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ANADAN OLMASININ 87-Cİ İLDÖNÜMÜNƏ HƏSR OLUNMUŞ

"HÜQUQ ELMİNİN MÜASİR PROBLEMLƏRİ" II Beynəlxalq Konfrans

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**Ümummilli Liderimiz Heydər Əliyevin anadan olmasının
87-ci ildönümünə həsr olunmuş**



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II Beynəlxalq Konfransın

MATERİALLARI

(I Hissə)

Bakı – 2010

RECOGNITION OF STATES IN INTERNATIONAL LAW

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ABSTRACT

In this study, we generally handle the *recognition of States* in respect of the international law with its historical background, referring to the different views on the issue. Although the subject of recognition can be explained under some several topics, it is generally accepted that the *recognition* in itself means only the *recognition of the states* rather than *the recognition of belligerency* or *recognition of governments*. Because the recognition of the states brings some burdens on the recognizing states, the recognizing states always act politically rather than acting in any other way. Because there have always been *the interests* of the existing states. Therefore the problem is far from being solved by only the principals of the international law. So we also choose to handle the very controversial issues of the recognition such as: the, constitutive and explanatory theories pertaining to the recognition, *de jure* and *de facto* recognition, when the recognition constitutes interference to another state's internal affairs and many other debates here. Because, there are still so many units (not yet recognized states) waiting for being recognized which we handle in this article.

Keywords: recognition, recognition of states, constitutive theory, declarative theory, *de facto* recognition, *de jure* recognition, TRNC

ULUSLARARASI HUKUKTA DEVLETLERİN TANINMASI

ÖZET

Bu çalışmada tanınmanın tarihi yönlerine ve konu üzerindeki çeşitli görüşlere de yer vererek geniş bir uluslararası hukukta tanıma çerçevesi çizilmiştir. Tanıma konusu birkaç ayrı başlık altında açıklanabilse de genellikle tanıma denince bu kavramın, hükümetlerin tanınması yahut muhariplik sıfatının tanınmasından ziyade, uluslararası hukukta *devletlerin tanınmasını* ifade ettiği kabul edilir. Devletlerin tanınmasının tanıyan devletlere getirdiği bir takım yükler bulunması sebebiyle tanıyan devletler herhangi bir başka yolu değil politik olarak menfaatlerine en uygun olan yolu tercih ederler. Nitekim Bangladeş'in tanınıp da Kuzey Kıbrıs'ın devlet olarak tanınmamasını sadece hukuk dairesinde açıklamak güçtür. Bu nedenle sorun da yalnızca uluslararası hukuk prensipleriyle çözülmekten çok uzak olagelmıştır. Yine, müflis bir devlet olmasına rağmen uluslararası hukukun bir süjesi olmaya devam eden bir Somali'nin varlığı ile sağlıklı işleyen bir devlet olmasına rağmen Kuzey Kıbrıs'ın tanınmıyışı konunun ilgi çekiciliğini artırıyor. Ayrıca burada, çokça tartışmalı olan tanımaya ilişkin kurucu ve beyan edici teorileri, *de jure* ve *de facto* tanıma konularını, ve daha birçok farklı tartışmayı Kuzey Kıbrıs Sorunu'na ilişkin özel referanslarla ele almayı ercih ettik.

Anahtar kelimeler: tanıma, devletlerin tanınması, kurucu teori, açıklayıcı teori, *de facto* tanıma, *de jure* tanıma, KKTC

1. General

As to the reason why we study this topic, we can say that though being one of the very basic issues of international law 'the recognition of states' still needs more and more debates on it to be clarified better. As Roth says: "the nearly the half century-old treatises of Hersh Lauterpacht and Ti-Chiang Chen remain the most oft-cited sources on the law of recognition" and stresses that old conceptual frameworks are still used to explain the contemporary examples of the issue¹. "The problem of recognition of states and governments has neither in theory nor in practice been solved satisfactorily"² says Kelsen and we agree with him today. One State can be left non-recognized while its claim to statehood may still be proper. On the other hand another entity is given recognition by majority of the states without its proper candidature of statehood³. So, the vitality of the issue made us have our say on the issue.

