Recognition of States in International Law

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OXFORD

RECOGNITION OF STATES IN INTERNATIONAL LAW

Pavle Kilibarda

OXFORD MONOGRAPHS IN INTERNATIONAL LAW

For Eni, my best friend.
Always by my side,
forever in my thoughts.

General Editors' Preface

Brave is the young scholar who tackles in a first monograph a canonical topic of international law. The risk is of just enumerating old themes, in the words of Yeats, or instead of breaking so radically with received wisdom as to raise doubts as to the soundness of the argument. Yet scholarship on the international legal canon needs regular renewal, not least if it is to take account of developments in state and other relevant practice. The task calls for a discerning balance of respect for what has gone before and independence of mind. In practice-rich areas of the discipline it also demands a command of the historical record. The challenge can be daunting.

Pavle Kilibarda is clearly not easily daunted. In *Recognition of States in International Law*, he tackles as canonical a topic of international law as could be imagined. He proves more than up to the task.

The book covers most conceivable aspects of its classic theme, starting with what is meant by, and the purpose and forms of, the recognition of a state, as well as the concept and obligations of non-recognition, before moving to states, as understood in international law, and their international legal personality. Yet, perhaps naturally, the heart of the work lies in the longstanding controversy as to the legal effect of the recognition of a state. It is here that Dr Kilibarda brings to bear his emphasis from the outset on the opposability or otherwise to another state of the statehood—in the juridical, as distinct from material, sense—of a new state. He posits that the essential question 'is not whether recognition creates statehood', as debated by the constitutive and declaratory schools, 'but whether it can render it opposable and, if so, under what conditions' to an existing state. In response, he advances a 'mixed' theory of recognition. The general or fallback legal position, said to be rare in practice today, is that, all other legal things being equal, the recognition by an existing state of a new state 'is not only capable of giving rise' to the opposability of the latter's statehood to the former 'but is necessary for it', with the consequence that, in the bilateral legal relations between the two, recognition is constitutive of the new state's statehood. More commonly, however, in practice, Dr Kilibarda argues, some special rule of international law renders opposable to all existing states parties to a treaty or to all existing states the statehood of a new state, in which case recognition is unnecessary for the opposability of this statehood to any of these states and the effect of any such recognition is merely declaratory. After this the book enquires into the international legal obligations of unrecognised states and the opposability to a new state of the statehood of an existing state. It closes with an analysis of the recent practice of withdrawal of recognition in cases of contested statehood.

Recognition of States in International Law represents confident and sophisticated legal conceptualisation that strives to remain faithful to the practice of states and its motivation. It stakes its original claim without overreaching. On the way, it covers a great deal of interesting ground. Its tone is engaging, even personable. It will prove a stimulating and enjoyable read and provoke discussion, as does the best international legal scholarship.

RO'K, CR
Milan and Oxford
May 2024

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Abbreviations

CIS	Commonwealth of Independent States
EU	European Union
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro)
GDR	German Democratic Republic
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
OAS	Organisation of American States
OAU	Organisation of African Unity
PCIJ	Permanent Court of International Justice
PISG	Provisional Institutions of Self-Government of Kosovo
PRC	People's Republic of China
ROC	Republic of China (Taiwan)
SFRY	Socialist Federal Republic of Yugoslavia
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties

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Introduction

1. The Problem of Recognition

The word 'recognition' has a difficult history in international law. Since the early modern period, it has been employed to designate an acceptance of another's claim and invoked most often and with the greatest vigour when coming from some higher authority as a sort of 'bill of rights'. Whether recognition was given by a religious or worldly authority, the concept was employed to denote a *title*, the validation of a claim of specific rights. Thus, Pope Alexander VI recognised Spanish and Portuguese claims to the New World in a series of bulls leading to the Treaty of Tordesillas in 1494, and later, the Spanish Empire recognised the independent Dutch Republic in Antwerp in 1609.

