 RECUEIL DES COURS at 444.

145. With regard to recognition of States, see the views of the American Commissioners in the Andrew Allen Case, British-American Mixed Commission under the Jay Treaty, 3 MOORE, *op. cit. supra* note 114, at 238-52; printed also in 1 LAPRADELLE-POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX (1905) 24-25. For the suggestion that the principle of retroactivity ought to have been invoked by Chile in the case of *The Macedonian* before the United States-Chilean Commission of 1858, see the note doctrinale in 2 LAPRADELLE-POLITIS, *supra* (Italian ed. 1923) 217.

On the other hand, the principle of retroactivity of recognition of governments has received repeated and emphatic application. United States v. Belmont, 301 U. S. 324 (1937); Oetjen v. Central Leather Co., 246 U. S. 297 (1918); Underhill v. Hernandez, 168 U. S. 250 (1897); Dougherty v. The Equitable Life Assurance Soc., 266 N. Y. 71, 193 N. E. 897 (1934); Princess Paley Olga v. Weisz, [1929] 1 K. B. 718; Luther v. Sagor, [1921] 3 K. B. 532; The Jupiter, [1927] P. 122, 250; White, Child, & Beney, Ltd. v. Simmons, 38 T. L. R. 616 (A. C. 1922); A. S. Kolbin & Sons v. William Kinnear & Co., [1930] Sess. C. 724; *In re* Marmatscheff, Tribunal of the Seine, March 7, 1929, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1929-1930, Case No. 150.

146. See, *e.g.*, KUNZ, *op. cit. supra* note 2, at 100.

tutive view, which knows of no rights and obligations prior to recognition. However, retroactivity may still be conceived as an exception to the constitutive doctrine [147]—an exception adopted for purposes of convenience and stability, with the object of preserving legal continuity between the old and the new order of things.[148] Inasmuch as preservation of the legal continuity of the municipal system torn asunder by revolutionary convulsions is one of the objects of international law, it is difficult not to approve of that exception. For the same reasons of convenience the principle of retroactivity has been applied not only to *de jure*, but also to *de facto* recognition.[149] Essentially, the principle of retroactivity is one of convenience. It would not be conducive to the maintenance of friendly relations if, for instance, after recognition has been given, courts were to continue to proceed on the theory that legislative acts of expropriation prior to recognition were acts of "thieves and robbers" and conferred no title.[150] There has been no hesitation to abandon that principle of convenience when opposed by more cogent considera-

147. It cannot logically be conceived as an exception to the *declaratory* view. It is logically opposed to it. For a suggestion that it is altogether contrary to juridical logic, see Jones, *The Retroactive Effect of the Recognition of States and Governments* (1935) 16 BRITISH YEAR BOOK OF INTERNATIONAL LAW 42, 55. And see Nisot, *Is the Recognition of a Government Retroactive?* (1943) 21 CAN. B. REV. 627, for a cogent statement of the view that the principle of retroactivity is not a rule of *international* law.

148. Where these considerations do not arise, there may be some reluctance to apply the doctrine of retroactivity. See, *e.g.*, the observations of the Permanent Court of International Justice in the Case of German Interests in Polish Upper Silesia, P. C. I. J., Ser. A, No. 7, at 27-29 (1926). And see Erich, *supra* note 60, at 499-502.

149. See Luther v. Sagor, [1921] 3 K. B. 532, and other cases cited *supra* note 145. It will be noted that the principle of retroactivity has been adopted not only with regard to the rights, but also with regard to the duties of the recognized authority. In particular, it is now clearly established that the recognized State or government originating in revolution is responsible, as from the commencement of the civil war, for the positive obligations undertaken by it as well as for any acts contrary to international law. Thus it has been held in a series of cases decided by the Claims Commissions of 1839 and 1849 between the United States and Mexico that the latter was responsible for certain monies and supplies furnished by citizens of the United States to the leaders of the revolutionary government engaged in revolt against Spain before the independence of Mexico was recognized. See 4 MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS (1898) 3426-32. A similar award was given in the Idler Case, United States-Venezuelan Claims Commission, 1885, *id.* at 3491-3544 (in respect of supplies furnished to the agents of Bolivar in 1817). See also the observations in Williams v. Bruffy, 96 U. S. 176 (1877). As to governments set up by successful insurgents, see The Puerto Cabello and Valencia Railway Case, reported in RALSTON, VENEZUELAN ARBITRATIONS OF 1903 (1904) 455; Bolivar Railway Co. Case, *id.* at 388; Hughes Case, 3 MOORE, *supra* at 2972. See also BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916) § 96; 1 HYDE, INTERNATIONAL LAW (1922) § 302; 6 MOORE, INTERNATIONAL LAW, 991; RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS (1926) 615; *id.* (Supp. 1936), 615a.

150. This aspect of the matter was stressed by the Supreme Court in United States v. Pink, 315 U. S. 203 (1942).

tions. Thus it has been held by the Supreme Court of the United States that the principle of retroactivity is not applicable to transactions in the United States between American nationals and the predecessor of the newly recognized government.[151]

IX.