In international law, recognition is not an institution restricted to the recognition of States, so literally any situation can be recognized by States⁴. In other words, recognition, in a broad sense, involves the acceptance by a state of any fact or situation occurring in its relations with other states.⁵ But within the classical international law recognition generally handled under three topics: Recognition of States, Recognition of Governments and Recognition of Belligerency.⁶ And recognition is regarded as among the

¹ ROTH/ Brad R., **Governmental Illegitimacy in International Law**, Oxford University Press, 2000, p. 121

² KELSEN, Hans, "Recognition in International Law", **AJIL**, Vol. 35, No. 4, 1941, p. 605

³ Take TRNC as an example of the first one and Bangladesh as an example of the latter. See CASSESE, Antonio, **Self Determination of Peoples: A Legal Appraisal**, Cambridge University Press, 1996, p. 7, cited by OKTEM, op. cit. p. 458

⁴ See ÖKTEM, Emre, Teori ve Uygulamada Uluslararası Tanıma, **Erdogan Teziç'e Armağan**, İstanbul, Galatasaray Üniversitesi Yayınları, Armağan Serisi, No: 5, p 431

⁵ **Oppenheim's International Law**, Edited by JENNINGS, Robert and WATTS, Arthur, Vol. 1 Peace, Ninth Edition, p.127

⁶ WILLIAMS, J. F., "La doctrine de la reconnaissance en droit international et ses developments recents" in **Recueil des cours de l'Académie de droit international**, 1933/III, tome 44, p. 209, cited by OKTEM, op. cit. , p. 432

unilateral acts of a state⁷. As we will be studying the recognition of states, other issues of recognition will be beyond the confines of our paper.

2. Statehood

According to Article 1 of the Montevideo Convention on Rights and Duties of States(1933)⁸ the state, as a person of international law, shall possess the following qualifications: i) a permanent population, ii) a defined territory, iii)government and iv) capacity to enter into relations with other states. Though the decision of recognition of a state is determined by existing states in a political way, we can say that once the aforementioned criterions met by the newly emerging state, it would probably be recognized. But we cannot say that there is a burden or duty to recognize⁹. This is left at the sole discretion of the governments as there is no a supra-national institution or a central organ to evaluate the requirements of statehood¹⁰. So, every state makes its own evaluation on the subject and decides what to do.

There is not a rule as to what ways can a recognition be given. It may be explicit from the acts of government organs, or from their statements or be implicit in any other way. But this generally creates some problems in relation to the interpretation. But in the end, the recognition is a matter of intention, this intention may either be shown in an express or implicit way¹¹.

Generally failing to meet the requirements of being a state will cause non-recognition. But the main problem arises when recognition is not given although the statehood criteria are met. At this point how can we make the non-recognizing State to give recognition? Should we be saying that there is a duty to recognize if the statehood criteria are met? That leads us the debate that if there is a duty to recognize.

3. Is there a duty of recognition?

Unlike the majority of the authors this question is answered with a yes by Lauterpacht.¹² To him, the recognition of states is a matter of legal right and ‘duty’ as between the State granting and receiving recognition. And once the conditions of statehood are met the existing States are under the duty to grant recognition¹³. And this is consistent with his being a constitutive theory supporter. But without having a central body that decides if the requirements of being a State were satisfied this view makes no sense. Because, States which are to give the recognition decision will again use their discretion to recognize and their decision will probably be arbitrary and as a result, the *duty of recognition* will again be left meaningless.¹⁴ Being aware of the absence of such an international organ competent to ascertain and authoritatively declare the presence of statehood requirements, Lauterpacht makes his theory by accepting the rule that States, in granting recognition, do not claim and are not entitled to serve exclusively the interests of their national policy notwithstanding international law principles.¹⁵ But today, an increasing number of commentators, in this area, are in the opinion that in the recognition of States, political point of view becomes of more and more importance than that of the legal.¹⁶ Actually it is said that because of the some practical problems, that the constitutive theorists face they attempt to meet the criticisms by supposing that there is a duty to recognize once a state has fulfilled the criteria laid down by international law. But this duty, Dixon notes, does not find any basis in state practice¹⁷. At this point Kelsen makes a helpful distinction between the political and legal character of recognition¹⁸. He attributes a declaratory feature to the act of political recognition and constitutive feature to the act of legal recognition¹⁹.