But the concept of recognition has long since expanded beyond territorial titles and claims. In contemporary practice, the word is used in a plethora of such widely differing situations that it is sometimes difficult to establish its link with a *legal* entitlement. It has thus become commonplace to speak of recognition of Russian 'interests' in the borders of the former USSR, or of US 'interests' in Latin America. We speak of recognition of a foreign State's judicial decisions, its high school and university degrees, or marriage concluded abroad. Various disciplinary frameworks today discuss recognition of victim status, or of one's gender identity and minority rights, or even of the legal personality of some species of animals. When the same term is employed in such dissimilar situations, it is unlikely to conserve the same meaning beyond its core significance: namely, that the seeker of recognition has a *claim* (legal, moral, political, or otherwise), and that its giver is *accepting* that claim in whatever frame of reference it is made.

Not all these phenomena are of interest to this study, which focuses on recognition in law, specifically international law and the best-known type of recognition by far—*recognition of statehood or of independence* (also often referred to as 'diplomatic recognition' as it is normally done through diplomatic channels). Such recognition is very different from 'recognition' of political interest or of individual identity for it is vested with legal meaning. It would be inappropriate to say that at least these forms of legal recognition are somehow poorly understood or unexplored: scholarship has been churning out detailed and specific analyses of diplomatic recognition for the better part of two centuries.

And yet, recognition somehow remains a mystical term, drawing controversy and scorn which have only grown since the Second World War. Unlike

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nineteenth-century scholarly debates, contemporary discussions appear to be so deeply entrenched in political matters that any position one adopts might lead to suspicions of bias. On the very rare occasion that States publish their views of recognition, they are at once confronted by the opposing camp, then neutral observers reduce both groups' views to their perceived underlying interests: perhaps one government favours self-determination to support its kinsmen across the border; yet another fears secession and dismemberment and so espouses a different view—the criticism piles on and denigrates recognition in an attempt to remove its legal veneer and lay bare the political machinations truly at work.

There is much to criticise in relation to diplomatic recognition—its ambiguous conditions and effects, the inconsistency and even the banality with which it is made and revoked—but a black-and-white description of recognition as *only* political or some sort of fig leaf for political interests is not only prejudice, it is itself a position (however simplistic) on a complex phenomenon unlikely to soon disappear. Just as politics shapes law and law seeks to restrain politics, so too does recognition have the two faces of Janus: motivated by political interests, it produces legal results.

More disconcerting is the idea that the legal regime of recognition is too unclear to be of any use. This is a strong argument, for the 'law of recognition', if such a thing exists, is murky indeed, and not, incongruously, because it is unexplored, but rather because too much has been written about it. There is not a manual or textbook in use today that does not reflect upon recognition (if at least to dismiss it as irrelevant!), and dozens of treatises have been written on it, mainly in the mid-twentieth century: even today, when recognition has become something of a pariah in the legal vernacular, monographs and theses are regularly produced on keywords from the same family, such as statehood, self-determination, secession, and many others. To use the colloquial term, recognition has been 'done to death' in legal doctrine.

2. The Great Debate

The myriad works on recognition comprise a prickly field to traverse. Its authors all have very different views of how, when, and why recognition takes place, whether it is a legal or political act, or whether States are obliged to extend recognition to others and under what circumstances: perhaps no two writers will answer all of these questions in the same way. But it has become habitual to speak of two schools of thought depending on whether recognition confers statehood or whether it merely takes note of it.

The latter school, called 'declaratory' (its adherents 'declaratists'), is today the more influential. Although a casual review of the literature may give the impression that the declaratory view is more modern, this is incorrect: in fact, some of

the oldest writings take this position either expressly or implicitly. Under the influence of Enlightenment thought, eighteenth- and early nineteenth-century writers such as Vattel or Heffter describe statehood as a simple fact: a State is, or it is not; recognition does not figure in the equation. It is however the more modern strain of declaratory thought that attaches legal consequences to this fact and describes the mechanism whereby this comes to pass. This view is often seen as flowing from natural law thinking, but this is an oversimplification: many declaratory scholars today do not subscribe to natural law philosophy.