The Legal Duty of Recognition

The Problem of the Legal Nature of Recognition. It has been submitted here that the declaratory view of recognition is inconsistent with the practice of States, that its conception of the function of recognition is oversimplified and devoid of usefulness, and that its criticisms of the constitutive view prove on analysis to be without foundation. This being so, what, it must be asked, are the reasons for the wide acceptance of the declaratory view? The answer is that it is the reaction against the conception of recognition as a political act pure and simple which has led most writers to subscribe to the declaratory view of recognition. There is a natural disinclination to regard recognition as constitutive of the international rights and duties of the new State if it is merely an act of policy, a bargain, or a concession of grace on the part of the recognizing State. Professor Brierly's and Sir John Fischer Williams' treatment of this question well illustrate this explanation of the declaratory theory. Thus Sir John, after expressing what is believed to be the accurate view, namely, that "The Members of the Family [of Nations], acting in the absence of a central authority, when they admit to membership, have a duty to act as in discharge of a duty to the Family and therefore upon some general principle, not in a merely selfish and arbitrary interest,"[152] maintains, somewhat surprisingly, that in the matter of recognition "each State cannot be conceived as doing more than declaring its own policy." It is difficult to see how recognition can at the same time be a matter both of legal duty and of policy, but the belief that it is an act of policy probably explains his preference for the declaratory view. "And as each

151. Guaranty Trust Company v. United States, 304 U. S. 126 (1938). This limitation was relied upon by the Appellate Division of the Supreme Court of New York in Koninklijke Lederfabriek "Oisterwijk" N. V. v. Chase National Bank, 263 App. Div. 815, 32 N. Y. S. (2d) 131 (1st Dep't 1941), *aff'g* 177 Misc. 186, 30 N. Y. S. (2d) 518 (Sup. Ct. 1941), where the Court pointed out that "recognition does not undo the legal consequences of previous recognition." *Id.* at 193, 30 N. Y. S. (2d) at 527. See also Union of Soviet Socialist Republics v. National City Bank of New York, 41 F. Supp. 353 (S. D. N. Y. 1941).

152. Williams, *supra* note 128, 47 Harv. L. Rev. at 780. It is possible that the learned author, like some other writers, has inclined to the declaratory view because of his opposition to the principle of non-recognition, a reason which may be regarded as of a transient character.

State," he says, "cannot be conceived as doing more than declaring its own policy, it is also clear that the nature of the act of each State cannot be creative in the sense of making a new international person, but must be limited to a declaration that it personally accepts the fact that a new international person has come into being." [153] Similarly, Professor Brierly seems to start from the proposition that international law delegates to each State the power to decide whether a community claiming the quality of statehood satisfies the necessary requirements.[154] However, from the circumstance that the act of recognition is liable to be abused for political purposes and that the recognizing State is free to take a decision according to its own appreciation of the facts, he draws the conclusion that recognition is merely "an act of policy and not of law and that no juridical consequences attach thereto." [155]

It is this negation of the element of legal obligation and the assertion of the State's right to full freedom of action in the matter of recognition which has identified the established constitutive view so closely with the extreme assertion of sovereignty and rendered it so conspicuously open to attack. That denial of the legal nature of recognition is, it is true, common also to the declaratory view. But there it is relatively innocuous. For on the declaratory view recognition is a formality or the expression of the wish to enter into diplomatic relations. This being so, the circumstance that recognition is a question of political discretion would be of little consequence. But a theory which makes the very rise of international personality and of the concomitant rights and duties depend on the unrestricted will of sovereign States brings once more into prominence the doctrine of sovereignty in its most uncompromising form. It is not surprising that it has become the subject of disapproval and attack. What is not so easy to understand is why criticism directed against the traditional constitutive view has assailed the sound heart of that doctrine, namely, that recognition is constitutive in its nature and has associated itself with the objectionable aspect of the constitutive doctrine, namely, with the conception of recognition as a political function.

Undoubtedly, the refusal or the grant of recognition are acts of political importance. Most legal transactions in the international sphere are of political significance and have political consequences. This naturally applies in particular to matters connected with the rise and the extinction of States. But it does not by any means follow that such transactions are "acts of policy" not governed by considerations of legal right and duty. It has been shown here that there is no warrant for describing

153. *Ibid.*

154. Brierly, *Règles Générales du Droit de la Paix* (1936) 58 RECUEIL DES COURS 23, 52.

155. *Id.* at 59.

recognition of States as an act of policy in this meaning. Courts [156] and governments have frequently described recognition as being a political and not a judicial question. But the intention of such pronouncements is to convey that the grant of recognition is a matter for the political as distinguished from the judicial organs of the State. They are not an authority for the view that in performing the function of recognition the political branch of the government is entitled to act arbitrarily without reference to applicable legal principles.

Once we have assimilated the idea that recognition is not primarily a manifestation of national policy, but the fulfillment of international duty, we shall have removed the principal objection to acceptance of the view that recognition marks the rise of rights and duties which constitute the international rights and duties of the State. That view is in accordance with the weight of the practice of governments, with decisions of courts, and, in particular, with the requirement of international intercourse. The existing procedural position in the matter of recognition is undoubtedly unsatisfactory. There are, theoretically, two ways of meeting the difficulty. It is possible to approach the subject by minimizing the importance of the act of recognition in its present procedural stage of development and to assert that as recognition is a purely political fact, it can be only declaratory of rights and duties. This method of approach has been shown to be both contrary to practice and unworkable. The better method, and one which is more consonant with practice and principle, is to admit the constitutive character of recognition and to bring it—the primary and perhaps the most fundamental aspect of international relations—under the sway of legal right and obligation. This is not what most international lawyers have done.

Acknowledgment of the Legal Nature of Recognition. The majority of writers deny the legal nature of the act of recognition of States. That majority includes the adherents both of the declaratory and of the constitutive view.[157] The first have no difficulty in denying that there is ever a duty to grant recognition. They are in a position to do so without em-

156. See Guaranty Trust Company v. United States, 304 U. S. 126, 137 (1938); Oetjen v. Central Leather Co., 246 U. S. 297, 302 (1918). And see other cases to the same effect, cited in 1 HACKWORTH, *op. cit. supra* note 77, at 165.