4. The nature of the recognition: declaratory or constitutive

When come to the question of “Can an entity be regarded as a State, before it was recognized? The answer of this question leads us to the debate over the nature of the recognition: Whether is declaratory or constitutive? In other words, besides the requirements of statehood can the recognition be regarded as another extra requirement to be a state? A yes, as an answer to this question will be the voice of the

⁷ PAZARCI, Hüseyin, **Uluslararası Hukuk**, Gözden Geçirilmiş 8. Bası, Ankara, Turhan Kitabevi, 2009, p. 336

⁸ See American Journal of International Law, Vol. 28, 1937, p.75

⁹ SUR, Melda, **Uluslararası Hukukun Esasları**, Güncellenmiş 3. Bası, İstanbul, Beta Yayıncılık, 2008, p. 119, see also BROWNLIE, op. cit., p 90, who states that there is a duty to ‘recognize’ for at least certain purposes.

¹⁰ OKTEM, op. cit. , p 432

¹¹ See, OKTEM, op. cit., p. 449

¹² LAUTERPACHT, Hersh, **Recognition in International Law**, Cambridge University Press, 1948, p. 12

¹³ See *ibid.*, p. 6

¹⁴ See also DIXON, Martin, **Textbook on International Law**, sixth Edition, Oxford university Press, 2007, p. 130 who states that if there is a legal duty to recognize then recognition itself is irrelevant to international personality. And this result makes the constitutive theory supporters argument(duty to recognise) less different from the declaratory theory.

¹⁵ See LAUTERPACHT, op. cit. p. 6

¹⁶ See TING/HUANG, “The Modern Concept of Sovereignty, Statehood and Recognition: A Case Study of Taiwan” **New York International Law Review**, Vol. 16, No.1, p. 125 cited by AZARKAN, Ezeli, **Uluslararası Hukukta devletlerin Tanınması: Slovenya, Hırvatistan, Bosna-Hersek**, First Edition, Ankara, Adalet Yayınevi, 2008, p. 21

¹⁷ DIXON, op. cit. p. 130

¹⁸ KELSEN, Hans, “Recognition in International Law”, **AJIL**, Vol. 35, No. 4, 1941, p. 605

¹⁹ See *ibid.* pp. 605-607, 609

constitutive theorists. So, recognition of an entity as a State will mean that the recognized body fulfils the conditions of statehood²⁰.

The constitutive theory goes parallel with the positivist insight of international law. Because, this view claims that legal relations of the two units which are not subject to a supreme legal order can only be constituted by their mutual recognitions of one another. On the other hand the declarative theory tells us that the international system automatically gives rights and responsibilities to the existing units.

Today it is acknowledged by the majority of the authors that *the recognition of states* is declaratory in nature²¹. And *declaratory theory* seems to be more in accord with international practice²². Furthermore, if the declaratory theory was accepted, in the case of a State which met the requirements of statehood, a *non – recognition* will not harm the entity's being a State but can only be regarded as an action showing the stance (disapproval to the 'claiming of statehood') of the actor. If this disapproval to the 'claim of statehood' is maintained all of the existing states, the claiming State would be left alone and its capacity to use the rights arising from being a State would have been restricted as it would not have the chance of entering into relationships with other states. Despite all these disapproval and mobbing of the existing States if the new State can survive by itself the situation will probably be normalized as the time passes. This is a part of the whole story about the recognition of States and it takes its basis from the principle of *ex factis jus oritur*. Another part of the story might be: with some recognizing states majority of the States does not grant recognition. The result will probably be the same with that of the first one, but maybe a little bit less time required for the normalization.

In conclusion, we can say that the denial of recognition of an entity cannot entitle the non recognizing States to act as if the entity which is in question were not a State²³.

5. 'De jure' and 'de facto' recognition

The terms *de facto* or *de jure* qualify the state or government recognized rather than the act of recognition itself²⁴. But this distinction may well refer the two different types of recognition that has some similar effects. As to the legal consequences of, majority of the commentators states that these two types of recognition have no noteworthy difference between them. But this does not change their being different from each other in the way that they are given. But on the other hand, it was also argued that, by some commentators, while *de jure* recognition is the fullest kind of recognition, *de facto* recognition is a lesser degree of recognition in which the provisional basis of the present realities are taken into consideration²⁵.