The opposing 'constitutivist' school ascribes to recognition a key role in the achievement of statehood. It has become something of a mantra among students of law to say that constitutivists argue that recognition *creates* a State: I am not aware of any author making such a counterintuitive and disingenuous claim; they may at most argue that recognition creates a State's legal personality. Thus, the State as a political and material phenomenon exists separately from the State as a subject of international or municipal law. This doctrine arose and spread in the second half of the nineteenth century and is today usually linked, and criticised together with legal positivism. Again, there is no necessary link between constitutivism and positivism: Hersch Lauterpacht was a constitutivist who shunned positivism.

Because the two schools are seen as being at opposing poles of the recognition debate and thus mutually exclusive, it is common to overstate their differences and disregard ways in which they might be complementary. A closer look at older doctrinal works demonstrates that both schools originate as a reaction to different problems: whereas the early declaratists tried to explain the phenomena of statehood and independence (and not *solely* in a legal sense), constitutivists sought to understand the expansion of the legal system to encompass new subjects. The normative framework that we know today as international law and understand as global and all-encompassing was not always such: it first arose as a regional—European and Christian—phenomenon, and was only gradually extended to other subjects, whether these subjects had previously been regarded as States or not. An entity could thus be a State and not form part of this particular system of law: for example, it is commonly raised in nineteenth-century literature that the Ottoman Empire was admitted into the legal community through the 1856 Treaty of Paris.

This study does not seek to lay to rest age-old debates on the relationship between statehood and recognition. Today such general debates seem little else than rhetorical exercises: whether an entity is recognised because it is a State, or it is a State because it is recognised, is just another version of the chicken-and-egg dilemma. In fact, this discussion will probably never be resolved, as my research points towards the conclusion that international law simply does not regulate recognition of statehood.

The last sentence might appear to the reader an exaggeration. There exist *legal* rules on premature recognition, and on non-recognition—and there exists so much State practice almost every year that surely recognition as an indubitably

legal term must come under legal regulation? The answer will depend, naturally, on one's own preconception of 'legal regulation'. As we will see, there do exist some rules on recognition (or more precisely, rules relevant to recognition), but they are all ephemeral: they proscribe when recognition cannot be made and nothing else. In vain might lawyers seek a rule stating, 'Recognition is declaratory' or 'It is constitutive'—even the scant treaty provisions and some jurisprudence in this regard are so ambiguous and contextual that they cannot be taken as proof of a norm of general scope. If such a norm were identified, then surely it would be the Holy Grail of recognition studies—but there is little indication that this is the case. Therefore, if we may speak of an 'international law of recognition', this can be little more than a poor and disorganised assortment of rules that may here and there be of local relevance.

Yet recognition is nonetheless a legal notion, for when States choose to extend or deny it, they do so using legal terminology and in the aim of producing legal consequences.[1] In a legal sense, to recognise something means to identify it as lawful and to accept its normative implications; this is so even if the legal framework is not specific to recognition and must be sought elsewhere in law. In other words, recognition may not be *specifically* regulated by law, but that does not mean it is unbound by it.

3. The Importance of Opposability

How then might we proceed with an analysis of recognition? This book assumes that any legal system is essentially a network, however intricate, of relations of rights and obligations between its various subjects: these rights and obligations may not be distributed in equal measure across the playing ground. Some norms will only bind specific subjects; others will be applicable to all individually but not between them; a third group will involve obligations owed by one subject to some others but not to all of them; yet a fourth will be owed to the community as a whole, but to no particular individual; and so on. The real question is *how* to determine whether a stakeholder has certain obligations towards another individual subject. Thus, the fundamental idea of this study is not whether recognition creates statehood, but whether it can render it opposable and, if so, under what conditions.