157. The following is a selection of those who deny that recognition can properly be regarded as a matter of legal duty to the community claiming it; ANZILOTTI, *op. cit. supra* note 5, at 149; BRIERLY, *op. cit. supra* note 105, at 100; 1 FAUCHILLE, *op. cit. supra* note 18, at 317; HENRY, *op. cit. supra* note 120, at 220; HERSHEY, THE ESSENTIALS OF PUBLIC INTERNATIONAL LAW AND ORGANIZATION (rev. ed. 1927) § 123; KUNZ, *op. cit. supra* note 2, at 43; 1 DE LOUTER, *op. cit. supra* note 2, at 219; 1 OPPENHEIM, INTERNATIONAL LAW (4th ed., McNair, 1928) § 71; PALLIERI, *op. cit. supra* note 109, at 193-94; SCALFATI, *op. cit. supra* note 60, at 232; VERDROSS, VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT (1926) 141, 164; VÖLKERRECHT (1927) 116; Kelsen, *supra* note 96, 35 AM. J. INT. L. at 610; Strupp, *supra* note 103, 47 RECUEIL DES COURS at 445; Williams, *supra* note 105.

barrassment for the reason that in their eyes recognition is devoid of any legally relevant substance; it is largely synonymous with a political decision to enter into diplomatic relations. The others are compelled to adopt the same view for the reason that it follows inevitably from the positivist attitude which, based in turn on the theories of sovereignty and consent as the foundation of international law, finds it impossible to admit that States may without their consent be constrained to be bound by rules of law in relation to a newcomer. In addition, the opinion that recognition, being a political act, can never be demanded as a matter of right, has found support from writers not wedded to any doctrinal view in terms of accepted terminology.[158]

However, the political view of recognition has not remained unchallenged. Alongside the predominant doctrine there has been a substantial body of opinion which has treated recognition from the angle of the fulfillment of a legal duty to the community asking for recognition and to the international society in general. Bluntschli, writing in 1868, put the point with all requisite clearness. He says:

> "31. So long as the open struggle for the establishment of the new State lasts and so long as it is doubtful whether a new State has arisen, no other State is bound to recognize the new State. . . . 35. The newly created State has a right to enter into the international community and to be recognised by other States if its existence is undoubted and secure. It has that right because it exists and because international law unites the States of the world into a common legal system. . . .[159] 36. The existing State can no more

158. Thus we find Sir William Harcourt saying: "It is sometimes said that the question of recognition is one of policy—and this is true, if considered with respect to the community which has recently asserted its independence. With respect to such a community, foreign powers have as yet contracted no duties similar to those which are incumbent on them in reference to established Governments with whom they have already entered into relations. It is entirely a matter of discretion and policy how, and how soon, they will admit such communities into the society of nations of which they are themselves members." HARCOURT, LETTERS BY HISTORICUS ON SOME QUESTIONS OF INTERNATIONAL LAW (1863) 12-13. Similarly, Sir Travers Twiss says: "Every other State is at liberty to grant or withhold this recognition, subject to the consequences of its own conduct in this respect; as, for instance, if it grants such recognition, it may incur the hostility of the State from which the new State has separated itself; if it refuses such recognition, it may incur the hostility of the new State or its allies." TWISS, THE LAW OF NATIONS (1884) 20.

159. He adds: "It is true that the recognition of a true State by other States takes place in the form of a free act of sovereign States, but it is not an absolutely arbitrary act, for international law unites the existing States into a human society even against their own will. The view often put forward in the older literature that it depends on the mere whim of a State whether it will or will not recognize another State, ignores the legal necessity of international law and would be correct only if international law were based solely on the arbitrary will of States, *i.e.*, if it were purely contractual law." BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIERTEN STAATEN ALS RECHTSBUCH DARGESTELLT (1868) 71.

> arbitrarily exclude a State from the society of States than they can themselves withdraw arbitrarily from that society." [160]

Hall's emphatic assertion of the right of the new State to recognition has been noted above.[161] More recently, Hyde says: "When a country has by any process attained the likeness of a State and proceeds to exercise the functions thereof, it is justified in demanding recognition." [162] Scelle's view is the same: "La reconnaissance étant constation est due, ou si l'on préfère obligatoire." [163]

While those directly admitting the legal nature of recognition in relation to the community claiming it are in a minority, careful examination reveals that it is often indirectly admitted by those who deny it. This applies even to thoroughly positivist writers wedded to the constitutive view. When, for instance, Anzilotti says that "one must deny that recognition may depend on any enquiry touching the legitimacy of the new State," [164] that statement must be interpreted as meaning that at least there is a duty not to refuse recognition on the ground of illegitimate origin. However, it is mainly from the adherents of the declaratory view that there has come the indirect acknowledgment of the legal nature of recognition. Such indirect admission must be deemed to be inherent in the assertion that statehood in the field of international law—that is, the quality of a subject of international law—and most consequences of statehood are independent of recognition. That assertion means that the seceding community is entitled as a matter of legal right to demand and the existing States are bound as a matter of legal duty to concede to it, international rights which according to the constitutive view flow from recognition and are dependent on it. As soon as the conditions of statehood exist, says Kunz, "the State newly arisen within the territorial domain of the family of nations becomes *ipso facto* and regardless of its consent a member of the international community and from that moment

160. *Id.* at 69-71.

161. See page 400 *supra*. *And see* pages 455-56 *infra*.

162. 1 HYDE, *op. cit. supra* note 111, at 56.

163. Scelle, *Règles Générales du Droit de la Paix* (1933) 46 RECUEIL DES COURS 330, 388. See also, to the same effect, FIORE, *op. cit. supra* note 111, § 174, where unjustifiable refusal of recognition is described as contrary to international law, although in section 169 it is referred to as being in its nature a political act; GAREIS, INSTITUTIONEN DES VÖLKERRECHTS (2d ed. 1901) 57; KLÜBER, EUROPÄISCHES VÖLKERRECHT (2d ed. 1851) § 45; 1 PRADIER-FODERE, *op. cit. supra* note 111, at 241; ULLMAN, *op. cit. supra* note 2, at 185; Holtzendorff, *supra* note 110, at 25. Probably, there ought to be included in this category writers who emphasize the *judicial* discretion of States granting or refusing recognition. Thus Normand says: "C'est formellement un acte libre de l'Etat. Mais ce n'est pas un acte arbitraire. Il doit traduire la conviction de l'Etate qui constate l'existence de certaines conditions materiaellement exigées." NORMAND, LA RECONNAISANCE INTERNATIONALE ET SES DIVERSES APPLICATIONS (1899) 228.