It will be useful to state that the *de facto and de jure recognition decisions* depend on the intent of the recognizing State. On the international plane, a statement of *de facto recognition* may be a product of a political judgment or a reluctant or cautious acceptance of the existing situation. But with respect to the legal terms, this kind of recognition involves a legal determination of the existence of a State but keeping the doubts of its *permanence and viability*²⁶ in mind. That is why the recognizing State with its decision to *de facto* recognition, impliedly has some reservations in relation to the recognized State's viability and permanence(future status) .That is because, *de facto* recognition is irrevocable in nature, as there is an implied reservation meaning and a strong possibility of a *change* in the status of the recognized State. So, unlike the *de facto (accepting the fact of*²⁷) *recognition, de jure recognition* (as of right²⁸) cannot be withdrawn.²⁹

6. Legal consequences and effects of recognition

Recognition of States, generally signifies acceptance of the recognized state's position within the international community and by the recognized state of the full range of rights and obligations which are the normal attributes of statehood.³⁰

To recognize a body as a State brings the chance to enter into any legal relations with the recognized State such as the diplomatic relations and especially the bilateral conventions³¹. But before the granting of

²⁰ See LAUTERPACHT, op. cit. p. 6

²¹ SUR, Melda, **Uluslararası Hukukun Esasları**, Güncellenmiş 3. Bası, İstanbul, Beta Yayıncılık, 2008, p 118, PAZARCI, op. cit. p. 337, See also KELSEN, Hans, "Recognition in International Law", **AJIL**, Vol. 35, no:4, 1941 p. 606 who attributes the *political recognition* a declaratory feature. Also see LAUTERPACHT, op. cit. pp. 41-47

²² DIXON, op. cit. p. 130

²³ **The British Yearbook of International Law :1976-1977**, Oxford, Clarendon Press, 1978, p.106

²⁴ **Oppenheim's International Law**, Edited by JENNINGS, Robert and WATTS, Arthur, Vol. 1 Peace, Ninth Edition, p. 155

²⁵ See *ibid*

²⁶ See BROWNLIE, op. cit., p 91

²⁷ DIXON, op. cit. p. 126

²⁸ *Ibid*

²⁹ BROWNLIE, op. cit., p 91, Brownlie notes that (unlike the legal sense of it) in the political sense recognition of either kind(*de jure* and *de facto* recognition) can always be withdrawn.

³⁰ See, **Oppenheim's International Law**... p. 158

³¹ PAZARCI, op.cit, p. 341

recognition some kind of relations can always be established as these are not necessarily be construed as a grant of recognition. Because in most of the cases there are express statements of the not recognizing States that they do not recognize the body that they enter into relation. “

The recognition has a inter-subjective effect, this means the legal consequences of the recognition come into existence between the recognizing state and the recognized state³². This refers to a relative and limited effect and means that the other states are still free to recognize or not to recognize.

7. Conclusion

It is true that the act of recognition carries some politic motives in itself but it has its consequences in the area of law. At this point Toluner says that the recognition is a matter of volition³³. So, non-recognition, will not necessarily shows an absence of a statehood. For example it is still arguable that in the case with TRNC the requirements of statehood are not met. Positive and negative arguments exist. It was neither declared as a puppet State nor declared as a State by. Turkey seems the only State that gave recognition to TRNC. But this does not show the absence of statehood there.

Recognition of States is not a ubiquitous event as the emergence of new states is not an everyday event. That is why, apart from the recognition as a general category, the *recognition of states* may, or it is more appropriate to use the word shall, create his own institutions to prevent the problems that are faced in the way of recognition of States. Because, we know that as far as the States remain non-recognized, even though they meet the requirement of being a State, by the majority of other States, many of the international problems will lay unresolved. Terrorism is one of them. It is also true that giving recognition does not have always healing effects but it generally has. Most probably, granting of recognition will bring stability and security to the problematic regions. As in the Cyprus Island and Palestinian territory etc. To reach a permanent solution in the problematic areas, the collective recognition may well be used in an objective manner, the legal criteria of statehood may be studied further and duty of recognition might be reconsidered, supra-national bodies might be entitled to give recognition to States.

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³² See, SUR, op. cit., p. 118, see also PAZARCI, op. cit., p. 33

³³ TOLUNER, op. cit. p. 370 See also, TOLUNER, Sevin, **Milletlerarası Hukuk Açısından Türkiye’nin Bazı Dış Politika Sorunları**, 1. Baskı, İstanbul, Beta Yayıncılık, 2000, pp.150-162 and **Son Gelişmeler Işığında Kıbrıs**, İstanbul, İstanbul Barosu Yayınları, 2005, p. 24