Opposability is a word that seldom appears in English-language literature on recognition, although the concept is often discussed. The only treatise so far to fully problematise the relationship between opposability and recognition is Jean

[1] This point has been identified and argued convincingly by John Dugard 'The Secession of States and Their Recognition in the Wake of Kosovo' (2013) 357 RCADI 9, 213ff; for a criticism of the view that international law does not regulate secession or recognition at all, see pages 26–27 of the same work.

Charpentier's doctoral thesis (published in 1956) *La reconnaissance internationale et l'évolution du droit des gens*. Charpentier finds that States do not recognise a new State or government directly: what they recognise is a legal fact, produced by the appearance of a new authority, that requires them to modify their behaviour. He defines opposability as 'the necessary reaction to a modification of the international legal order by a third State' (*la réaction nécessaire d'une modification de l'ordre juridique international sur le comportement d'un État tiers*).[2] If a State is legally bound to act in a certain way towards a fact or situation, then that fact or situation is 'opposable' to it. Although Charpentier's analysis leads him to conclude that recognition has nothing to do with the opposability of statehood (a conclusion very different from my own), I am convinced that his focus on opposability is fully justified.

To illustrate: from a purely practical perspective, is it more purposeful to ask whether A is a State in the absolute, or whether B is simply required according to the rules of international law to treat it as a State? Insisting on the former raises complex and difficult questions that law may ultimately be ill-equipped to answer, a point raised convincingly by Arrigo Cavaglieri.[3] Consider in this respect that even the oft-invoked Montevideo Convention, which contains a definition of statehood, has brought us no closer to resolving situations of contested statehood: States simply ignore some of its criteria, or invoke others, when reacting to such cases. But the law *can* pinpoint its own subjects, their relations and interactions, with a sufficient degree of clarity to work as a functional system.

This is where recognition comes into play. The first question I asked myself in preparing this study was whether State A is opposable to State B if B does not recognise A (namely, whether opposability results from recognition). The answer will of course depend on the context, namely whether a specific rule may be identified to ground opposability: if such a rule exists, then opposability could be inferred from it regardless of recognition, but if it does not, could opposability still flow from recognition?

The paucity of international law on the topic points to the conclusion that, in general, recognition is not only capable of giving rise to opposability, but is necessary for it to exist. There is no rule of general international law leading to another conclusion.[4] In its absence, every State is free to choose with whom it enters legal relations, following a principle-based approach.

But the 'in general' above does not mean that these conditions arise frequently. To the contrary, in many situations today when statehood is newly created—perhaps in most cases—rules *can* be identified to render it opposable to existing

[2] Jean Charpentier, *La reconnaissance internationale et l'évolution du droit des gens* (Pedone 1956) 9.
[3] Arrigo Cavaglieri, 'Règles générales du droit de la paix' (1929) 26 RCADI 311, 321.
[4] I understand by 'general international law' the contemporary rules of universal (and not regional or bilateral) customary law and the general principles of law binding upon all States regardless of express individual acceptance.

States. This might be the case, for example, if the new State is admitted into the United Nations (UN), or enjoys a 'right to statehood' under the principle of self-determination.[5] Because a rule-based approach is then possible, recognition is not a condition of opposability as there exist other applicable rules establishing it. Regardless of their relative frequency, circumstances where a rule-based approach is possible are normatively exceptional as the requisite rule cannot be inferred from general international law and must be drawn from the given context.

For example, a new State may arise by seceding from its Parent State, a UN member, and achieve UN membership itself. In this case, the Parent State will be required to treat the breakaway entity as a State by virtue of the provisions of the UN Charter regardless of whether it has recognised it individually: this is why Pakistan could no longer deny the statehood of Bangladesh even some time before it had recognised it. However, where the secessionists do not have the consent of their parent to create a new State, do not enjoy membership in the United Nations or a similar collective entity, and are not entitled to external self-determination, there will not exist any rule of international law requiring the parent or any other State to legally treat them as a State: only recognition could produce such a result.