164. ANZILOTTI, *op. cit. supra* note 92, at 169.

it becomes subject to all international rights and duties." [165] The declaratory view of recognition postulates that the new State is entitled, as soon as it "exists," to most of the rights (for instance, jurisdictional immunities) enjoyed by already recognized States. The new State is thus, it would appear, entitled as a matter of law to what normally follows from recognition, but not to recognition as such. The unsatisfactory nature of the solution thus suggested reveals the confusing dilemma resulting from the uncritical repetition of the phrase that there is no right to recognition. From that dilemma the adherents of the declaratory view have attempted to escape by devitalizing the function of recognition, that is, by reducing it either to a formality or to a gesture of assurance of enjoyment of already existing rights or to a declaration of willingness to enter into diplomatic relations. It has been shown that no one of these interpretations of the function of recognition can be accepted as even remotely in accordance with international practice.

X.

Improvements in the Process of Recognition

Collectivization of the Process of Recognition. The preceding criticism of the declaratory view of recognition does not imply that the present position under which existing States in compliance with a legal duty fulfill the function of recognition with a constitutive effect, is satisfactory and that it ought to be perpetuated. It is true that an acknowledged and decisive infusion of the element of national interest has not been a typical feature of the process of recognition. But, as has been shown,[166] the exceptions are frequent and disquieting. Neither is it possible to ignore the political implications and repercussions of the process of recognition, even when it takes place in the fulfillment of a duty owed to international society and to the community in question. The dual position of the recognizing State as an organ administering international law and as a guardian of its own interest must reveal itself in a disturbing fashion whenever there is an occasion for successfully using the wea-

165. Kunz, *op. cit. supra* note 2, at 88. See also Verdross, according to whom States are from the moment of their establishment subjects of international law *in posse*, but do not actually become such except by recognition on the ground that in the absence of a positive rule of international law to that effect, neither the new State nor the others are bound to entertain international relations and that there is in international law neither an obligation to recognize nor a right to recognition. Verdross, Verfassung, *op. cit. supra* note 157, at 164. It is not easy to follow this argument because Verdross maintains at the same time that existing States are bound to treat as valid the internal acts of the unrecognized community. The maintenance of international intercourse does not exhaust the scope of international rights and duties.

166. See pages 415-17 *supra*.

pon of recognition for the purpose of achieving political advantages. Situations will arise in which a State may see in the manner of the exercise of the function of recognition an opportunity for securing for itself benefits from the parent State or from the community claiming recognition. Consideration of such benefits cannot be regarded as legitimate, but it cannot always be absent in the decision of the recognizing State. It would be futile to deny either the existence of the difficulty or the fact that it is due to an obvious imperfection of international organization. The solution of that difficulty would seem to lie in transferring that function to an international organ not laboring under the conflict between interest and duty. An innovation of this nature would also abolish the glaring anomaly of a community existing as a State in relation to some but not to other States.[167]

Collectivization of the process of recognition depends clearly upon a high degree of political integration of the international community in the form of an international organization of States. Recognition of States, though consisting in the application of a legal principle and in the ascertainment of the existence of conditions of statehood as laid down by international law, could and probably ought to be placed, in view of its political implications, within the competence of the highest executive and legislative organs. The thorough collectivization of recognition in this way would be possible only if the international organization were both universal and compulsory, that is, an organization to which by a sovereign act of international legislation all States would be made to adhere and from which there could be neither withdrawal nor expulsion. An international organization which is not universal would make possible the collectivization of recognition only in the mutual relations of its members, though, politically, the authority of such recognition would extend outside the scope of its membership. In a universal international organization on a compulsory basis recognition by an appropriate majority of its highest organs corresponding to the Council or Assembly of the League of Nations would automatically involve membership. In an international organization which is not universal or in which membership is voluntary, admission by the competent organ would automatically involve recognition by all the members of the organization. The position would have to be made clear by a constitutional provision lifting the fact of automatic recognition above the uncertainty and the controversy with which it was surrounded in the Covenant of the League of Nations.

Development in the direction of collectivization of recognition may be facilitated by the realization that instances of collective recognition are not absent from international practice—to mention only the cases of recognition of Greece by the Treaty of London of 1830, of Belgium by

167. See page 458 *infra*.

the Treaty of London of 1831, of the German Empire by the Protocol of London of 1871, of the Balkan States by the Berlin Treaty of 1878, of the Congo State by the Berlin Treaty of 1885, of the creation of Albania by the Treaty of London of 1913 as well as the recognition of her independence by the Conference of Ambassadors in 1921, and the various instances of collective recognition of new States by the Allied Powers after the War of 1914-1918.[168] Moreover, diplomatic practice shows that, as in the case of recognition of governments, recognition of States, even when granted separately, is often preceded by negotiations aimed at establishing a common line of action. The attempts made by Great Britain to secure at the Congress of Verona joint action with other European Powers in the matter of the recognition of the Latin-American States, as well as the attempts of the United States to secure the coöperation of Great Britain in the same matter, may be mentioned as examples.[169]

International Courts as Agencies of Recognition. It is not believed that a promising avenue of progress would lie in conferring upon the highest international judicial authority the power to grant recognition on the application of the community claiming it. On the face of it, this would seem to be the natural course. It would appear that a function consisting in the application of international law and in the ascertainment of the existence of requisite conditions of fact may and ought properly to be fulfilled by a judicial organ of the highest authority and impartiality. There is no doubt that so far as its Statute, including the rules of law applicable thereunder, is concerned, the Permanent Court of International Justice would be in a position to act in that capacity. Yet it seems undesirable to burden the Court with a task whose implications and the circumstances of whose performance are of capital political significance. This applies in particular to cases where the question of recognition of States arises in connection with a revolt against and secession from the parent State. For these reasons it is, from the practical point of view, more appropriate that this particular function of applying the law should be performed not by the judicial, but by the highest executive or legislative organs of the international community. The Court might still make

168. See, *e.g.*, the Note addressed by the President of the Inter-Allied Conference at Paris to the President of the Estonian Delegation, Jan. 26, 1921: "Le Conseil Suprême des Puissances alliées, prenant en considération les demandes présentées à diverses reprises par votre Gouvernement, a décidé, dans sa séance d'aujourd'hui, de reconnaître l'Esthonie comme État *de jure*." 114 BR. AND FOR. STATE PAPERS (1921) 558.

169. See, *e.g.*, the Instructions of Mr. Adams to Mr. Anderson, United States Minister to Colombia, May 27, 1823, pointing out that in August, 1818, the United States made a formal proposal to the British Government "for a concerted and contemporary recognition of the independence of Buenos Ayres." 1 MANNING, *op. cit. supra* note 6, at 195.

a useful contribution in pronouncing by way of advisory opinions or in a similar capacity on any questions of law incidental to recognition. Neither do objections apply to the ability and the propriety of the Court's giving redress in the form of compensation for injury actually suffered for arbitrary delay of recognition by one State in face of practically universal recognition by other States. In this connection the claim of the United States in the case of the *Bergen Prizes,* a case of non-recognition of belligerency, is of some interest.[170]

Municipal Courts and the Function of Recognition. The foregoing considerations explain also why no amelioration of the present position can be expected from transferring the function of recognition to municipal courts as distinguished from the executive organs of the State. Moreover, the possibility must be envisaged of different tribunals of the same State reaching different conclusions as to the existence of the requirements of statehood in any given case. In addition, the contingency would still remain of the courts of various countries arriving at divergent views on the matter.

It is convenient in this connection to consider the criticism which has been levelled against two principles—one of a procedural, the other of a substantive nature—obtaining in Great Britain and in the United States, as well as in other States in the matter of recognition.

The procedural rule of unchallenged authority is that in the matter of recognition as on other questions relating to foreign affairs, the position taken up by the executive department of government is of decisive weight. The question whether a foreign community exists as a State in the contemplation of international law is answered by the courts in strict reliance upon the statement of the Executive informing the court whether and to what extent recognition has been granted. The practical justification of that procedural principle is that it would be inconvenient for the State *and* its neighbors if its various organs were to assume divergent positions in the matter of its external relations.[171] It is proper that courts

170. See page 455 *infra.*

171. For a clear statement of both practice and principle as applied by British courts, see McNair, *Judicial Recognition of State and Governments, and the Immunity of Public Ships* (1921) BRITISH YEAR BOOK OF INTERNATIONAL LAW 57. And see, for a critical survey and discussion of the existing rule, JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933). See also Dickinson, *Recognition Cases 1925-1930* (1931) 25 AM. J. INT. L. 214; Makarov, *Die Anerkennung der Sowjetregierung durch die Vereinigten Staaten* (Deutschland, 1934) 4 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1; Tennant, *Recognition Cases in American Courts 1923-1930* (1931) 29 MICH. L. REV. 708. For a thorough judicial treatment of the question, see Duff Development Co. v. The Government of Kelantan, [1924] A. C. 797. See also The Annette, The Dora, [1919] P. 105. As to the identical position in France, see HENRY, *op. cit. supra*

should act on the information of the Executive for the reason that the latter in reaching a decision on the question of recognition does not act arbitrarily. In granting recognition of statehood the Executive is supposed to act on the applicable principles of international law. This is one of the frequent cases in which the executive organs are entrusted with quasi-judicial functions of administering law. The fact that the Executive is presumed to proceed in accordance with international law on this matter of recognition ought to free the decisions of courts of any reproach of artificiality or opportunism. It is a sound and convenient principle that in some matters pertaining to relations with foreign States the rules of international law should be applied by the Executive and not by the courts. Recognition is one of them. This being so, it is difficult to assent to the view that the existing rule is open to objection.[172]

The fact that as a rule the decision of the executive department is and is presumed to be in accordance with international law explains the second, substantive, principle which governs the attitude of courts in the matter of recognition. That principle is that in the absence of recognition the community in question and the acts of its authorities are legally nonexistent. It is a principle the soundness of which is self-evident so long as the decision as to recognition is a decision in conformity with international law, that is, one which does not arbitrarily ignore the legally relevant facts of the situation. It would be improper and unreasonable if courts were to treat as States communities which are not States—the fact that they are not States being evidenced by the circumstance that recognition has been refused to them by an organ which does not act arbitrarily, but which conscientiously takes into consideration the relevant facts in conformity with international law. The rule on which courts act in this matter would be open to criticism if the governments in granting or refusing recognition claimed or were entitled to act without reference to legal principle. Since legal principle does control, however, it is proper and inevitable that what the executive authority has declared to be nonexistent should be so treated by courts.[173]

Adherents of the declaratory view of recognition have occasionally attempted to show that courts admit the validity of the acts of State

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note 120, at 85-87. See also Mann in 29 TRANSACTIONS OF THE GROTIUS SOCIETY (1943).