Fleshing out the principle-based and rule-based approaches is my primary goal in this study. This involves describing the relationship between recognition and opposability. The issue cannot be resolved without first being broken down into a number of related questions, such as: does recognition ever lead to opposability? Can opposability exist without recognition? Are existing States opposable to a new State if it does not recognise them? What is the legal position of an unrecognised State, namely does it have obligations under international law? Is there such a thing as partial opposability? Is there an obligation to extend recognition? And, can opposability be undone if recognition is withdrawn?

To adequately digest these questions, it is first necessary to adopt an analytical view of diplomatic recognition. When State A recognises State B, it is carrying out a specific *act* (recognition) towards an *object* (State B) bringing about legal *effects* (B's rights as a State vis-à-vis A). This act–object–effects triptych seems most convenient for this study and forms the basis of its structure; a similar approach was developed by Joe Verhoeven in his seminal treatise on recognition.[6] 'Object' signifies here an occasion or fact that *as a matter of law* requires or authorises certain conduct as an 'effect'; the 'act' may be the necessary link between these two elements.

A clean-cut differentiation between the three is conceptually impossible. Thus, some points will necessarily overlap: for example, the elements of statehood are

[5] We will discuss in the coming chapters whether the principle and right of self-determination could directly establish the opposability of statehood or simply lead to an *entitlement* to create an independent State.

[6] Joe Verhoeven, *La reconnaissance internationale dans la pratique contemporaine* (Pedone 1975).

part of the object of recognition (if it is a State that is being recognised), but they may also be prerequisites for an act of recognition to produce effects. Similarly, statehood rights may result from recognition and thus be considered an effect, but it is also possible to regard them as inherent in statehood and thus part of the object of recognition (regardless of whether recognition is required for opposability). Law is not an exact science and some degree of logical inconsistency or at least uncertainty is tolerable if we want to avoid the chicken-or-egg moment, as mentioned earlier. In my view, when discussing recognition of States, it is best to treat material statehood and a State's legal personality as part of the object of recognition, whereas the only effect may be to render them opposable towards the issuer.

4. Outlook, Methodology, and Structure

I have already mentioned the 'Great Debate' between adherents of the constitutivist and declaratist schools of thought on recognition. I have no delusions of being able to finally resolve these controversies, which will doubtless continue for years to come. But if one conclusion poignantly stands out from this study it is that many constitutivists and declaratists are more closely aligned than meets the eye. Whether recognition 'creates' statehood in any fashion is a theoretical matter: whether it is needed for opposability is something else entirely. If they examine the matter at all, some unabashed declaratists might require recognition for the possession or at least the exercise of legal rights towards other States (which is, of course, opposability). Therefore, one of my main goals was to recast major doctrinal works on recognition on an opposability axis, rather than one focusing on the 'creation' of statehood or legal personality. The resulting classification is similar to what one might otherwise expect, but there may be a few surprises: for example, some have described the theories of Pradier-Fodéré, Fauchille, and Verhoeven as declaratory; I regard the former two rather as constitutivists, while the latter produces a rare example of a truly 'mixed' theory.

Regarding 'mixed' theories, which are commonly discussed in more recent works on recognition, I only discuss them briefly. Insofar as opposability is expressed in binary terms, there is no room for an intermediate approach (A is either opposable to B or it is not). Nevertheless, a few authors have ingeniously come up with ways of overcoming the dichotomy altogether. Although I ultimately disagree with their understanding, I concede that they draw attention to important aspects that the more traditional constitutive–declaratory debate has largely ignored. In truth, my own proposed 'normative theory of recognition' may be regarded as a mixed theory, bearing in mind the precarious relationship it identifies between recognition and opposability.