172. In Duff Development Co. v. The Government of Kelantan, [1924] A. C. 797, 826, Lord Sumner described the principle that in these matters "the Courts of the King should act in unison with the Government of the King" as being "rather a maxim of policy than a rule." It is believed that that principle is both a rule of law and a sound maxim of policy. The position is different when, in the circumstances of the case, the attitude of the Executive is obscure or indefinite. See the observations of Sir Wilfrid Green (as he then was) in Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S. S., [1939] 2 K. B. 544, 552-56.

173. For an able presentation of the contrary view, see JAFFE, *op. cit. supra* note 171.

authorities prior to recognition.[174] Actually, the courts of practically all countries refuse to recognize the validity of the acts of unrecognized States in the same way as they have refused to recognize the judicial and legislative measures of unrecognized governments.

The uniform practice of courts in this matter has been subject to two exceptions only, both of them more apparent than real. In the first instance, courts have on occasion given effect to the judicial or legislative acts of an unrecognized State or of an unrecognized government when considerations of equity, convenience, and fair dealing required that account should be taken of the acts in question. It appears clearly from the pronouncements of courts that in these cases there was no question of acknowledging the validity of the legal acts of a foreign authority in the same way as effect is given to foreign legislation in conformity with the rules of private international law. Rather was it a question of treating such legislation merely as a fact the disregard of which in relation to private parties would be contrary to equity and common sense.[175]

174. Professor Verdross, VERDROSS, *op. cit. supra* note 157, VERFASSUNG, at 132 *et seq.*, VÖLKERRECHT, at 113, has been prominent in this interpretation of the judicial practice. That interpretation has been accepted by many, including Kelsen, *supra* note 96, 42 RECUEIL DES COURS, and KUNZ, *op. cit. supra* note 2. An examination of the decisions enumerated by Verdross shows that—as had already been tentatively suggested by Strupp, *supra* note 103, 47 RECUEIL DES COURS, and Cavaglieri, *supra* note 99, 24 RIVISTA DI DIRITTO INTERNAZIONALE—they are in no way an authority for the view contended for. This applies, it is believed, to all the cases relied upon by Verdross. See notes 115, 145 *supra*, as to the cases of *Andrew Allen, McIlwain v. Coxe's Lessee*, and the decision of the Court of Milan of 1920. And see note 175 *infra*, as to *Sokoloff v. National City Bank* and *Russian Reinsurance Co. v. Stoddard*. Of the two remaining cases, one is an *obiter dictum*, probably referring to recognition of governments in a dispute between two Swiss Cantons concerning rights of water, Ziegler ca. Kanton Schaffhausen, Swiss Federal Court, Oct. 5, 1905, cited in (Deutschland, 1907) 1 ZEITSCHRIFT FÜR VÖLKERRECHT 276, 280; the other is the decision relating to certain acts of the South African Republic after its annexation by Great Britain, Van Deventer v. Hancke and Mossop, Supreme Court Transvaal, [1903] T. S. 457.

175. This is the true import of the often cited decision in Sokoloff v. National City Bank, 239 N. Y. 158, 145 N. E. 917 (1924) (a case which arose out of the non-recognition of Soviet Russia by the United States, but in which the court relied on a number of judicial decisions in connection with the acts of the Confederate States during the Civil War). The intention to deny the legal nature of the foreign acts of which account is taken is clearly expressed in Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 147 N. E. 703 (1925). The court said: "The courts in considering that question assume as a premise that until recognition these acts are not in full sense law. Their conclusion must depend upon whether these have nevertheless had such an actual effect that they may not be disregarded. In such case we deal with result rather than cause. We do not pass upon what such an unrecognized governmental authority may do, or upon the right or wrong of what it has done; we consider the effect upon others of that which has been done, primarily from the point of view of fact rather than of theory." *Id.* at 158, 147 N. E. at 705. This is also the meaning of the decision in Hausner v. International Commercial Bank of Petrograd, Swiss Federal Court, April 6, 1925, 51 ENTSCHEIDUNGEN DES SCHWEI-

The second exception, made in the case of recognition of governments, has arisen where the decision to deny recognition was admittedly due to the adoption of questionable tests of recognition unrelated to the actual existence and the normal functioning of the government in question.[170]

CONCLUSIONS

Meaning of the Legal Duty of Recognition. The view of recognition which has here been submitted as approximating most closely the practice of States and a working juridical principle is: (a) that recognition consists in the application of a rule of international law through the ascertainment of the existence of the requisite conditions of statehood; and (b) that the fulfillment of that function in the affirmative sense (and nothing else) brings into being the plenitude of normal rights and duties which international law attaches to statehood. Both principles introduce an essential element of order into what is a fundamental aspect of international relations. Both prevent it from being treated as a purely physical phenomenon uncontrolled by a legal rule and left entirely within the precarious orbit of politics.

It is necessary at this stage to push analysis still further at the risk of a reproach of undue refinement. How is it possible to put forward two

ZERISCHEN BUNDESGERICHTS, pt. iii, 64. See also Wilbuschewitz v. Trust Office of the City of Zurich, Swiss Federal Court, July 13, 1925, reported in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1925-1926, Case No. 75.

For similar reasons governments have on occasion relaxed the consequences following from non-recognition. On December 30, 1919, the Lithuanian Executive Committee in Washington informed the Secretary of State that the Provisional Government of Lithuania constituted that Committee its diplomatic agent in the United States. The Committee were thereupon informed by the Secretary of State that the United States not having recognized the Lithuanian Government, they could not attribute to the Committee any diplomatic character. At the same time it was stated that within these limitations the Department was prepared to deal informally with individuals and groups acting disinterestedly on behalf of the Lithuanian people. The Committee were also informed that notwithstanding the refusal to recognize, the United States were ready to coöperate in removing some of the resulting inconveniences. Thus in the matter of passports persons of Lithuanian origin were allowed to depart from the United States on affidavits of identity and nationality approved by the State Department. 3 FOR. REL. U. S. 1920 (U. S. Dep't State 1936) 642.

176. In Salimoff & Co. v. Standard Oil Company of New York, 262 N. Y. 220, 186 N. E. 679 (1933), *aff'g* 237 App. Div. 686, 262 N. Y. Supp. 693 (1st Dep't 1933), the State Department of the United States informed the court that the "Department of State is cognizant of the fact that the Soviet regime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact." *Id.* at 224, 186 N. E. at 681. The refusal to recognize was stated to be based "on other facts." In view of this clear admission that the unrecognized government actually existed, it was not easy for the court to act upon the natural implication of non-recognition and to treat the unrecognized authority and its legislation as nonexistent.

apparently contradictory propositions, namely, that recognition is constitutive of the normal rights of statehood of the seceding community and that, given the required conditions of fact, there is a duty of recognition? If there are no rights prior to recognition—and this appears to be the effect and the meaning of the constitutive view—is it permissible to assert the existence of a duty in relation to an entity which is incapable of possessing and asserting rights? It is possible to exaggerate the embarrassment caused by these questions.[177] In the first instance, as the established States act in this matter on behalf of the international community, they may be deemed to owe *to that community* a duty of recognition, notwithstanding the fact that the substantive right is not yet fully vested in the beneficiary directly concerned. The law of most States is in many respects based on the principle that certain rules of conduct must be observed in relation to other persons, although the latter do not possess a private right enforceable in their own name. Under the criminal law we are bound by certain duties of conduct towards others, but to these duties there does not correspond a specific private right of the actual or potential victims of the criminal act or design. From a different angle, the paramount logic of the duty of recognition flows irresistibly from the fact that a society cannot exist without members. When the rise of personality depends, as the constitutive view properly asserts, upon an act of the existing members, that act cannot be the result of arbitrary will, but one of duty to the society at large.

Secondly, it must be constantly borne in mind that although recognition is constitutive of the international rights and duties of the new State, it consists in the ascertainment—in a declaration, if we wish—that there are present in the particular case the conditions of statehood as laid down by international law. To that extent recognition, while constitutive of the international personality of the new State, is declaratory of an existing physical fact. If this fact is present, the established States fall under a duty to declare its existence and thus to bring into being the international rights and duties of the new State. This means once more that although prior to recognition the community in question does not possess the ordinary rights of statehood, it is entitled to claim recognition. In the existing state of international law this is, as a rule, an unenforceable and therefore imperfect right. But circumstances are conceivable in which that dormant and unenforceable right may acquire legal effectiveness. In an international society in which the obligatory jurisdiction of international tribunals will become the rule, the new State, after having been recognized, would be in a position to claim damages for spe-

177. Some embarrassment there must, of course, remain. A certain logical hiatus is inherent in a situation in which the formal rise of legal personality is the result of the acts of the individual members of the community and not of the community as a whole.

cific losses resulting from unwarranted and arbitrary delay in the granting of recognition. Of this, the case of the *Bergen Prizes,* although relating primarily to rights of belligerency, is an instructive example.[178]

Recognition as Declaratory of Facts and as Constitutive of Rights. These considerations suggest, in relation to the current terminology in the matter of recognition, that the antinomy of the declaratory and constitutive doctrines, although relevant and important, does not exhaust the legal problem at issue. As we have seen, while recognition is constitutive in one sphere, it is declaratory in the other. It is declaratory in the meaning that its object is to ascertain the existence of the requirements of statehood and the consequent right of the new State to be treated henceforth as a normal subject of international law. It is declaratory in the sense that in the contemplation of the law the community in question is entitled to recognition as a matter of right and that we may safely disregard the objection that, not being recognized, it cannot be "legally entitled" to anything. On the other hand, recognition is constitutive in the meaning that it is decisive for the creation of the international personality of the State and of the rights normally associated with it. It is constitutive in the sense that, provided the existing State acts in good faith in the exercise of the discretion left to it by international law, it is not bound to concede to the community in question the normal rights of statehood. A State may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of particular international rights and duties until by recognition—and by nothing else—it has been lifted into the sphere of law, until by recognition it has become a juridical fact. Recognition declares the existence of a physical, not of a legal phenomenon. This explains why, although declaratory of a fact, it is at the same time constitutive of legal consequences. It is, if we wish, merely evidence of facts to which the law attaches importance. But it is indispensable evidence without which potential international rights are a mere claim. In the absence of a judgment of a higher authority endowed with the requisite jurisdiction, a claim of this nature must remain without effective legal validity. Hall's precise analysis of the process of recognition, which is perhaps the most valuable contribution

178. In this case the United States pressed for a long time against Denmark a claim for compensation on account of the action of the latter in denying to the United States belligerent rights at a time when, during the War of Independence, Denmark had not recognized it as a belligerent. That action consisted in the restoration to Great Britain of some prizes captured by the United States and brought into the Danish port of Bergen. See 1 MOORE, INTERNATIONAL LAW, § 60; WHEATON, ELEMENTS OF INTERNATIONAL LAW (Lawrence ed. 1863) 41, n. 16. See also the observations by Rolin on *The Macedonian,* a case between the United States and Chile, in 2 LAPRADELLE-POLITIS, *op. cit. supra* note 145 (Italian ed. 1923), at 215-17.

to the subject by any text-book writer, expresses this point of view with all possible clarity.[179]