I have also said that this book should enable a comprehensive approach to all situations of contested statehood. An analysis of the combination of material and

legal factors present in such cases (including the current and historic claims of statehood of Abkhazia, the Baltic States, Biafra, Cabinda, Donbas, the two Germanies, Israel, Northern Cyprus, Korea, Kosovo, Palestine, Rhodesia, Somaliland, South Ossetia, Taiwan, Vietnam, Western Sahara, and the Yugoslav republics) demonstrates that an alternating application of the principle- and rule-based reasoning allows sense to be made of very complex situations. This requires us to accept that statehood as a legal fact and statehood as a material fact are not the same phenomenon: failing to acknowledge the distinction will leave us in the quagmire of absolute thinking that has already plagued this field for more than two centuries.

Not even a comprehensive approach will leave all readers satisfied. This is not a work on ethics and may at times come across as unduly conservative or even reactionary. I wish to underline that the primary focus of this book is to ascertain the state of positive law (*lex lata*) in the domain of statehood and recognition; when I give recommendations for how the law should be, but is presently not (*lex ferenda*), I do so explicitly. On a few points where I found it impossible to glean whether a positive law rule exists—such as the automatic opposability of separation with the consent of the Parent State to third States—I give my own opinion as to how the problem should be tackled. My reflections in this regard were always based on the values underpinning contemporary international law.

This leads me to the problem of unknowability in law. International law in its current state does not provide answers to all possible questions, and some matters will remain *aporia*, to use the Platonic term. For example, opposability (or lack thereof) in the sense discussed in this work has meaning on a bilateral level, as expressed in the mutual legal relations of different subjects; it loses any meaning in situations where the bilateral axis becomes obscured or indirect. It is therefore impossible to know, given the current state of the law, whether unrecognised States can participate in the creation of customary international law, or how to classify an armed conflict between two States when the statehood of one of them is not opposable to the other (this is a point I examine in some detail, but I can ultimately only make assumptions and suggestions). Yet these questions are ephemeral for recognition: they depend on the state of other branches of international law, and therefore deserve separate analysis.

The rules of international law are to be found within its sources: these are largely or even exclusively a product of State practice. While practice on recognition of States and governments is abundant, it is also opaque and inconsistent. Very few States publish their views on the role and effects of recognition of other States and governments, and when they extend recognition, it is often impossible to know whether they are making a political or legal commitment (to be clear, recognition is *always* political: the question is whether, in addition to being a political act, it is also a legal one). It is likely that many, if not most, States simply do not have a clear position on this issue; to make matters worse, different governments of the same State may give the act a differing significance.

Jurisprudence is also not of much help in making sense of State practice and the shape of customary law. This work examines a large amount of international and domestic jurisprudence, but very little of it is directly relevant to recognition. When it comes to recognition of States, most international bodies seem to consciously avoid taking a position on the matter. Domestic courts tend to be less shy, but it is often difficult to determine whether their position is formed as a matter of international law or local legislation, or even if it is simply a matter of judicial policy. This leaves us with doctrine, which is sharply divided, as mentioned above. But while analysing jurisprudence and doctrine, I was mindful of the fact that a lack of consensus or explicit statements from relevant authorities may itself be significant—namely, that positive law simply does not provide an answer.

This book is split into thirteen chapters, including the introduction and concluding remarks. As I analyse recognition according to the act–object–effects formula, the initial chapters reflect on recognition as a legal act, its basis in international law, the forms and types of recognition, as well as the question of non-recognition. Chapters 5 and 6 then turn respectively to material and legal statehood, whereas the subsequent chapters evaluate the state of positive law on recognition and statehood in light of jurisprudence, State practice, and legal doctrine. Chapters 9 and 10 outline my normative theory of recognition, which distinguishes between situations where statehood may be inferred from the legal norms applicable to the case at hand (when recognition is declaratory) and those where this is not possible, giving lawful recognition a constitutive effect. These chapters synthesise findings presented in the rest of the book and may be considered the theoretical crux of the whole work. Chapter 11 considers the legal position of States regardless of recognition and Chapter 12 reflects on the phenomenon of withdrawal of recognition or 'derecognition', a matter that has not previously been subjected to serious academic scrutiny. Chapter 13 summarises the main findings and offers some concluding observations and reflections.