Antinomy of the Legal and Political Character of Recognition. These are the reasons why there is room for the opinion that it may be more conducive to the understanding of the problem of recognition if we treat it not as one of a choice between the declaratory and the constitutive character of recognition, but as one between the legal and political, or juridical and diplomatic, view of its function. For it may be said that the decisive question is whether this fundamental aspect of international relations is one which can be brought within the orbit of the rule of international law or whether it is and must remain yet another manifestation of the weakness of the law of nations. The correct answer to these doubts is probably that the problem of recognition cannot be properly understood without a clear appreciation of *both* its essential elements, namely, of its constitutive character and of the legal nature of its function. The antinomy between the constitutive and the declaratory nature of recognition is as real as that between the legal and political view of its function. Undoubtedly, the basis of any scientific theory of recognition must be the realization that there exists a law above States; that that law determines the conditions of statehood; that a society cannot exist without members; that those who compose it at any given time must, if there be no other competent organs, apply the law which determines the conditions of membership; and that full international personality is not a concession of grace on the part of the existing States. But the law embodying these principles is not an automatic abstract rule; nor is it pure jurisprudential speculation. It has no reality until it has been applied by a competent organ acting in good faith and in the fulfillment of a duty; and it has no meaning unless, when thus applied, it is the indispensable condition for the rise of statehood as part of the international legal system. The legal character of recognition extricates the process of recognition from the arbitrariness of policy; its constitutive character liberates it from an equally disintegrating element of uncertainty and controversy.

179. He fully adopts what is here described as the legal view of recognition: "Theoretically a politically organized community enters of right . . . into the family of states and must be treated in accordance with law, so soon as it is able to show that it possesses the marks of a state . . . . no state has a right to withhold recognition when it has been earned. . . ." HALL, *loc. cit. supra* note 29. At the same time he adopts the constitutive view of the effect of recognition: "The commencement of a state dates nevertheless from its recognition by other powers . . . although the right to be treated as a state is independent of recognition, recognition is the necessary evidence that the right has been acquired." *Ibid.* His view on the question has often been described as contradictory. In fact it reveals the true nature of recognition.

This being so, what is the explanation of the wide acceptance of the declaratory view? Its appeal lies not in any approximation to the practice of governments and courts, but in the fact that it has been a reaction against the constitutive view as commonly propounded—against a doctrine, that is to say, which, basing itself on a radical positivist approach and on an extreme assertion of the sovereignty of existing States, deduces the international personality of new States from the will of those already established. Nowhere is the brand of positivism current in the science of international law more offensive and repulsive than in its application to recognition of States. It elevates the arbitrary will of States to the authority of the source not only of particular rights, however fundamental, of States, but of their very rise and existence. An attempt has been made here to show that this latter aspect of the constitutive doctrine is in no way essential to it and that its value as a scientific theory receives a refreshing and decisive accession of strength after it has discarded the assertion that the will of States granting or refusing recognition is altogether unfettered by law. Once this blemish—introduced by writers and unsupported by practice—has been removed, the constitutive view reveals itself as being in accordance with positive law and, indeed, as inevitable from the point of view of principle.

The Problem of Recognition and the Political Integration of International Society. Much of the preceding discussion may tend to create the impression of being of a somewhat abstract nature. However, in assessing the necessity for a detailed analytical examination such as has been here undertaken, it must be borne in mind that the problem of the recognition of States, of fundamental importance in itself, is also the basis of a satisfactory treatment of recognition of governments and belligerency. The question of recognition of States is one of the rise of international personality in a legal system which is deprived of the normal and objective means of ascertaining juridical personality and which achieves that end by a precarious process of delegation to not altogether disinterested agencies. It is a question of the application of principles of law to a political phenomenon, frequently taking place at times of historical upheavals and international crises. Yet, so long as international law claims the name of law, it is difficult to concede without overwhelming proof that this fundamental aspect of international relations takes place outside the law and that it is in its principal manifestation a matter of politics pure and simple. There is no such proof. On the contrary, 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 principle of order into what would otherwise be a pure manifestation of power and of negation of order. The grotesque spectacle of a community being

a State in relation to some, but not to other States is a grave reflection upon international law. It cannot be explained away amidst some complacency by questionable analogies to private law [180] or to philosophical relativism.[181] That paradoxical phenomenon which more than anything else signifies the negation of the unity of international law as a system of law may be unavoidable pending the collectivization of the process of recognition. In that intermediate period adherence to the legal view of recognition—that is, recognition given or refused in accordance with principles of law and in the fulfillment of a legal duty—will naturally tend to reduce the occasions for divergency.

We are not in a position to say either that there is a clear and uniform State practice 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. But the balance of the articulate practice of States enables us to maintain that the imperfections of machinery, that is, the absence of a central organ of recognition, have not decisively affected its essential nature.[182] That practice permits us to comprehend the recognition of States not as a source of weakness of international law, but as a substantial factor in its development to a true system of law. It is to be hoped that the political integration of the international community, which in the long run is the absolute condition of the full development of the potentialities of man and humanity, may, alongside of other improvements, render possible the collectivization of the process of recognition as best in keeping with its nature and purpose. Pending that consummation it is preëminently desirable that the recognition of international personality and of governmental capacity should continue to take place—though more uniformly, more consciously, and more conscientiously than has been the case in the past—in accordance with legal principles and in pursuance of a legal duty owed to the community of States.

180. As does ANZILOTTI, *op. cit. supra* note 92, at 168, who points out that in private law a person may be possessed of rights in relation to some persons only. Apart from slavery, private law knows of no cases in which a person, physical or juridical, possesses legal personality in relation to some members of the community, but not to others.

181. Kelsen, *supra* note 96, 35 AM. J. INT. L. at 609.

182. A persistent feature of the discussions on the subject is the difficulty which writers experience in comprehending the possibility of a rule of law being administered by the individual members of the society acting as agents of the law. See, *e.g.*, SCALFATI, *op. cit. supra* note 60, at 229, and HENRY, *op. cit. supra* note 120, at 220, who regard the fact that there is no international agency for determining the existence of conditions of statehood as sufficient reason for denying its legal nature in present-day international law.